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IN THE SUPREME COURT OF FLORIDA

JERMAINE FOSTER,

Appellant,

v. **CASE NO. SC23-0831**
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The symbols used to reflect record cites in this brief will be as follows: "SPCR. _" refers to the record on appeal for Foster's successive postconviction appeal to this Court (SC17-2198). "PCR-5. _" refers to the present record on appeal (SC23-0831).

Appellant, Jermaine Foster, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All other citations will be self-explanatory or otherwise explained herewith.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals and certainly should not do so in a case raising an issue that is not retroactive under this Court's current controlling precedent.

RELEVANT PROCEDURAL HISTORY

The jury convicted Foster of two counts of first-degree murder, one count of attempted first-degree murder, and four counts of kidnapping. *Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996). After the penalty phase, the jury unanimously recommended that Foster be

sentenced to death for the murders. The trial court followed this recommendation, finding four statutory aggravators[1] and one statutory mitigator.[2] In conjunction with the statutory mitigator, the trial court found that Foster is "mildly mentally retarded," *Id.* at 755, based on evidence that Foster had an IQ score of 75 and showed deficits in adaptive functioning. However, at that time, "mental retardation," which is now known as intellectual disability, was not a bar to execution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). This Court affirmed Foster's convictions and sentences on direct appeal. *Id.* at 756. The United States Supreme Court denied certiorari review of Foster's case on March 17, 1997. *Foster v. Florida*, 520 U.S. 1122 (1997).

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[1] The trial court found the following aggravators: Foster was previously convicted of another capital felony; the capital felony was committed while the defendant was engaged in the commission of a kidnapping; the capital felony was committed for pecuniary gain; and the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Foster I*, 679 So. 2d at 751 n.2. 3.

[2] As the statutory mitigator, the trial court found that Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *Id*. at 751 n.3.

On June l, 2000, Appellant filed his Motion to Vacate Judgment of Conviction and Sentence pursuant to Rule 3.851, Florida Rules of Criminal Procedure. *Foster v. State*, 929 So. 2d 524, 527 (Fla. 2006). On September 25, 2000, Foster filed a supplemental motion to vacate his judgment of conviction and sentence, asserting that he was denied effective assistance of counsel because counsel failed to investigate a voluntary intoxication defense in conjunction with his mental disability. On January 23, 2002, Foster filed a motion for leave to amend his motion to vacate, attaching the affidavit of clinical social worker Janet Vogelsang. The postconviction court found that the evidence was not newly discovered and denied the motion to amend as untimely. The court held an evidentiary hearing, which began on January 30, 2002, and ended on February 1, 2002. Subsequently, the trial court denied Foster's rule 3.850 motion. *Id.* at 528.

Foster appealed to this Court raising three issues: (1) whether trial counsel was ineffective for failing to raise and establish a voluntary intoxication defense in conjunction with evidence pertaining to Foster's mental disability; (2) whether the trial court

erred by denying the *Atkins* and *Ring* claims[3] without an evidentiary hearing; and (3) whether the trial court erred by not permitting an amendment to the motion to vacate his judgment and sentence based upon the claim relating to Vogelsang's statement. *Id.*

On October 14, 2004, this Court reversed the order denying his Motion for Leave to Amend and relinquished jurisdiction for 180 days, with direction to hold an evidentiary hearing on the allegations set forth in that pleading. On January 20-21, 2005, the circuit court conducted the hearing, and denied relief on March 1, 2005. Foster appealed alleging that the evidentiary hearing established all factors except whether the onset of his alleged mental retardation occurred before age eighteen. This Court affirmed, holding that Foster had not established the necessary prongs to show mental retardation:

> After reviewing the record and the postconviction court's findings, we reject Foster's claim that his rights under *Atkins* were violated. Foster was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The postconviction court found that the evidence did not support his claim. We find no errors in the postconviction court's findings or conclusions.

Id. at 533, 537.

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002).

On August 29, 2017, Foster filed a successive motion for postconviction relief, raising a claim of intellectual disability again, based on the decision of *Hall v. Florida*, 572 U.S. 701, 704 (2014), which held unconstitutional Florida's rule that if a prisoner has an IQ above 70, no other evidence of intellectual disability is considered. On November 17, 2017, the circuit court denied his *Hall* claim without an evidentiary hearing, because all three prongs of the intellectual disability test had already been considered. Foster appealed, and this Court remanded for a "*Hall*-compliant" evidentiary hearing on the intellectual disability claim. *Foster v. State*, 260 So. 3d 174, 181 (Fla. 2018).

In *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), this Court held that *Hall* applies retroactively. On May 21, 2020, however, this Court held that *Hall* was not retroactive, explicitly overruling its prior decision in *Walls*. *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020).

On June 17, 2020, based on *Phillips*, the State filed a motion for summary denial of the intellectual disability claim. The State argued that under the current law of *Phillips*, which would apply in any subsequent appeal, the entire claim would be denied solely on non-retroactivity grounds and therefore, an evidentiary hearing

would be futile. PCR-5. 667-77. Foster filed a response on August 7, 2020, arguing that the circuit court did not have the authority to disregard this Court's Mandate. PCR-5. 683-715. On January 29, 2021, the circuit court held a hearing on the State's motion for summary denial, and on February 18, 2021, the circuit court denied the State's motion for summary denial, finding it lacked the authority to disregard this Court's mandate, based on the recent decision in *State v. Okafor*, 306 So. 3d 930 (Fla. 2020). PCR-5. 753-57.

On March 31, 2022, however, this Court held that *Phillips* constituted an intervening change in law, which eliminated the need for a new *Hall*-compliant hearing, distinguishing *Okafor* where the defendant's sentence remained intact. *Thompson v. State,* 341 So. 3d 303 (Fla. 2022).

On March 31, 2022, the State filed a Renewed Motion for Summary Denial of the Intellectual Disability Claim, arguing that there has been an intervening change in the law which had eliminated a need for a new *Hall*-compliant hearing. PCR-5. 820-22. The circuit court granted the State's renewed motion and denied Foster's intellectual disability claim. PCR-5. 911-19. Foster appealed

the order denying his motion for post-conviction relief that is now at issue in the instant case.

SUMMARY OF THE ARGUMENT

Issue I. Foster's sentence was final years before the decision in *Hall v. Florida*, 572 U.S. 701 (2014). The post-conviction court correctly followed the existing law enunciated in *Phillips*, that *Walls* was erroneously decided, and that the decision in *Hall* is not to be applied retroactively to intellectual disability claims.

Issue II. There was no abuse of discretion when the postconviction court summarily denied Foster's intellectual disability claim because the same issues had been litigated in previous postconviction motions and were procedurally barred. Furthermore, the postconviction court had competent substantial evidence that Foster did not meet the statutory definition of a person with an intellectual disability. Regardless, this Court should affirm the denial of the claim based solely on *Phillips*.

Issue III. There was an intervening change in the law, and it would be manifestly unjust to force the state to conduct an evidentiary hearing when the state has said all along that *Hall* is not and should not be retroactive. Furthermore, this Court has held that trial courts

have a duty to follow intervening precedent from a higher court and to not do so constitutes a clear departure from the essential requirements of the law. *State v. Yero*, 319 So. 3d 643 (Fla. App. 3rd Dist. 2021). *See United Auto Ins. Co. v. Comprehensive Health Center*, 173 So. 3d 1061 at 1065–66 (Fla. App. 3rd Dist. 2015).

ARGUMENT

I. THIS COURT'S DECISION IN *PHILLIPS V. STATE* DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT IS CONSISTENT WITH THE FEDERAL LAW IN *HALL*.

Under the law articulated by the Florida Supreme Court in *Phillips*, Foster should not be granted another evidentiary hearing. Foster committed this heinous crime thirty (30) years ago and now wants the benefit of a change in the law that occurred in 2012, nineteen (19) years after his crimes. The intellectual disability claim should be denied solely on non-retroactivity grounds without addressing any of the other issues raised in the appeal or the merits of the claim, as this Court recently did in *Walls v. State*, 361 So. 3d 231 (Fla. 2023).

Foster asserts that the postconviction court improperly denied the intellectual disability claim on non-retroactivity grounds and

argues in favor of reversing this Court's recent decision in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021).[4] Foster's argument in favor of reversing this Court's recent decision in *Phillips* is not only flawed but has been repeatedly rejected by this Court and its holding applied in the postconviction context.[5]

The trial court properly followed this Court's current precedent of *Phillips.*

Retroactive analysis.

Under a *Witt* analysis, to determine if the law is a "development of fundamental significance, the change in law must place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, or, alternatively, be of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold

[4] This Court's holding in *Phillips* was that the holding in *Hall v. Florida*, 572 U.S. 701 (2014) did not constitute a development of fundamental significance, and therefore did not apply retroactively. *Phillips*, 299 So. 3d 1013.

[5] *See, e.g.*, *Thompson v. State*, 341 So. 3d 303, 304 (Fla. 2022) (death sentence final in 1993); *Pittman v. State*, 337 So. 3d 776, 777 (Fla. 2022) (death sentence final in 1995); *Nixon v. State*, 327 So. 3d 780, 781 (Fla. 2021) (death sentence final in 1991); *Freeman v. State*, 300 So. 3d 591, 593 (Fla. 2020) (death sentence final in 1991); *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020) (death sentence final in 1999).

test of *Stovall/Linkletter*." *Asay v. State/Jones*, 210 So. 3d 1,16 (Fla. 2016). Three factors are analyzed using the *Stovall/Linkletter* test: "(a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice." *Asay,* 210 So. 3d at 17. (*citing Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980)).

In *Phillips*, this Court considered whether federal law required the retroactive application of *Hall. Phillips*, 299 So. 3d at 1022. This Court utilized the analysis of *Teague v. Lane*, 489 U.S. 288 (1989) to determine that state courts must give retroactive effect to new substantive rules of constitutional law. *Phillips*, 299 So. 3d at 1022. (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 728-29 (2016)). Substantive rules place certain criminal laws and punishments beyond the state's power to impose and procedural rules enhance the accuracy of a conviction or sentence by regulating the manner of determining a defendant's culpability. *Phillips*, 299 So. 3d at 1022. The Court found that *Hall* was not a substantive rule and did not require retroactive application. *Phillips*, 299 So. 3d at 1022. The new procedural rule announced in *Hall* regulated the manner in which a defendant was found culpable and did not place certain criminal laws

and punishments beyond the State's power to impose. *Phillips*, 299 So. 3d at 1022. The prohibition on executing the intellectually disabled was not expanded by *Hall. Id.*

In *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), the Court was presented with the same question that is relevant to the case at hand; whether a new rule of criminal procedure applies retroactively to overturn final convictions. The Court repeatedly stated that a decision that announces a new rule of criminal procedure ordinarily is not applied retroactively. *Edwards*, at 1551. (citing *Teague v. Lane*, 489 U.S. 288 (1989)) The Court has announced many new rules of criminal procedure since *Teague* was decided thirty-two years ago and none of them have been applied retroactively. *Edwards*, 141 S. Ct. at 1551. The Court illustrated the retroactivity standard balancing test articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965), that "new rules that constituted clear breaks with the past generally were not given retroactive effect, including on federal collateral review." *Edwards*, 141 S. Ct. at 1554. (citing *Teague v. Lane*, 489 U.S. at 304). The Court went on to name landmark cases that were not applied retroactively, such as *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966), and *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986) (state prosecutors cannot discriminate based on race in jury selection), *Crawford v. Washington*, 541 U.S. 36 (2004) (restricts the use of hearsay evidence), and *Duncan v. Louisiana*, 391 U.S. 145 (1968) (defendants have a constitutional right to a jury trial), all fundamentally reshaped criminal procedure throughout the United States, yet the Court did not apply any of those decisions retroactively on federal collateral review. *Edwards*, 141 S. Ct. at 1559.

The new procedural rule in *Hall* should not apply to Foster because his conviction and sentence were final in 1997. Applying constitutional rules not in existence at the time a conviction became final undermines the principle of finality and undermines our criminal justice system. *Edward*s, 141 S. Ct. at 1554. (citing *Teague v. Lane*, 489 U.S. 288, 304). The Court in *Hall* held only that "Florida's rule, as interpreted by that State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be executed." *Hall*, 572 U.S. at 701.

Hall merely "created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Phillips*, 299 So. 3d at 1020. (citing *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014)). Rules that regulate only the manner of determining the defendant's culpability are procedural. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Hall clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty. In contrast, "a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. *Hall* did not alter the range of conduct or the class of persons the law punishes. *Hall* merely created a new procedural requirement that those with IQ test scores within the test's standard error would have the opportunity to otherwise prove their intellectual disability and does not violate the Eighth Amendment. *Phillips,* 299 So. 3d at 1020.

It is the current law that governs on appeal and the current law is *Phillips.* Appellant offers no compelling, much less persuasive reasons to revisit its recent ruling in *Phillip*s. The postconviction

court was correct in denying the intellectual disability claim on non-retroactivity grounds and that determination is the end of this appeal.

II. THERE WAS NO ABUSE OF DISCRETION WHEN THE POST-CONVICTION COURT SUMMARILY DENIED FOSTER AN EVIDENTIARY HEARING BECAUSE THE SAME ISSUES HAD BEEN LITIGATED IN PREVIOUS POST-CONVICTION MOTIONS AND WERE PROCEDURALLY BARRED.

Foster's case was final in 1997 which was just a year before *Phillips*' case was final. Here, as in *Phillips*, *Hall* does not apply retroactively, and Foster is not entitled to a redo of his intellectual disability claim any more than *Phillips* was. Indeed, this Court recently affirmed the denial of an intellectual disability claim on non-retroactivity grounds, in a case where the trial court refused to conduct an evidentiary hearing, despite a mandate to do so. *Thompson v. State*, 341 So. 3d 303 (Fla. 2022).

A. Subaverage intellectual functioning and adaptive deficits

Pursuant to Florida law, a capital defendant claiming intellectual disability must prove the following elements by clear and convincing evidence: 1) significantly subaverage general intellectual

functioning; 2) deficits in adaptive behavior; and 3) condition must have manifested before age eighteen. § 921.137, Fla. Stat. The burden is on Appellant to prove he is intellectually disabled. Foster fails to meet that burden.

Contrary to Foster's allegations, Foster did have the benefit of the trial court reviewing all three prongs of the intellectual disability test without one prong being dispositive of the other. The trial court considered and examined all three prongs of the intellectual disability test, and determined he did not meet the criteria. This Court made the following remarks as to Foster's intellectual disability claim:

> Foster also alleges that the postconviction court erred in summarily denying his claim that he is mentally retarded and thus the sentence of death violates *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Subsequent to Foster's postconviction evidentiary hearing that also included testimony concerning his mental abilities, the United States Supreme Court issued its decision in *Atkins,* which held that the imposition of the death penalty on those who are mentally retarded violates the Eighth Amendment. The Court further recognized that to be considered mentally retarded, a defendant should be able to show: (1) a significantly subaverage intellectual function and that typically between 70 and 75 or lower is the cutoff IQ score; (2) related limitations in two or more of certain applicable adaptive skill areas; and (3) the onset must occur before age eighteen. *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242. Foster contends that the evidentiary hearing established all factors except whether the onset of his alleged mental retardation occurred before age

eighteen; thus, he contends that the circuit court erred by denying his claim without an additional hearing that would provide him with an opportunity to establish this last element.

Contrary to such allegations, the lower court did not find that Foster established the necessary prongs to show mental retardation. First, after quoting extensive portions of Dr. Dee's testimony, the postconviction court found that Dr. Dee's testimony did not clearly establish that Foster was mentally retarded.

> Q In your testing of Mr. Foster ... did he have the mental functioning to do the every day chores from what you observed and the testing you did?
>
> A He never had. No. And although there is some question in this case whether there was opportunity and whether or not he was a sufficient age at which-at least to me to make that determination, so I remember specifically saying while he was mildly intellectually disabled or borderline, that's about the best I could do in terms of descriptive functioning. I think from behavior, he could be considered mildly intellectually disabled, he didn't keep a job or kept any accounts, he always depended on other people for support. But, once again, there are socioeconomic factors have to be considered so I wasn't insisting on that.

On cross examination, however, Dr. Dee further clarified his opinion as to whether Defendant was mentally retarded. He testified that:

> Q In looking at Mr. Foster's adaptive behavioral scales did you do like the Vineland test or any of the-

> A No, I didn't think it would be particularly useful because I had the information I needed. I could do one now from the information I have but he never had a job for a substantial period of time. He hadn't finished school. He was not really functioning literal [sic]. He had a lot of cultural deprivation. It's a very difficult call in the situation. Still very young and he's been subject to some very bad influence, involved in criminal behavior and kind of moved around from pillar to post, and *I was kind of reluctant to decide finally whether mental retardation for him so I said mildly intellectually disabled to borderline. Not borderline very high, but I was reluctant to make a decision regarding retardation.*

(Emphasis added.) The postconviction court then reviewed the three prongs of mental retardation as noted in *Atkins* to determine whether Foster had proven any of the factors.

Dr. Dee testified that Defendant's IQ was 75, which at most is borderline to even begin to consider whether a person is mentally retarded. Nevertheless, even if Defendant's IQ score of 75 is considered as evidence of mental retardation, Defendant does not meet the second prong of the test set forth in *Atkins,* i.e., significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Dr. Dee's testimony was refuted by the testimony of Leonore [sic] Henderson and by Mr. Smallwood, Defendant's original trial attorney....

Evidence showed that Defendant was supporting himself and functioning on his own, albeit, by illegal drug sales. He was even able to provide shelter and sustenance for another, Leondre [sic] Henderson. His communication skills, as evidenced by his meetings with his trial attorney

> and by his own testimony before this Court, did not indicate significant limitations as required by *Atkins,* 122 S.Ct. at 2242.
>
> Moreover, the testimony from the original trial does not support the allegation that Defendant evidenced significant limitations in adaptive skills before age 18. In school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded.
>
> It is evident that the issue as to whether Defendant is mentally retarded was presented at and explored during the evidentiary hearing in this matter. In *Atkins,* the Court stated that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins,* 122 S.Ct. at 2250. After considering all the evidence and personally observing Defendant testify, this is just such an instance as contemplated by the United States Supreme Court. This Court finds that Defendant is not mentally intellectually disabled as defined in *Atkins.* The evidence simply does not support this claim.
>
> After reviewing the record and the postconviction court's findings, we reject Foster's claim that his rights under *Atkins* were violated. Foster was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The postconviction court found that the evidence did not support his claim. We find no errors in the postconviction court's findings or conclusions.

Foster, 929 So. 2d at 531-33.

Nevertheless, Foster argues that he is entitled to an evidentiary hearing where the evidence will show he suffers from subaverage

intelligence and adaptive deficits. The State respectfully disagrees. The fact that Foster now has the affidavit of a different expert with a more favorable analysis does not grant him relief. Neither do the sworn affidavits provided by Foster that depict him as slow and unable to care for himself.

Furthermore, although Foster contends that the trial court ruled or "adjudicated" him to be intellectually disabled, this Court also rejected this contention and found that the trial court did not adjudicate Foster as intellectually disabled. *See Foster*, 929 So. 2d at 532, ("[c]ontrary to such allegations, the lower court did not find that Appellant established the necessary prongs to show mental retardation.")

Accordingly, the trial court already evaluated all three prongs of the intellectual disability test and found that the evidence failed to establish that Foster was intellectually disabled. The trial court properly held that Appellant was not entitled to an evidentiary hearing.

Regardless, under this Court's current precedent of *Nixon* and *Thompson*, this Court ends all analysis of any intellectual disability claim with the determination of non-retroactivity.

III. THERE WAS AN INTERVENING CHANGE IN THE LAW AND IT WOULD BE MANIFESTLY UNJUST TO FORCE THE STATE TO CONDUCT AN EVIDENTIARY HEARING WHEN THE STATE HAS SAID ALL ALONG THAT *HALL* IS NOT AND SHOULD NOT BE RETROACTIVE.

Foster incorrectly maintains that the State "explicitly conceded that *Phillips* does not apply to this case, in light of *Okafor*." IB at 41. As such, Foster argues that the circuit court is required to hold an evidentiary hearing on his intellectual disability claim in light of *Hall*. Applying *Hall* to Foster would result in a manifest injustice because he is asserting a right that does not exist, that *Hall* should be applied retroactively to him.

The circuit court initially denied the State's Motion Summary Denial of the Intellectual Disability Claim finding that it lacked the authority to disregard the mandate directing it to hold a *Hall*-compliant evidentiary hearing, based on the Florida Supreme Court's recent decision in *State v. Okafor*, 306 So. 3d 930 (2020). The court also acknowledged the State's concession relying on *Okafor*. PCR-5. 756.

Foster mistakenly equates the State's deference to this Court's mandate in *Okafor* as binding authority for the circuit court to have

held the evidentiary hearing. However, the State never waived or forfeited its retroactivity argument. *See Schiro v. Farley*, 510 U.S. 222, 228 (1994) (finding that the state waived retroactivity argument by failing to timely raise it); *Godinez v. Moran*, 509 U.S. 389, 397 (1993) (similar).

After this Court's decision in *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), the State timely contested this Court's mandate calling for a *Hall*- compliant evidentiary hearing and moved for summary denial of Foster's intellectual disability claim. PCR-5. 667-77. The parties agreed to stay the proceeding until this Court's mandate in *Okafor*. After the mandate was issued, the circuit court held a hearing where the State conceded that based on *State v. Okafor*, 306 So. 3d 930 (Fla. 2020), the circuit court was required to follow this Court's mandate requiring an evidentiary hearing on his intellectual disability claim. PCR-5. 753-57. However, the State argued it was not waiving its prior ***defense*** that *Hall* was not retroactive to Foster. PCR-5. 943. The trial court concluded, "Based on the State's concession, the applicable law, and the Florida Supreme Court's recent decision in *State v. Okafor*, 306 So. 3d 930 (2020), this Court finds that it lacks the authority to disregard the

Florida Supreme Court's Mandate, directing it to hold a *Hall*-compliant evidentiary hearing."

On March 31, 2022, the state filed a Renewed Motion for Summary Denial of the Intellectual Disability Claim citing *Thompson v. State*, 341 So. 3d 303 (Fla. 2022). PCR-5. 820-22.

Thompson v. State is controlling precedent.

In a case with a similar procedural posture as the instant case, William Lee Thompson filed a successive motion for postconviction relief, arguing that *Hall* applied retroactively to his case. *Thompson v. State*, 341 So. 3d 303, 305 (Fla. 2022). Thompson's death sentence became final in 1993. *Id.* at 304. Following *Hall v. Florida*, Thompson filed a seventh successive postconviction motion raising an intellectual disability claim again. Relying on *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), this Court held that *Hall v. Florida* applied retroactively to Thompson and remanded for an evidentiary hearing. *Id.* at 304-305. (citing *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016)). But during the remand, this Court receded from *Walls* in *Phillips*. The State filed a motion for summary denial based on *Phillips* arguing there was no need for an evidentiary hearing under the current law. The trial court agreed and summarily denied the claim

without conducting the evidentiary hearing that had been ordered by this Court.

On appeal, Thomas argued, relying on *State v. Okafor*, 306 So.3d 930, 933 (Fla. 2020), that the trial court was required to conduct an evidentiary hearing on the claim of intellectual disability, regardless of *Phillips*. *Id*. at 305. This Court distinguished *Okafor* explaining that the prior judgment vacating the death sentence in that case had "wiped the slate clean as to that sentence, rendering it a nullity," and therefore, *Okafor* "was a convicted capital defendant without a sentence." But in Thomas' case, this Court's judgment ordering a new evidentiary hearing "did not vacate Thompson's death sentence." *Id.* at 306.

This Court also rejected an argument based on the law-of-the-case doctrine citing *Nixon*. This Court explained that "Thompson could not succeed on his *Hall*-based intellectual disability claim," regardless of what he established at the evidentiary hearing, due to the non-retroactivity of *Hall* under the current law. The intellectual disability claim would fail as a matter of law under *Phillips*, regardless of what facts Thompson could prove at an evidentiary hearing. This

Court refused to recede from *Phillips*. *Id*. This Court affirmed the trial court's summary denial of the claim.

Here, as in *Thompson*, Foster could not succeed on his intellectual disability claim, regardless of what he established at the evidentiary hearing, due to the non-retroactivity of *Hall* under the current law. And, here, as in *Thompson*, the intellectual disability claim fails as a matter of law under *Phillips*, regardless of what facts Foster proved at an evidentiary hearing.

Lastly, any acquiescence to an evidentiary hearing was later superseded by an intervening change in the law, *which was binding* on the court. This Court has held that trial courts have a duty to follow intervening precedent from a higher court. *Yero*,319 So. 3d 643. (citing *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997) (finding that "[a]n intervening decision by a higher court is one of the exceptional situations" that warrants modification of the law of the case.) The mandate in the present case instructed the court to hold an evidentiary hearing and made no rulings on the merits of the case. The mandate was issued based on an error that this Court has since corrected in *Phillips*. The post-conviction court has a duty to follow

intervening precedent by a higher court and Foster is not entitled to relief under *Hall*.

CONCLUSION

WHEREFORE, in light of the foregoing, the State respectfully requests this Honorable Court to affirm the order of the lower court denying Foster's postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of November 2023, I electronically filed the foregoing with the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a

notice of electronic filing to the following: the Honorable Jalal Harb, Circuit Judge, Orange County Courthouse, P. O. Box 9000, Drawer J140, Bartow, Florida, 33831-9000, **csullivan@jud10.flcourts.org**; Linda McDermott, Chief, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Suite 4200, Tallahassee, Florida 32301-1300, **Linda_Mcdermott@fd.org, lindammcdermott@msn.com, flnml_chu_ecfnotify@fd.org, Daniel_Lawless@fd.org,** Julissa R. Fontán, and Lauren Rolfe, **fontan@ccmr.state.fl.us, lauren_rolfe@fd.org and support@ccmr.state.fl.us**, Assistants Capital Collateral Counsel, Capital Collateral Regional Counsel – Middle, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637; Kenneth S. Nunnelley, Office of the State Attorney, Fifth Judicial Circuit, 425 N. Orange Ave. #63, Orlando, Florida 32801-1526, **knunnelley@sao5.org and eserviceninth@sao5.org,** co-counsel for the State of Florida.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this response is 14-point Bookman Old Style, in compliance with

Fla. R. App. P. 9.120 and 9.210, and Certificate of Compliance Fla. R. App. P. 9.045(e) this response 5113 contains words.

s/DORIS MEACHAM
DORIS MEACHAM
SENIOR ASSISTANT
ATTORNEY GENERAL