

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC23-831
L.T. No. 481993CF012001000AOX**

JERMAINE FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant, Jermaine Foster, respectfully requests oral argument in this matter.

STATEMENT OF THE CASE¹

In 1994, Mr. Foster was convicted of two counts of first-degree murder in the Ninth Judicial Circuit, in and for Orange County. See *Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996). Following a penalty phase, the jury recommended two death sentences. *Id.* On July 18, 1996, this Court affirmed Mr. Foster's convictions and death sentences. *Foster*, 679 So. 2d at 756, *cert. denied Foster v. Florida*, 520 U.S. 1122 (1997).

Mr. Foster filed his initial motion for postconviction relief in 1998, which he later supplemented and amended. *Foster v. State*, 929 So. 2d 524, 527 (Fla. 2006). After an evidentiary hearing, the circuit court denied relief. *Id.* at 528.

¹ Citations in this brief are as follows: The abbreviation "R. _" refers to the first ten volumes of the record on appeal for Mr. Foster's direct appeal to the Florida Supreme Court (SC60-84228). "T. _" refers to the separately paginated sixteen-volume guilt phase transcript of the record on appeal. "PP. _" refers to the separately paginated six-volume penalty phase transcript of the record on appeal. "PCR. _" refers to the fifteen-volume record on appeal for Mr. Foster's initial postconviction appeal to this Court (SC03-1331). "SPCR. _" refers to the fifteen-volume record on appeal for Mr. Foster's successive postconviction appeal to this Court (SC17-2198). "PCR-5. _" refers to the present record on appeal (SC23-0831). All other citations will be self-explanatory or otherwise explained herewith.

Between the evidentiary hearing and the date that the circuit court denied Mr. Foster's postconviction motion, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Foster raised an *Atkins* claim during the rehearing period for the denial of the postconviction motion, which the circuit court denied. *Foster v. State*, 929 So. 2d 524 (Fla. 2006). This court affirmed on appeal. *Id.*

On August 29, 2017, Mr. Foster filed his first successive 3.851 motion, which included a claim that he is intellectually disabled and ineligible for execution under *Hall v. Florida*, 572 U.S. 701 (2014). The circuit court denied those claims on November 17, 2017. On appeal, this Court reversed the summary denial of Mr. Foster's claim of intellectual disability and ordered an evidentiary hearing. *See Foster v. State*, 260 So. 3d 174 (Fla. 2018).

After this Court's decision in *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), the State moved for summary denial of Mr. Foster's intellectual disability claim, which it later renewed. PCR-5. 667-77, 820-22. The circuit court granted the State's renewed motion on May 4, 2023. PCR-5. 911-19.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Prior to his trial, Mr. Foster was evaluated by Dr. Henry Dee, a clinical neuropsychologist, in February 1994. PP. 310, 320. Dr. Dee testified at the March 1994 penalty phase that Mr. Foster scored a 75 I.Q. on intelligence testing. PP. 320. Mr. Foster's low I.Q. score was in conjunction with "adaptive dysfunction" because Mr. Foster failed to meet the criteria for functional literacy and never had formal employment. PP. 321.

Janet Vogelsang, a board certified and licensed clinical social worker, also testified for Mr. Foster at the penalty phase. PP. 98-143. Vogelsang reviewed a number of records, including Mr. Foster's school and medical records, and interviewed members of his family. PP. 112. Her testimony provided a summary of Mr. Foster's life history, including physical and psychological abuse, neglect, intergenerational intellectual impairment, and psychological and emotional battering. PP. 116-17.

Mr. Foster's trial occurred before the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Consequently, the issue of Mr. Foster's intellectual disability was not a focus of the defense's presentation. At no point during the testimonies of Dr. Dee or Ms. Vogelsang were they asked to describe the three-prong analysis established in *Atkins*.

Following the advisory jury's unanimous recommendation of two death sentences, the trial court found four aggravating factors: (1) previously convicted of another capital felony; (2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was committed in a cold, calculated, and premeditated manner. *Foster v. State*, 929 So. 2d 524, 527 n.1 (Fla. 2006). The trial court found one "statutory" mitigating factor: Mr. Foster's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. *Id.*

The trial court also found mental retardation as one of Mr. Foster's non-statutory mitigating circumstances. Overall, the trial court found the following "non-statutory" mitigators: Mr. Foster (1) endured an abusive childhood; (2) "suffers some organic brain damage, is mildly mentally retarded, and has a low I.Q."; and (3) "suffers from a substance abuse problem and . . . was to some extent under the influence of drugs and alcohol" at the time of the crime. R. 752-53. Despite the finding of mental retardation, the trial court followed the jury's recommendation and sentenced Mr. Foster to death. R. 753. This Court affirmed. *Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996).

Dr. Dee was retained for further testimony at Mr. Foster's 2002 evidentiary hearing. His testimony, which, too, was provided before *Atkins*, went to Mr. Foster's claim that trial counsel was ineffective for failing to present a voluntary intoxication defense in conjunction with Mr. Foster's mental disability. PCR. 694-741. Dr. Dee testified that, given Mr. Foster's reduced intellectual functioning, drugs and alcohol would have a more deleterious effect on him than on the average person. PCR. 697, 709. To support this view, Dr. Dee explained that even as an adult, Mr. Foster lived with others and that his memory function was very poor. PCR. 706-07. Dr. Dee also noted that Mr. Foster was the type of person who, for "a person he looked up to and relied on[,] . . . he [would] do whatever you asked him to do." PCR. 710. Dr. Dee described Mr. Foster as "a follower, he was never a leader." PCR. 710.

On cross-examination, Dr. Dee testified to what the United States Supreme Court recognizes as adaptive deficits. *See Atkins*, 536 U.S. at 318. According to his testimony, Mr. Foster was unable to hold a job for a substantial period of time or finish school, and suffered from cultural deprivation. PCR. 725. As far as Mr. Foster's intellectual functioning, Dr. Dee testified that he was "mildly [] to borderline" intellectually disabled. PCR. 725.

After the evidentiary hearing but prior to the circuit court's July 8, 2002, denial of Mr. Foster's 3.851 motion, the United States Supreme Court decided *Atkins*. PCR. 514-42. Mr. Foster moved for rehearing to establish that he met all three-prongs under *Atkins*, is intellectually disabled and therefore ineligible to be executed. PCR. 543-46. The circuit court denied rehearing and Mr. Foster's *Atkins* claim without holding an additional evidentiary hearing on June 3, 2003. PCR. 616-22.

This Court affirmed the circuit court's denial of relief on the *Atkins* claim. *Foster v. State*, 929 So. 2d 524, 531-33 (Fla. 2006). This ruling was issued when this Court unconstitutionally imposed a hard I.Q. cut-off score of 70 for proving intellectual disability. See *Cherry v. State*, 959 So. 2d 702, 711-14 (Fla. 2007). This Court found no errors in the circuit court's findings that Dr. Dee's pre-*Atkins* testimony failed to support all three prongs of intellectual disability. *Foster*, 929 So. 2d at 533. These findings included that Mr. Foster was supporting himself at the time of the crimes and providing shelter to his younger co-defendant, Leondra Henderson, as well as a lack of evidence supporting adaptive deficits before the age of 18. *Id.* Further, Mr. Foster had testified on his own behalf at the evidentiary hearing, so he had some communication capacity. *Id.* Finally, this Court wrote that Mr. Foster

was not in special education. *Id.* (It is now acknowledged by the parties that this observation by the Court was simply wrong.).

On August 29, 2017, Mr. Foster filed a successive 3.851 motion asserting that he is ineligible for the death penalty because of his intellectual disability under the decisions in *Hall v. Florida*, 572 U.S. 701 (2014) and *Walls v. State*, 213 So. 3d 340 (Fla. 2016). SPCR. 155-79. Mr. Foster explained that none of the reasons provided by this Court for affirming the summary denial of intellectual disability relief in 2006, pre-*Hall*, remained valid bases to deny relief. SPCR. 159-161. After the State filed its answer, Mr. Foster filed a reply including a proffer of the expert report of Dr. Jethro Toomer addressing Mr. Foster's intellectual disability, see SPCR. 530-32, 613, as well as sworn statements by lay witnesses supporting the issue, see SPCR. 514-29.

The circuit court held formal argument at a case management conference conducted on November 2, 2017. SPCR. 684-723. The State did not dispute that Mr. Foster's I.Q. score was within the *Hall* range, so Mr. Foster focused on his adaptive deficits and the manifestation of intellectual disability during the developmental period. SPCR. 696-97.

Mr. Foster's difficulties in school, where Mr. Foster was held back in the fourth grade before being placed in special education classes were

described. SPCR. 697. Then, only reading at a first-grade level, Mr. Foster often required the assistance of his younger relatives with his homework and consistently scored in the lowest percentiles on standardized tests. SPCR. 697. Counsel further noted that Mr. Foster was eventually socially promoted from grade to grade because he was so much older than his classmates as a result of being held back. SPCR. 700.

By the time Mr. Foster reached the eighth grade, he was sixteen-and-a-half years old, and effectively four years behind. SPCR. 698. Counsel noted that his eighth-grade records suggested Mr. Foster lacked comprehension skills, could not read an index, table of contents, or dictionary, and could not write more than three sentences on the same topic. SPCR. 698.

Counsel further noted the lay witness statements of Mr. Foster's peers and relatives, who described Mr. Foster as "slow his entire life." SPCR. 702. Other children in the neighborhood took advantage of Mr. Foster's deficits by convincing him to lick batteries, jump off roofs, sniff ammonia, and run in front of cars. SPCR. 703. Mr. Foster's counsel pointed out that this is "the kind of mistreatment that one would expect with a person who is slow and is being bullied." SPCR. 703.

Mr. Foster never lived independently as he lacked the ability to perform simple tasks like balance a checkbook, apply for a job, pay bills, or prepare a meal for himself without starting a fire. SPCR. 703-04. He greatly struggled with maintaining clean hygiene, and frequently had to be reminded to shower, dress appropriately for the weather, wear shoes, or brush his teeth. SPCR. 703. Mr. Foster also struggled with verbal communication, and often became frustrated when he was unable to understand things. SPCR. 704.

The circuit court denied relief on November 17, 2017, ruling that Mr. Foster was procedurally barred from raising a *Hall* claim because he had already raised an intellectual disability claim during his pre-*Atkins* penalty phase and pre-*Atkins* Rule 3.851 hearing. SPCR. 641-48.

On appeal, this Court reversed the summary denial of the intellectual disability claim and remanded for the circuit court to hold a *Hall*-compliant evidentiary hearing. *Foster v. State*, 260 So. 3d 174 (Fla. 2018). The mandate was issued on January 17, 2019. The State neither moved for reconsideration nor sought certiorari review from this Court's decision.

On May 21, 2020, this Court in *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), receded from *Walls* and held that *Hall* is not retroactive. The State then moved for summary denial of Mr. Foster's intellectual disability

claim and requested that the evidentiary hearing be canceled. PCR-5. 667-77.

Argument was held on January 29, 2021, and the circuit court denied the State's motion on February 18, 2021, finding it lacked the authority to disregard this Court's mandate directing it to hold a hearing. PCR-5. 753-57. The State renewed its motion for summary denial of the intellectual disability claim on March 31, 2022, arguing that an intervening change in the law obviated the need for a *Hall*-compliant hearing. PCR-5. 820-22. The circuit court granted the State's renewed motion and denied Mr. Foster's intellectual disability claim. PCR-5. 911-19. This appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Foster is intellectually disabled. At the time of his capital trial, and before a capital defendant's intellectual disability exempted him from execution, Mr. Foster presented evidence of intellectual disability, including an I.Q. score of 75, and the trial court found that Mr. Foster was "mildly mentally retarded". R. 739-40. Following the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Foster timely raised his claim that his execution would violate the Eighth Amendment. However, Mr. Foster was erroneously denied an opportunity to establish his intellectual disability due to this Court's constitutional misinterpretation of Florida's

statute imposing a bright-line threshold I.Q. score of 70 or below to establish intellectual disability. See *Hall v. Florida*, 572 U.S. 701 (2014).

Following *Hall*, this Court corrected its error and remanded Mr. Foster's case for a full and fair evidentiary hearing on Mr. Foster's claim where he could present all of the compelling evidence supporting his claim. *Foster v. State*, 260 So. 3d 174 (Fla. 2018). Now, Mr. Foster appears poised to again be unconstitutionally denied an opportunity to demonstrate that his execution would violate the Eighth Amendment.

At issue before this Court are the arguments that: (1) *Hall's* retroactivity is mandated by the fact that the United States Supreme Court was simply correcting this Court's misinterpretation of Florida's intellectual disability statute and therefore, *Hall* is retroactive because *Atkins* is retroactive. Furthermore, the denial of a full and fair opportunity to show Mr. Foster meets the criteria for intellectual disability is arbitrary and capricious in violation of the Eighth Amendment.

Additionally, (2) all of the proffered evidence, independently and along with the evidence already in the record, consistently and credibly supports the conclusion that Mr. Foster is intellectually disabled and therefore exempt from the death penalty. The constitution compels that he be granted a life sentence, or in the alternative, be provided an evidentiary hearing. Without

such an opportunity, this Court “creates an unacceptable risk that persons with intellectual disability [like Mr. Foster] will be executed”. *Hall*, 572 U.S. at 704.

Finally, (3) this Court should allow Mr. Foster to proceed because the State waived any argument that he was not entitled to an evidentiary hearing when it agreed that, despite the decision in *Philips v. State*, 299 So. 3d 1013 (Fla. 2020), this Court’s mandate required he receive a hearing on his intellectual disability claim. The State’s waiver is binding and the circuit court erred in excusing it.

ARGUMENT

This Court should reverse the circuit court’s summary denial of Mr. Foster’s successive 3.851 motion and remand for an evidentiary hearing. This Court’s review of the circuit court’s order is de novo and the factual allegations presented in Mr. Foster’s motion and in this appeal must be taken as true unless conclusively refuted by the record. See *Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020).

I. PHILLIPS v. STATE WAS WRONGLY DECIDED. THE EIGHTH AMENDMENT REQUIRES THAT MR. FOSTER BE PROVIDED A FAIR OPPORTUNITY TO ESTABLISH THAT HE IS INELIGIBLE FOR EXECUTION DUE TO HIS INTELLECTUAL DISABILITY.

A. Introduction

In *Hall v. Florida*, 572 U.S. 701 (2014), the United States Supreme Court reaffirmed that “[n]o legitimate penological purpose is served by executing a person with intellectual disability.” (citing *Atkins v. Virginia*, 536 U.S. 304, 317, 320 (2002)). However, in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), this Court reversed its holding in *Walls v. State*, 213 So. 3d 340 (2016), and held that *Hall* was not retroactive under *Witt v. State*, 387 So. 2d 922 (1980). While several evidentiary hearings proceeded even after *Phillips* and similarly situated defendants obtained sentencing relief on the basis of *Hall*,² Mr. Foster has now been denied a fair opportunity to establish that his

² Several capital defendants’ death sentences were vacated following the decision in *Hall*: *Hall v. State*, 201 So. 3d 629 (Fla. 2016); *Herring v. State*, Order, March 31, 2017; 2017 WL 1192999 (Fla. 2017) (“Because Herring has previously established each element of the test for intellectual disability, we vacate his sentence of death and reduce his sentence to life.”); *State of Florida v. Roger Lee Cherry*, Volusia County Circuit Court Case No. 86CF4473, Order, April 10, 2017 (resentencing Mr. Cherry to life in prison with the possibility of parole upon agreement of the parties); *State of Florida v. Sonny Boy Oats*, Marion County Circuit Court Case No. 80CF0016, Order, April 1, 2021 (vacating death sentence and resentencing to life in prison based upon joint stipulation of the parties).

execution would violate the constitution. This is so despite the fact that at his capital trial, the trial judge found that he was “mildly mentally retarded.” R. 739-40. Thus, applying *Phillips* to Mr. Foster’s case would be unconstitutional. See *Moore v. Texas*, 581 U.S. 1, 13 (2017) (citing *Atkins v. Virginia*, 536 U.S. 304, 331 (2002)) (“In *Atkins v. Virginia*, we held that the Constitution ‘restrict[s]. . . . the State’s power to take the life of’ *any* intellectually disabled individual.”) (emphasis in original).

Other capital defendants were provided opportunities to present evidence establishing that they are intellectually disabled following the decision in *Hall* and received a merits determination in the circuit court and/or this Court: *Haliburton v. State*, 331 So. 3d 640 (Fla. 2021) (affirming denial of relief after *Hall* compliant evidentiary hearing); *Franqui v. State*, 301 So. 3d 152 (Fla. 2020) (same); *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (same); *Nixon v. State*, 327 So. 3d 780 (Fla. 2021) (“The trial court held an evidentiary hearing on remand and received evidence on all three prongs of the intellectual disability test. Ultimately the court concluded that Nixon had presented clear and convincing evidence of adaptive deficits but that he had failed to establish the other two prongs—significantly subaverage intellectual functioning and manifestation by age 18.”); *Quince v. State*, 241 So. 3d 58 (Fla. 2018)(“The trial court stated that it would review the record and evidence from Quince’s 2008 intellectual disability hearing and reconsider his intellectual disability claim in light of *Hall*. After reviewing the record and considering written memoranda from both parties, the trial court concluded that Quince failed to prove that he is intellectually disabled . . .”).

Still another capital defendant was provided an opportunity to present evidence establishing that he is intellectually disabled following the decision in *Hall*: *State of Florida v. Frank Walls*, Okaloosa County Circuit Court Case No. 87CF000856 (holding evidentiary hearing June 30, 2021, through July 7, 2021).

B. *Phillips* was wrongly decided

Under *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1980), “changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties” are retroactive. *Atkins v. Virginia* created the constitutional right at issue here, which applies to capital postconviction defendants, including Mr. Foster. 536 U.S. 304, 321 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399, (1986)) (“[T]he Constitution ‘places a substantive restriction on the State’s power to take the life’ of a[n] intellectually disabled] offender.”). Likewise, in deciding *Hall*, the United States Supreme Court did not intend to draw a line between the retroactivity of *Atkins* and *Hall*. Rather, in *Hall*, the Court wrote: “But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.” *Hall*, 572 U.S. at 719. Accordingly, *Hall* more fully “define[d] the scope of the constitutional protection,” *id.*, generally and rudimentarily defined first in *Atkins*. Under *Witt*, both *Atkins* and *Hall* must apply retroactively.

Furthermore, both this Court and the United States Supreme Court have applied *Hall* retroactively. In *Haliburton v. State*, Case No. SC12-893, this Court entered an Order following *Hall* stating: “Upon reconsideration of this matter as ordered by the United States Supreme Court in *Haliburton v.*

Florida, 135 S. Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203.” This Court’s order made no mention of *Hall* being inapplicable to Mr. Haliburton.

This Court’s application of *Hall* to Mr. Haliburton was consistent with the understanding that *Hall* made clear that *Atkins*’s did not find Florida’s statute defining intellectually disability unconstitutional, but rather held that the Court’s interpretation of the statute was erroneous. *Hall*, 572 U.S. at 712 (“That strict IQ test score cutoff of 70 is the issue in this case.”). Decisions explicating statutes favorably to criminal defendants are—and as a matter of federal constitutional due process and equal protection must be—applied retroactively. See *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Schiro v. Summerlin*, 542 U.S. 348, 351 (2004) (distinguishing “decisions that narrow the scope of a criminal statute by interpreting its terms” from “constitutional determinations”).

And, in *Brumfield v. Cain*, 576 U.S. 305 (2015), the United States Supreme Court held it was unreasonable and contrary to well-established federal law to refuse to conduct an evidentiary hearing on an *Atkins* claim where the capital defendant had attained an adjusted I.Q. score of 75. The Court specifically relied on *Hall* in its opinion. *Id.* at 315-16.

Alternatively, under *Witt*, it can be argued that *Hall* is to *Atkins* what *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was to *Lockett v. Ohio*, 438 U.S. 586 (1978).³ In both *Hall* and *Hitchcock*, the United States Supreme Court granted certiorari review in collateral proceedings and found that Florida's capital sentencing scheme did not comport with the Eighth Amendment jurisprudence established over a decade earlier in *Atkins* and *Lockett*, respectively. This Court in *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), recognized that *Hitchcock* applied retroactively, as it corrected Florida's misapplication of *Lockett*.

Moreover, to not apply *Hall* retroactively and deny Mr. Foster the ability to rely upon that decision, as an expansion of the right recognized in *Atkins* and curtailment of the State's discretion to statutorily define the right, would violate Mr. Foster's right to equal protection and due process. Mr. Hall was convicted for a crime occurring in 1978. His conviction was affirmed on appeal and became final in 1981. See *Hall v. State*, 403 So. 2d 1319 (Fla. 1981). Mr. Foster was convicted for a crime occurring in November 1992. The trial occurred in 1994. His conviction and sentences of death were affirmed in 1996. *Foster*, 679 So. 2d at 756, cert. denied *Foster v. Florida*,

³ While *Hall* is retroactively applicable as placing beyond the authority of the State the power to execute certain individuals, Mr. Foster includes this argument for completeness.

520 U.S. 1122 (1997). Thus, Mr. Foster's conviction and sentence has remained final since 1997. There can be no valid basis for giving Mr. Hall the benefit of the ruling in *Hall* as to his death eligibility for the 1978 crime for which he was convicted in 1981, while denying Mr. Foster the ruling in *Hall*, as additional authority in support of his arguments that the Eighth Amendment precludes his execution for his 1992 crime for which he was convicted in 1994. Allowing Mr. Hall the benefit of *Hall*, while precluding Mr. Foster would be arbitrary and constitute a violation of *Furman v. Georgia*, 408 U.S. 238 (1972).

Indeed, the United States Supreme Court has established that arbitrary capital punishment eligibility determinations do not comport with the Eighth and Fourteenth amendments. See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1972) (“*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

Further, members of this Court have echoed concerns for arbitrary line drawing that treats similarly situated defendants differently. *Hitchcock v. State*, 226 So. 3d 216, 216 (Fla. 2017) (Lewis, J., concurring) (“Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant’s docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.”).

Yet, this Court’s decision in *Phillips* backpedaling from *Walls* created two distinct classes of similarly situated defendants. The difference between those who successfully had the “holistic review” this Court found necessary in *Walls* in order to assess an intellectual disability claim, and those who did not is that *Phillips* was issued before some circuit courts were able to resolve docket congestion sooner than others. See *Walls v. State*, 213 So. 3d 340, 346-47 (Fla. 2016). The implication of such arbitrary line drawing is that some intellectually disabled defendants will receive the review they are entitled to while others may be unconstitutionally executed. Ultimately, Florida’s retroactivity application “is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred.” *Hamilton v. State*, 236 So.

3d 276, 280 (Fla. 2018) (Pariante, J., dissenting) (citing *Hannon v. Sec'y, Florida Dep't of Corr.*, 716 Fed. Appx. 843, 846-47 (11th Cir. 2017)).

At a minimum, fundamental fairness necessitates the retroactive application of *Hall* to Mr. Foster's case where his trial court made a finding that he was "mildly mentally retarded," and he raised timely *Atkins* and *Hall* claims. See *Mosley v. State*, 209 So. 3d 1248, 1275 (holding fundamental fairness requires retroactive application of *Hurst* where Mosley had raised a *Ring* claim at his first opportunity and repeatedly thereafter, but was rejected at every turn). Finally, in *Hall*, the United States Supreme Court made clear what the Eighth Amendment required in the context of determining intellectual disability: "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719. In fact, according to *Hall*: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." *Id.* at 723. Simply put, the states are not free to ignore the medical community's clinical definition of intellectual disability, which was the underlying fundamental premise of *Atkins*. While "the legal determination of intellectual disability is distinct from a medical diagnosis," *Hall* requires that the legal determination is to be "informed by the medical community's diagnostic framework." *Id.* at 722. "By failing to take

into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning." *Id.* at 724. Thus, this Court's error in narrowly interpreting Fla. Stat. § 921.137(1); see *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007), is only further exacerbated by denying Mr. Foster access to a full and fair proceeding at which he would have an opportunity to prove that his death sentence violates the Eighth Amendment.

In recognizing "its duty to teach human decency as the mark of a civilized world[,]" *Hall*, 572 U.S. at 724, this Court must allow Mr. Foster a fair opportunity to establish that he is intellectually disabled and exempt from execution.

II. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. FOSTER AN EVIDENTIARY HEARING ON HIS INTELLECTUAL DISABILITY CLAIM.

On December 28, 2018, this Court reversed the denial of Mr. Foster's intellectual disability claim raised in his August 29, 2017, successive Rule 3.851 motion. *Foster v. State*, 260 So. 3d 174 (Fla. 2018). There, this Court acknowledged that at the pre-*Atkins* postconviction evidentiary hearing, Mr. Foster's "counsel was focused on proving that an involuntary intoxication defense would have been enhanced with evidence of intellectual disability,

not on proving a claim of intellectual disability.” *Id.* at 179. While Mr. Foster presented evidence of his 75 I.Q. score which is sufficient, under today’s standards, to satisfy the first prong of the intellectual disability test, the evidentiary presentation was constrained to the greater impact drug and alcohol use would have had on someone with limited intellectual functioning. *Id.* at 179-80.

At that hearing, no evidence was introduced to support adaptive deficits, though as this Court recognized in its opinion remanding for an evidentiary hearing, it was available. *Id.* at 180. In fact, Mr. Foster proffered additional evidence in support of this claim. *Id.* at 179. This evidence included affidavits of friends and family addressing Mr. Foster’s adaptive deficits, school records demonstrating a manifestation before the age of eighteen, and the expert opinion of Dr. Jethro Toomer diagnosing Mr. Foster with an intellectual disability based on the affidavits and school records. *Id.* at 179; SPCR. 514-603. The proffer was not disputed by the State in the circuit court, and the circuit court made no adverse credibility finding regarding the evidence.

Mr. Foster has never had a full and fair opportunity to present evidence at a hearing in support of his intellectual disability claim despite timely assertions after both *Atkins* and *Hall*. Allowing Mr. Foster the opportunity to

do so would simply comport with fundamental fairness and be consistent with the proceedings numerous similarly situated defendants were provided, including: *Franqui v. State*, 211 So. 3d 1026, 1032 (Fla. 2017) (remanding for *Hall*-compliant evidentiary hearing); *Oats v. State*, 181 So. 3d 457, 471 (Fla. 2015) (same); *Cherry v. Jones*, 208 So. 3d 701, 702 (Fla. 2016); *Thompson v. State*, 208 So. 3d 49, 59-60 (Fla. 2016) (same); *Haliburton v. State*, 163 So. 3d 509, 1 (Fla. 2015) (same); and *State of Florida v. Dean Kilgore*, Polk County Case No. 1989-CF- 686-A-0 (Mr. Kilgore died on death row on January 12, 2018 while awaiting his evidentiary hearing). If provided such an opportunity, Mr. Foster can demonstrate that he satisfies all three-prongs of the intellectual disability test.

A. Mr. Foster suffers from subaverage intellectual functioning and adaptive deficits

It has long been established that capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” *Atkins*, 536 U.S. at 319. The intellectually disabled cannot be among the worst offenders given their inherent lower culpability in light of cognitive impairments. *Id.* at 320-21.

The American Psychiatric Association describes the criteria for intellectual disability in the DSM-5-TR:

- A. Deficits in intellectual functions . . . confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility.
- C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5-TR, at 37; AAIDD-11, at 59-60; *Atkins*, 536 U.S. at 318. To prevail under the third prong, a defendant need not have been administered an I.Q. test prior to the age of 18. See *Oats*, 181 So. 3d at 469. Rather, it must be demonstrated that his “intellectual deficiencies manifested while he was in the ‘developmental stage’—that is, before he reached adulthood.” *Id.* at 468 (quoting *Brumfield v. Cain*, 576 U.S. 305, 323 (2015)).⁴ The undisputed factual proffer below establishes that Mr. Foster is intellectually disabled.

Dr. Dee testified at the penalty phase that he administered the Wechsler Intelligence Scale-Revised (WAIS-R) I.Q. test to Mr. Foster in

⁴ In 2021, the AAIDD-12 extended the developmental period from age 18 to age 22 to accommodate recent scientific developments and provide uniformity across jurisdictions. See AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports*, 32-33 (12th ed. 2021) (“AAIDD-12”). In similar fashion, the DSM-5-TR expanded the third criterion from an age of onset of 18 to an onset during the “developmental period.” DSM-5-TR, at 37. This more expansive language comports with the recent scientific progressions and acknowledges that the brain’s developmental period does not cease upon reaching the age of 18.

1994, on which Mr. Foster obtained a full-scale I.Q. score of 75. PP. 320. To contextualize the implications of this score, Dr. Dee testified that about ninety-four percent of the population is functioning at a higher level than Mr. Foster. As the State rightly conceded, “Foster’s I.Q. score fell within the range of subaverage intellectual functioning after the standard error of measurement is applied.” SPCR. 327; *see also Hall*, 572 U.S. at 722 (“an individual with an I.Q. test score ‘between 70 and 75 or lower’ may show an intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning”) (citing *Atkins*, 536 U.S. at 309). Not only does Mr. Foster’s I.Q. fall within the range of intellectually disabled persons, but it exists concurrently with Mr. Foster’s adaptive deficits which manifested during his developmental period.

The DSM-5-TR defines adaptive deficits as “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-5-TR, at 42. This definition is comparable to Florida’s statutory definition of adaptive behavior which is “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.”

Fla. Stat. § 921.137(1); see also *Jones v. State*, 231 So. 3d 374, 375 (Fla. 2017).

Adaptive functioning is assessed in three domains: conceptual, social, and practical. DSM-5-TR, at 42. Deficits in adaptive functioning are present “when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.” *Id.* at 38.

In support of his claim before the circuit court, Mr. Foster submitted the report of Dr. Jethro Toomer, an experienced forensic and clinical psychologist with expertise in the assessment of adaptive deficits. Dr. Toomer concluded:

Mr. Foster does have significant adaptive deficits. It is also quite clear that these deficits originated in childhood [H]is intelligence was previously tested within the current range for an intellectual disability diagnosis. A diagnosis of intellectual disability is appropriate for Jermaine Foster under the current professional and legal standards.

SPCR. 532. Dr. Toomer explained that while the presence of adaptive deficits within only one of the three domains provided in the DSM-5—conceptual, social, and practical—would allow for a diagnosis of intellectual disability, Mr. Foster has adaptive deficits in all three. SPCR. 531. See DSM-5, at 38.

In accord with Dr. Toomer's conclusions, Mr. Foster's family, peers, and other acquaintances relate that Mr. Foster has struggled in every facet of his life. SPCR. 516, 525. As a child, Mr. Foster was unable to grasp seemingly basic out-of-school activities like kicking a kickball and jumping rope. SPCR. 516. Board games like Monopoly, Checkers, Jacks, and Operation were "too advanced" for Mr. Foster. SPCR. 516.

In the classroom, Mr. Foster faced significant barriers to learning—not only could he not comprehend what was being taught, but the lack of comprehension caused him great frustration only exacerbating his difficulties. SPCR. 516. He had problems with math concepts more difficult than simple addition, subtraction, multiplication, and division. SPCR. 516, 525. He was noticeably less able to understand his schoolwork than the other children in his family. SPCR. 525.

School records confirm Mr. Foster's adaptive deficits. In the third, fifth, and eighth grades, Mr. Foster took tests that combined the skills he was learning in school with those he needed in the real world. In third grade, Mr. Foster was unable to perform simple tasks like identifying specific details, distinguishing between the real and unreal, identifying irrelevant sentences, putting words in alphabetical order, solving word problems involving addition, and subtracting to solve practical money problems under 50 cents. SPCR.

575-77. These deficits only worsened in the fifth grade where Mr. Foster could not identify the order of events in a paragraph; distinguish between fact and opinion; identify sets of words in alphabetical order; write simple sentences, arrange four sentences into a paragraph, use commas between the names of cities and states and the day of month and year; capitalize proper nouns; put three numbers of less than 1,000 in order; tell the time on the hour, half-hour, quarter-hour, or minutes; solve real-world problems by subtracting two 3-digit numbers; solve real-world problems by multiplying a 1-digit and a 2- or 3- digit number; solve purchase problems involving change from one dollar; or read bar graphs or pictographs. SPCR. 572-73.

Mr. Foster was pushed from one grade to the next throughout the school system, but his records demonstrate that even upon reaching eighth grade, he failed to meet the minimum student performance standards. SPCR. 566-67. On the reading portion, Mr. Foster was unable to distinguish between fact and opinion; find the main idea in a paragraph; identify the meaning of words using context and prefixes or suffixes; understand cause and effect; or obtain information from an index, table of contents, or dictionary. SPCR. 566. The reading test concluded that Mr. Foster could not demonstrate knowledge of basic vocabulary, determine word meaning from

word parts, demonstrate inferential comprehension skills, or demonstrate evaluative comprehension skills. SPCR. 566, 568.

On the writing portion, Mr. Foster struggled to make subjects and verbs agree; could not write at least three sentences on the same topic; was unable to include the necessary information in a phone message, written message, invitation, or announcement; could not address a business envelope or complete order blanks and simple forms; and had difficulty with grade-appropriate spelling, including the months, days, and numbers 1 to 121. SPCR. 568. As a result of his inability to grasp the above skills, the writing test concluded that Mr. Foster could not write a paragraph expressing ideas clearly, write for the purpose of supplying information, write letters and messages, fill out common forms, or spell correctly. SPCR. 568. Overall, Mr. Foster only mastered four out of fourteen minimum student performance standards in both reading and writing. SPCR. 568.

On the math portion of the eighth-grade exam, Mr. Foster was unable to add three numbers, each with no more than three decimal places; subtract two numbers, each with no more than two decimal places; solve real-world problems by multiplying a 2-digit and a 3-digit number; or solve real-world problems of comparison shopping (purchase less than ten dollars). SPCR. 567. In sum, Mr. Foster only mastered five out of fourteen minimum student

performance standards in mathematics. SPCR. 568. Among the nine skills Mr. Foster was unable to grasp were the ability to solve real-world problems involving whole numbers, solve money problems, solve measurement problems, interpret graphs, tables, and maps. SPCR. 568.

The results of these examinations illustrate Mr. Foster's severe limitations in mental functioning in the classroom which have been corroborated by both expert and lay witnesses. Family members would often attempt to assist Mr. Foster with his studies, but he simply could not grasp reading and writing. SPCR. 525. His inability to comprehend what he was being taught caused him great frustration, and family members who tried to help him with his studies felt as if they could not "break through" to him. SPCR. 516, 525, 527.

Eventually, Mr. Foster dropped out of school, but his deficiencies in communication and mathematics continued. SPCR. 519. A long-time girlfriend recounted that Mr. Foster had only written her one letter during their companionship, and that despite using very simple words, the letter was riddled with spelling and grammatical errors. SPCR. 519. It was not the writing of a sixteen-year-old, but rather that of a second or third grader. SPCR. 519.

Growing up with these deficits often led to Mr. Foster being mistreated and easily manipulated by other youth. Mr. Foster was teased for being “stupid.” SPCR. 517. When he was younger, the manipulation took the form of making Mr. Foster do plainly dangerous things for “entertainment.” SPCR. 517. This included making him jump off roofs, lick nine-volt batteries, sniff ammonia, and run in front of cars. SPCR. 517, 528. Mr. Foster, desperate to fit in, would do anything on a dare, and would never question what was asked of him. SPCR. 525, 528. He lacked the wherewithal to recognize the danger and refuse to engage. And because he was easy to manipulate as a result of his inability to function independently, he would often follow the wrong crowd. SPCR. 526. Mr. Foster was a follower and would mimic what the other kids or family members were doing SPCR. 517-18, 524, 526, 529.

Not only was Mr. Foster highly susceptible to manipulation as a result of his adaptive deficits, but he was also incapable of functioning independently without assistance or supervision. SPCR. 517, 519, 520, 522-23, 526-28. When Mr. Foster’s grandmother was his caregiver, she was responsible for ensuring his basic needs were met as he was incapable of doing so. Mr. Foster’s grandmother ensured he bathed and brushed his teeth regularly, otherwise such tasks would not occur. SPCR. 517. Mr. Foster often

would leave the house without shoes and would not dress appropriately for the weather without being told to do so. SPCR. 517.

Mr. Foster relied not just on his grandmother, but other relatives for assistance and care. SPCR. 517, 519, 520, 522-23, 526-28. Family members filled out paperwork for him, took him wherever he needed to go, fed him, purchased his clothing, and cleaned his clothing. SPCR. 517, 523, 525-26. When Mr. Foster was younger, he could “only handle the simple things” like washing dishes and taking out the trash. SPCR. 525. He could not cook for himself. SPCR. 525. His grandmother only trusted him to put his clothes in the dryer, not the washing machine, and only after demonstrating multiple times how the dryer worked. SPCR. 517. Sorting clothing, washing them on the right temperature, and ironing were beyond Mr. Foster’s capabilities. SPCR. 517.

Such dependence continued throughout Mr. Foster’s teen years. “Simple everyday things” like using a pager or VCR proved challenging without assistance. SPCR. 528. Even after being shown repeatedly how the devices operated, Mr. Foster could not grasp how to use them. SPCR. 528. When Mr. Foster sought to apply for a job, his younger cousin had to fill out the application for him. SPCR. 527. Eventually Mr. Foster did obtain a job—a cart-pusher at the grocery store, Winn Dixie—but he only held on to the job

for a few days. SPCR. 526. When he wanted to write letters to his then-girlfriends, his cousin would write them for him and then read them to him. SPCR. 527-28.

In his later teens, Mr. Foster relied on his then-girlfriend to care for him. SPCR. 519. This included balancing a check book, repeatedly reminding him of appointments, and bringing him to those appointments. SPCR. 518-20. Mr. Foster always lived with someone because he could not live independently. SPCR. 518, 520, 522. His girlfriend assumed the responsibility of handling money when the two would stay in hotels because Mr. Foster was so susceptible to being swindled by the hotel clerks. SPCR. 520.

Mr. Foster began living with his younger friend and eventual co-defendant, Leondra Henderson, and similarly relied on Henderson for assistance. SPCR. 522. Mr. Foster could not fill out the paperwork to get their utilities turned on, and could not read the utility bills, let alone pay them, so Henderson assumed those responsibilities. SPCR. 522. When it came to purchasing a vehicle, Mr. Foster relied on Henderson to finalize the purchase with the seller as Mr. Foster was unable to read or sign the title. SPCR. 522. Henderson had to prepare all their meals because Mr. Foster's deficits made attempts to cook life-threatening—on more than one occasion, he would

forget he began cooking and set off the smoke detectors or nearly start a fire. SPCR. 522. Mr. Foster's need for assistance extended to grocery shopping as well where, if he were sent to pick out certain groceries, he would return with the wrong items. SPCR. 523. Someone always had to accompany Mr. Foster to the store. SPCR. 520, 523.

Mr. Foster's hygiene remained an issue in his late teens as Henderson and Mr. Foster's then-girlfriend repeatedly had to remind him to shower, brush his teeth, or change his clothing. SPCR. 521. Even during cold weather, even if Mr. Foster was visibly freezing, he had to be told to put on warm clothing. SPCR. 521. Without daily assistance, Mr. Foster would have just worn his outfit from the previous day over and over. SPCR. 521.

Mr. Foster earned the reputation of "happy go lucky" and a "big kid" who his closest friends recounted "delighted in watching cartoons and playing in the motel pools." SPCR. 521, 523. His deficits made leading an impossibility, and often resulted in him being "taken advantage of" by people younger and older, family and non-family. SPCR. 517, 520. Mr. Foster could not pick up on the manipulation he was frequently subjected to. SPCR. 520.

Communication and comprehending what others were saying was a constant struggle of Mr. Foster. SPCR. 523. He relied on his friends to explain or clarify conversations that he did not understand. SPCR. 523. Mr.

Foster's "inability to understand what was happening around him" caused him immense confusion and frustration. SPCR. 523. This frustration was especially present when the conversation topic was money. SPCR. 523. Social cues were difficult to pick up on as well; even when certain situations called for seriousness, Mr. Foster opted for playfulness. SPCR. 523. He just "couldn't understand what was going on around him." SPCR. 523.

Mr. Foster's need for assistance and inability to understand a lot of communication made it nearly impossible for him to assist others. When Mr. Foster was seventeen or eighteen, his older cousin asked him to babysit her children who ranged from infants to elementary school students. SPCR. 518. Right after the cousin left Mr. Foster alone with the children, he left the house and the children alone. SPCR. 518. "He just didn't get it." SPCR. 518.

These accounts by his friends and relatives align with the testimony of Dr. Dee, the psychologist who evaluated Mr. Foster prior to his trial and testified at his 2002 postconviction evidentiary hearing. Much like these lay witnesses, Dr. Dee testified, "I think from behavior, he could be considered [intellectually disabled], he didn't keep a job or kept any accounts, he always depended on other people for support." PCR. 706. Dr. Dee explained that even as an adult, Mr. Foster lived with others and that his memory function was very poor. PCR. 706-07. He also explained that Mr. Foster was the type

of person who, “to a person he looked up to and relied on . . . he [would] do whatever you asked him to do.” PCR. 709. Dr. Dee described Mr. Foster as “a follower, he was never a leader.” PCR. 709. When asked about adaptive deficits on cross-examination at the post-conviction evidentiary hearing, Dr. Dee again explained that Mr. Foster never had a job for a substantial period of time, never finished school, and was not functioning. PCR. 725.

B. Mr. Foster’s subaverage intellectual functioning and adaptive deficits manifested during the developmental period

Dr. Toomer’s report also demonstrates that the age of onset prong is established by Mr. Foster’s history. See SPCR. 532. Mr. Foster exhibited his intellectual and adaptive deficits from childhood onward. Many of the impairments described by his family and companions included information from when Mr. Foster was a child. See, e.g., SPCR. 527 (“Though Jermaine is four years older than I am, I took it upon myself to care for him because I knew he was unable to take care of himself. Even when I was as young as ten, he required my help.”); *id.* at 525 (“I often tried to help [Mr. Foster] with his studies. He just didn’t get it. I have children of my own. None of them had nearly the same amount of difficulties.”); *id.* at 516 (Mr. Foster “could not comprehend what he was trying to learn, be it reading, writing, or math. I tried to help him but could never break through. I recall the great difficulties he had at school.”).

Mr. Foster's school records, described in Argument II, A, *supra*, show that his intellectual and adaptive deficits were first documented in elementary school. While this Court erroneously found that Mr. Foster had not been placed in special education classes, his school records conclusively refute this. SPCR. 564, 695-96, 697. As early as first grade, Mr. Foster failed to receive an "Excellent" rating in any of his subjects. SPCR. 537. In his first grade "safety" class, he received grades of G- ("G" represents good progress), and NI ("needs improvement"). SPCR. 537. When Mr. Foster was in 4th grade, the same year he was placed in special education courses, he took the standardized Iowa tests. His score was about the same as a typical student in the eighth month of second grade. SPCR. 574. On the reading portion of the test, his score was consistent with a student in the second half of first grade. SPCR. 574. Overall, his score was in the fourth percentile nationally, meaning that 95% of fourth-graders scored better than he did. SPCR. 574. He ended up repeating the fourth grade. SPCR. 539. In junior high, Mr. Foster received a grade as low as 1 in English on a 0-100 point scale. SPCR. 550.

In addition to repeating the fourth grade, Mr. Foster was "administratively advanced" to the next grade due to his age rather than his ability as a student at several points during his schooling. Following second

grade, Mr. Foster was administratively placed in third grade. SCPR. 537. After failing fourth grade, Mr. Foster was administratively placed into fifth grade the following year. SPCR. 538. At age 16, he was still in eighth grade and was administratively advanced to ninth grade. Mr. Foster was in ninth grade when he dropped out, unable to keep up at all. SPCR. 561.

Mr. Foster's impairments, as shown through the report of Dr. Toomer, witness accounts, and his school records provide ample evidence of his intellectual and adaptive deficits during the developmental period. In combination with his low I.Q. and adaptive deficits, Mr. Foster meets all three prongs that establish intellectual disability.

C. Because Mr. Foster is intellectually disabled, his death sentences violate the Eighth Amendment and relief should be granted; at a minimum, an evidentiary hearing is appropriate

Because Mr. Foster is intellectually disabled, his death sentences violate the Eighth Amendment. *Hall*, 572 U.S. at 704; *Atkins*, 536 U.S. at 321. Mr. Foster's I.Q. of 75 "falls within the test's acknowledged and inherent margin of error, [so that] the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." See *Hall*, 572 U.S. 723; see also *Hall v. State*, 201 So. 3d 628, 637 (Fla. 2016) (because Mr. Hall had already established one prong, onset before age 18, it was no longer at issue and this Court focused on the other

two prongs). Mr. Foster has also demonstrated that he has adaptive deficits in not just one, but all three of the “accepted broad categories of adaptive functioning—conceptual skills, social/interpersonal skills, and practical skills.” *Wright*, 213 So. 3d at 899 (denial of *Hall* relief vacated and case remanded for full consideration). This includes his susceptibility to accept dangerous dares by the other children in his neighborhood, properly clothe himself, his inability to dress appropriately for weather, do laundry, communicate effectively, comprehend communication, follow directions or read maps, maintain his own personal hygiene, know when he is being taken advantage of, or keep track of his own utilities and bill payments. Both his low intellectual functioning and adaptive deficits manifested during the developmental period, as shown by his school records and lay witness accounts that illustrated his poor performance in school, enrollment in special education, and inability to grasp practical skills.

In “turn[ing] to the record” in this case, this Court should find that “[Mr. Foster] has presented sufficient evidence to establish that he meets the statutory definition of intellectual disability.” *Hall v. State*, 201 So. 3d at 635. Indeed, the prior findings by the trial court, evidence in the record, concession by the State as to the first prong, and proffered evidence when combined clearly and convincingly establish that Mr. Foster is intellectually

disabled. Thus, just as in *Hall*, “[t]he record evidence in this case overwhelmingly supports the conclusion that ‘[Foster] has been [intellectually disabled] his entire life.’” *Hall*, 201 So. 3d at 638 (quoting *Hall v. State*, 109 So. 3d at 712-14 (Pariante, J., concurring) (first alteration added)). This Court should likewise grant relief in Mr. Foster’s case. See *id.* at 634 (after “turn[ing] to the record” to determine whether Mr. Hall had established his intellectual disability claim, this Court vacated his death sentence and remanded with instructions to enter a life sentence).

In the alternative, this Court should remand for an evidentiary hearing and allow Mr. Foster to present additional evidence in support of his intellectual disability claim that addresses his adaptive deficits and the onset during the developmental period. A hearing is especially appropriate here given the fact that Mr. Foster’s trial and post-conviction hearing both pre-date *Atkins*, when Mr. Foster “had little reason to investigate or present evidence relating to intellectual disability.” *Brumfield*, 576 U.S. at 321. Mr. Foster has never had a hearing specifically on his intellectual disability claim.

This Court should either find Mr. Foster intellectually disabled and grant relief on the current record, as in *Hall*, or remand to allow Mr. Foster to present his evidence at a full and fair hearing.

III. THE CIRCUIT COURT ERRED IN DISREGARDING THE STATE'S WAIVER THAT AN EVIDENTIARY HEARING SHOULD BE HELD

A. Background information

On appeal from the summary denial of Mr. Foster's successive motion for postconviction relief raising a claim of intellectual disability, this Court remanded for a "*Hall*-complaint" evidentiary hearing. *Foster v. State*, 260 So. 3d 174, 181 (Fla. 2018).

After this Court's decision in *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), the State moved for summary denial. PCR-5. 667-77. The circuit court held a hearing where the State explicitly conceded based on *State v. Okafor*, 306 So. 3d 930 (Fla. 2020), that the circuit court was required to follow this Court's mandate and agreed that Mr. Foster was entitled to an evidentiary hearing on his intellectual disability claim. PCR-5. 753-57; See also Status Conference for State's Motion for Summary Denial of the Intellectual Disability Claim, January 29, 2021, at 8 (" . . . based on the ruling in *Okafor*, it appears that this Court is required to enforce the mandate, to not disregard the mandate, which means that the defendant is entitled to an evidentiary hearing). Thus, the circuit court denied the State's motion on the merits "*based on the State's concession, the applicable law and . . . Okafor[.]*" PCR-5. 756. (Emphasis added). The State did not appeal or pursue any remedy following the ruling.

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

After a hearing, on May 4, 2023, the circuit court held the State’s “concession” based on *Okafor* did not constitute a “waiver” or “abandon[ment]” of the argument that *Hall* is not retroactive to Mr. Foster’s case to grant the evidentiary hearing. PCR-5. 917. Specifically, the court reasoned that *Thompson* was unavailable at the time of the State’s motion for summary denial in 2021 to enlighten the same decision. *Id.*

B. The circuit court misinterpreted whether forfeiture of an issue constitutes a waiver

This Court should reverse the circuit court’s order because failure to timely contest a court’s decision is equivalent to a waiver.

The crux of the waiver doctrine rests upon conduct demonstrating an intent to relinquish a right. *Ferry–Morse Seed Co. v. Hitchcock*, 426 So. 2d 958, 962 (Fla. 1983). “Waiver is the intentional relinquishment or abandonment of a known right or privilege, or conduct that warrants an inference of the intentional relinquishment of a known right.” *Hale v. Dep’t of Revenue*, 973 So. 2d 518, 522 (Fla. 1st DCA 2007). Included in the actions that constitute conduct inferring waiver is the failure to appeal or otherwise challenge previous adverse rulings on the same issue. *Airvac, Inc. v. Ranger*

Ins. Co., 330 So. 2d 467, 469 (Fla. 1976) (finding that party waived any objection to trial court’s denial of motion after party failed to exercise its “full opportunity to perfect an appeal” on a previous denial on the same issue).

Additionally, whether a United States Supreme Court opinion applies to a case on collateral review is a defense subject to waiver or forfeiture. 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). A court cannot simply ignore a party’s decision to forfeit an issue. See *Wood v. Milyard*, 566 U.S. 463, 466 (2012) (noting that “[a] court is not at liberty . . . to bypass, override, or excuse a State’s deliberate waiver” of a defense to merits adjudication) (citing *Day v. McDonough*, 547 U.S. 198 (2006)).

C. The circuit court erred by not determining that the State’s prior waiver was binding

The circuit court abused its discretion in reversing course after initially finding that the State explicitly and unequivocally forfeited the issue of whether following this Court’s mandate ordering an evidentiary hearing was necessary. PCR-5. 756. Once the State explicitly and unequivocally waived the issue, as the circuit court found in its original order, the parties and the circuit court were bound by that waiver.

After the original order, the State neither sought rehearing of the circuit court's original order denying the motion to summarily dismiss the intellectual disability claim, nor sought review of that order in this Court. Further, the mandate was issued on January 19, 2019, so the State had until May 18, 2019, to request an alteration. The State did not do so. Instead, the State sat silently on its rights for over thirteen months as the parties moved toward an evidentiary hearing. In fact, after the State's concession was accepted by the circuit court and the motion to dismiss was denied, the State fully participated in the discovery process. The circuit court did not have the authority to evade this Court's mandate commanding an evidentiary hearing because the State sat on its hands at the time the decision was made. As this Court has long recognized, the State's failure to act or explicitly deny waiver of issues is binding both as to substantive intellectual disability claims and procedural issues regarding such a claim. *Hall*, 201 So. 3d 628, 637-38 (Fla. 2016).

In *Hall*, the State argued that Mr. Hall's claim should be remanded to the circuit court for an evidentiary hearing, despite the fact that there had been a previous evidentiary hearing, because the State "has not had a chance to have a full adversarial proceeding to challenge Mr. Hall's claim that he is intellectually disabled." *Hall*, 201 So. 3d at 637. However, this Court deemed this issue waived because the "argument was not raised in the

State’s initial supplemental brief, . . . but only in its supplemental reply brief” and “at the [2010] evidentiary hearing, the State did not attempt to rebut the testimony of the experts.” *Id.* Therefore, this Court found the State’s argument waived and granted Mr. Hall full merits relief because “[t]he fact that the State has chosen not to avail itself of prior opportunities is not a sufficient reason to expend further resources to continue to litigate this issue.” *Id.* at 637-38. Similarly, in this case, the State’s failure to avail itself of prior opportunities is not a sufficient reason to continue litigating whether Mr. Foster is entitled to an evidentiary hearing.

Most relevantly, the State has also made similar post-*Phillips* waivers in other cases remanded in light of *Hall*. For example, in *Haliburton v. State*, 331 So. 3d 640 (Fla. 2021), this Court engaged in a full merits review of his intellectual disability claim under *Hall* despite recognizing in the opinion that *Phillips* had overruled *Walls*. The State waived the applicability of *Hall* by not challenging the argument in a brief in opposition to Mr. Haliburton’s certiorari petition to the United States Supreme Court and failing to raise the challenge again in its briefing before this Court. See Answer Brief at 7, 8 n.2, *Haliburton v. State*, SC19-1858 (filed August 20, 2020) (“Before the State’s response [in the Supreme Court] was due, the Supreme Court issued *Hall v. Florida*, 134 S. Ct. 1986 (2014). At the State’s request, the case was remanded to

the Florida Supreme Court.”). Therefore, instead of *sua sponte* applying *Phillips* to *Haliburton*, this Court, unlike the circuit court below in this case, respected the State’s waiver and conducted a merits review.

Here, the State’s waiver based on *Okafor* puts Mr. Foster’s case in this class of cases with *Hall* and *Haliburton* in which the State has waived legal arguments or defenses to holding an evidentiary hearing and conducting a complete merits review of a defendant’s intellectual disability claim.

In addition, it should be noted that the circuit court made a factual error on the basis of the State’s waiver. The State did not waive “the argument that *Hall* is not retroactive,” but instead the contestation of the lower court’s authority to follow this Court’s mandate requiring Mr. Foster to proceed with an evidentiary hearing. PCR-5. 917. The State conceded that because this Court’s mandate implicates the principles-of-finality based on *Okafor*, the circuit court must hold an evidentiary hearing in accordance therewith. PCR-5. 756. The circuit court agreed it does not have the authority to disregard that mandate. PCR-5. 756. (“This Court is unaware of any authority that would allow it to disregard the Mandate from the Florida Supreme Court, directing it to hold an evidentiary hearing on [Foster’s] intellectual disability claim.”).

D. This Court's decision in *State v. Okafor* controls the issue before the Court

This Court's mandate requiring the circuit court to conduct Mr. Foster's first opportunity to present evidence of intellectual disability post-*Atkins* is a final judgment not subject to evasion. In *State v. Okafor*, this Court held, "[a] trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so." 306 So. 3d at 935-36 (quoting *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 328 So. 2d 825, 827 (Fla. 1975)). *Okafor* held there is a "difference between a final appellate court judgment and the decisions on questions of law that underlie that judgment." *Id.* at 935. A final judgment is untouchable while the law of the case doctrine is subject to exceptions, such as an intervening change in the law. This Court further explained that "the State's petition does not ask us to decide [which law] should govern *Okafor's* resentencing going forward. Rather, the petition asks us to revisit and undo a final judgment." *Id.* at 934 (footnote omitted). While intervening case law "established a new constitutional baseline going forward, [the] judgment vacating *Okafor's* death sentence is final and no longer subject to reconsideration." *Id.* at 935. In other words, a change in the law of the case that would alter the outcome of a substantive issue may be subject to reconsideration. However, an intervening change in the law cannot undo a final judgment.

Here, the circuit court ignored the distinction this Court drew in *Okafor* because the court decided to cancel Mr. Foster's evidentiary hearing based on this Court's recent holding in *Thompson*. Mr. Foster acknowledges that *Thompson* interprets *Okafor* differently than the circuit court did in its 2018 order. *Okafor* held "[a]n appellate court decision ordinarily becomes final when the appellate court issues a document known as a mandate." *Okafor*, 306 So. 3d at 933 (quoting *Philip J. Padovano, Florida Appellate Practices* § 20:8 (2020 ed.)) The circuit court's first denial acknowledged "[i]t is a bedrock principle that 'the judgement if an appellate court, where it issues a mandate, is a final judgement in the cause.'" PCR-5. 756. But, in *Thompson*, *Okafor* was "not controlling . . . because [the] judgement ordering a new *Hall* hearing did not vacate [Appellant's] death sentence." *Id.* at 916. A mandate commanding a lower court to issue a *Hall* hearing was found not to be a final judgment; thus, the law of the case doctrine applied.

However, neither *Thompson's* rationale nor the law of the case doctrine should apply here because Mr. Foster's case and *Thompson* are distinct. Unlike Mr. Foster, Mr. Thompson's opportunities for factual development pertaining to his intellectual disability claim were duplicative and thus subject to reconsideration. See *Okafor*, 306 So. 3d at 935. In Mr. Thompson's third post-conviction motion, this Court ordered the trial court to

conduct an evidentiary hearing based on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007). *Thompson v. State*, 3 So. 3d 1237, 1238-39 (Fla. 2009). Although relief was denied, the trial court held an evidentiary hearing and considered the three prongs of the intellectual disability test. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010). Within seven years, *Hall and Walls* granted *Thompson* a *second* mandated evidentiary hearing on the same intellectual disability claim. Thus, Mr. Thompson had at least one substantive review of his intellectual disability claim while Mr. Foster has not.

Conversely, while Mr. Foster's sentence was not vacated as *Okafor's* was, both cases share a procedural due process notion absent in *Thompson*—their mandates are founded on their first opportunity to be fairly heard.⁵ *Okafor's* mandate afforded him a new sentencing proceeding given

⁵ Foster has never been afforded an evidentiary hearing on his intellectually disability claim. As this Court specifically recognized:

At the prior postconviction evidentiary hearing concerning intellectual disability, Foster's counsel was focused on proving that an involuntary intoxication defense would have been enhanced with evidence of intellectual disability, *not on proving a claim of intellectual disability as a bar to execution under the governing case law, which was issued after that hearing*. He presented evidence of intellectual disability only to show that his drug and alcohol use would have affected him more severely than it would have affected another person with higher intellectual functioning, and he came to the hearing with the background of having received a finding from the trial court that he is mildly intellectually disabled (albeit not a finding based on

the fact that his jury did not make the factual findings necessary to impose a sentence of death. The mandate granted him his *first* fair penalty phase under *Hurst*. Here, this is Mr. Foster's *first* fair opportunity to establish his intellectual disability.⁶ A mandate vacating a death sentence may hold a different judgment than a mandate ordering an evidentiary hearing for an intellectual disability claim, but both are final because reversal would desecrate fundamental principles of the Eighth Amendment and the Due Process clause of the Fourteenth Amendment. A blind application of

the Atkins prongs). The limitation on Foster's evidentiary presentation is illustrated by the fact that he did not offer any of his school records into evidence, even though the record generated in connection with the motion under review shows that Foster's school records would have afforded favorable, though not conclusive, evidence for Foster. Similarly, he did not include testimony from friends and family who observed adaptive deficits in him as a child, even though the current record includes affidavits showing that this testimony would have been available. In fact, it includes an attestation from a family member that Foster was in special education, which was not indicated at the original postconviction evidentiary hearing *[W]e conclude that Foster must now be afforded an opportunity to present evidence of intellectual disability in a proceeding fully informed by Hall.* (Citation omitted).

Foster v. State, 260 So. 3d 174, 180-81 (Fla. 2018) (emphasis added).

⁶ Mr. Foster will present evidence that he is intellectually disabled under clinical and legal standards. This Court should guard against the undue risk that the State of Florida will execute an intellectually disabled person and remand for a full and fair evidentiary hearing.

Thompson would deny Mr. Foster of any opportunity to present his intellectual disability claim. The circuit court's findings are constitutionally infirm and relying on their analysis would deny Mr. Foster "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall*, 572 U.S. 701, 724 (2014).

CONCLUSION

This Court should reverse the lower court and remand the cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 26th day of October, 2023.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14-point Arial type, a font that is not proportionately spaced.

/s/ Linda McDermott
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