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

APPELLANT'S REPLY BRIEF

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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

Appellee asserts the United States Supreme Court made clear that: "Florida's rule, as interpreted by the State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ was more than 70, created unacceptable risk that persons with intellectual disability would be executed." (citing *Hall v. Florida*, 572 U.S. 701 (2014)). AB at 12. However, despite this recognition, Appellee urges this Court to risk Mr. Foster's life without adequate exploration of whether he suffers from intellectual disability. Such a risk violates the Eighth Amendment and does not comply with the United States Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S. 304, 331 (2002), wherein the Court emphatically ruled that the Constitution "restrict[s]. . . . the State's power to take the life of *any* intellectually disabled individual." (emphasis in original). With this understanding, this Court should reject Appellee's invitation to short circuit the Eighth Amendment and create the intolerable risk of executing an individual who the trial court found to be mildly mentally retarded, *see* R. 752-

53, based upon application of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), or any other procedural obstacle the State asserts.

B. Appellee's arguments

Initially, Appellee urges this Court to apply *Phillips* and hold that *Hall* is not retroactive. AB at 8. However, Appellee fails to address *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), or any of the other litigants who received the benefit of *Hall*, including Freddie Hall himself. Yet without doing so, the State's argument that Mr. Foster could not receive the benefit of *Atkins* or *Hall*, because he was nineteen years too late based upon the date of the crime is illogical. AB at 8.

First, Appellee overlooks *Atkins*. There certainly should be no doubt that if the Eighth Amendment protects a particular class of individuals from the death penalty, in this case those individuals who suffer from intellectual disability, then it simply does not matter when the date of Mr. Foster's crime was or when his conviction and death sentences became final. If he can establish that he is intellectually disabled, his death sentences cannot stand. But, rather than address Mr. Foster's arguments, Appellee simply cites to a

string of cases where this Court sometimes did and sometimes did not allow exploration of the issue of a defendant's claim that he was intellectually disabled to urge this Court to deny Mr. Foster that opportunity, ignoring the fundamental unfairness of such a result. AB at 9.

Finally, Appellee argues *Hall* was not a substantive change of the law, but simply procedural. AB at 9-10. In the context of intellectual disability, *Atkins* was unquestionably retroactive because it defined a class of individuals who could not be executed under the Eighth Amendment. *Hall* recognized the interpretation of Florida's statute was likewise unconstitutional because it restrictively carved out an entire group of individuals, i.e., those capital postconviction defendants whose IQ exceeded 70, from the protections recognized in *Atkins*. Precluding those individuals an opportunity to establish that they fall within the class identified in *Atkins* violates the Eighth Amendment. Appellee's argument that *Hall* was merely a procedural decision, AB at 10, 12, misunderstands the importance of Eighth Amendment jurisprudence as it relates to capital cases. The interpretation of Florida's statute was unconstitutional because it "create[d] an unacceptable risk that persons with intellectual disability will be executed" *Hall*, 572 U.S. at 704. That risk requires that Mr. Foster be provided a fair opportunity,

compliant with *Hall* and *Atkins*, to establish that he suffers from intellectual disability.

II. MR. FOSTER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS INTELLECTUAL DISABILITY CLAIM.

A. Introduction

Appellee incorrectly suggests that Mr. Foster is not entitled to a "redo" of his intellectual disability claim. AB at 14. This argument has no merit because Mr. Foster has never had the opportunity to be heard on an intellectual disability claim.

B. Appellee's arguments

First, the comparison to *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), amounts to a false equivalence. Mr. Thompson was granted an evidentiary hearing post-*Atkins* and was given the opportunity to submit evidence in support of the statutory criteria as interpreted by *Cherry v. State*, 959 So. 2d 702 (Fla. 2007). However, in *Hall*, the United States Supreme Court deemed this Court's interpretation of Florida's capital sentencing statute to be unconstitutional. The only evidentiary hearing Mr. Foster has had in state court was held on the issue of ineffective assistance of trial counsel at the guilt and penalty phases for failure to present evidence of Mr. Foster's diminished mental capacity in the context of a voluntary intoxication defense. PCR. 426, 636-39. At no point was Mr. Foster granted the

opportunity to demonstrate that he satisfies *Atkins* and is unable to be executed due to his intellectually disability because *Atkins* was decided on June 20, 2002—over four months *after* Mr. Foster's January 30 – February 1, 2002, evidentiary hearing—and it was not addressed in the circuit court's order denying postconviction relief. PCR. 514-42. Only when Mr. Foster moved for rehearing pursuant to *Atkins,*[1] did the court address the opinion. PCR. 616-22. Rather than afford Mr. Foster the chance to present evidence demonstrating he has an intellectual disability as he requested in the motion for hearing, the circuit court post-hoc analyzed the *Atkins* prongs based upon evidence admitted in a hearing on claims entirely unrelated to whether Mr. Foster was ineligible to be executed due to his intellectual disability. *Id.*

While Appellee set forth the standard for demonstrating an intellectual disability, AB at 14-15, it overlooked the fact that this standard did not exist at the time Mr. Foster sought postconviction relief and received an evidentiary hearing. It is disingenuous and incorrect to suggest Mr. Foster was afforded the opportunity to put on evidence in support of satisfying the holding of a case that did not exist at the time of his evidentiary hearing.

[1] Mr. Foster also raised *Ring v. Arizona*, 536 U.S. 584 (2002), as a ground for challenging Florida's capital sentencing scheme in his motion for rehearing.

Since Mr. Foster raised his *Atkins* claim during the rehearing period of the denial of his motion for postconviction relief, he has diligently sought an opportunity to present evidence that he satisfies *Atkins*, and *Hall* after its issuance, and is consequently ineligible for the death penalty. Appellee quotes at length this Court's 2006 opinion affirming the circuit court's denial of postconviction relief, and ignores this Court's more recent opinion that explicitly stated:

> [The *Atkins*] standard had not been announced by this Court at the time of the original postconviction court's decision, but the standard was driven by the statutory definition of "mental retardation" that was already in effect at that time, see § 921.137, Fla. Stat. (2001), and the standard had been announced by the time this Court affirmed the original postconviction court's ruling. *See Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

Foster v. State, 260 So. 3d 174, n.8 (Fla. 2018).

This Court went further to state:

> "Although the original postconviction court did not cite [the *Atkins*] standard,[] its analysis began with skepticism that Foster could be considered intellectually disabled given his achievement of a score of 75 on an IQ test, and the court's consideration of this issue was not aided by any explanation of the standard error of measurement."

Id. at 180.

In ignoring this opinion, Appellee overlooks the fact that this Court specifically found Mr. Foster's evidentiary presentation was limited, and this is "illustrated by the fact that he did not offer any of his school records into

evidence"—records that categorically demonstrate Mr. Foster "was in special education" courses, a fact Appellee continues to dispute. *Id.* at 180-81.

Notably, this Court's issuance of *Phillips* does not negate this Court's finding that Mr. Foster never received an opportunity to present the various affidavits from friends and family who directly observed Mr. Foster's adaptive deficits, or the school records showing he was placed in special education in elementary school.

Mr. Foster's IQ score of 75 was presented at his original postconviction proceeding in 2002. This IQ score places him within the class of defendants who are ineligible to be executed. Mr. Foster can satisfy all three prongs of his intellectual disability claim; he has simply fallen victim to unfortunate timing during the course of his litigation. He should not be executed for failing to raise an *Atkins* claim and receive an evidentiary hearing pre-*Atkins*, or for clogs in state court that delayed his *Hall*-compliant evidentiary hearing so long that it was subsequently revoked after this Court's decision in *Phillips*.

Finally, Appellee suggests that the merits of Mr. Foster's intellectual disability claim need not be addressed as the claim fails on non-retroactivity grounds. Mr. Foster reiterates that *Hall* was a clarification of *Atkins* and correction of this Court's misinterpretation of Florida's intellectual disability

statute. Because *Atkins* is retroactive, and *Hall* is merely a refinement of *Atkins*, *Hall* is retroactive.

III. UPHOLDING THIS COURT'S MANDATE WOULD NOT INFLICT MANIFEST INJUSTICE ON APPELLEE YET APPLYING *THOMPSON* OR *NIXON* TO MR. FOSTER WOULD VIOLATE DUE PROCESS.

A. Introduction

Appellee again mistakes its own waiver to evade consequences. Mr. Foster agrees Appellee did not waive "its prior defense that *Hall* was not retroactive to Foster." AB at 20. That is not at issue here. Instead, Mr. Foster argues Appellee waived the circuit court's authority to follow this Court's mandate, which entitles Mr. Foster to an evidentiary hearing on his intellectual disability claim. Appellee's retroactivity argument is not relevant to the waiver issue. This Court should decline Appellee's contention that it did not waive, disregard the notion that the mandated evidentiary hearing would result in manifest injustice, and find *Thompson* and *Nixon* are inapplicable here.

B. Appellee's Arguments

No manifest injustice would result from adhering to *Okafor*. Appellee quickly argues "applying *Hall* to Foster would result in manifest injustice because he is asserting a right that does not exist, that *Hall* should be applied retroactively to him." AB at 20. As aforementioned, Mr. Foster is asserting

his right to have a final mandate enforced. Appellee admites "[t]he court also acknowledged the State's concession relying on *Okafor*." AB at 20. Because Appellee conceded to this Court's mandate per court record and both parties took steps towards preparing for an already agreed upon evidentiary hearing, without further objection, Appellee irrevocably waived.

Regardless, manifest injustice is irrelevant here because following this Court's mandate, as *Okafor* holds, would not produce a result that is fundamentally unfair to Appellee. Applying *Okafor* to Mr. Foster's case does not violate the constitution nor perpetuate a rule that burdens Appellee. *See State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997) (". . . reliance upon our prior decision in Owen's direct appeal would result in manifest injustice to the people of this state because it would perpetuate a rule which we have now determined to be an undue restriction of legitimate law enforcement activity."). No such manifest injustice would occur here because Mr. Foster's entitlement to an evidentiary hearing places no unnecessary burden on Appellee. In fact, Appellee has never had the opportunity to challenge Mr. Foster's intellectual disability claim in an evidentiary hearing. Neither effort nor resources expended in complying with the mandated evidentiary hearing would be wasteful.

Manifest injustice exists if applying the law of the case would result in a harsher sentence for a defendant. *See Green v. State*, 813 So. 2d 184 (Fla. 2d DCA 2002) (citing *Line v. State,* 722 So. 2d 853 (Fla. 4th DCA 1998)); *Xolache v. State,* 687 So. 2d 298 (Fla. 4th DCA 1997). Here, if this Court were to accept Appellee's argument that the law of the case applies, a harsher punishment would result for Mr. Foster in that he would be unable to present a clear bar to his execution, and thus suffer manifest injustice.

Additionally, Appellee argues that "any acquiescence to an evidentiary hearing was later superseded by an intervening change in the law, which was binding on the court." AB at 24. The intervening change in the law should not affect Appellee's waiver on *Okafor*'s authority because the mandate is final and without an evidentiary hearing, Mr. Foster is denied the opportunity to present his claim. Appellee ignores the different procedural opportunities Mr. Thompson and Mr. Nixon had that Mr. Foster did not. Both Mr. Thompson and Mr. Nixon already had evidentiary hearings on intellectual disability claims whereas Mr. Foster has not. If *Okafor* was applied to *Thompson* and *Nixon*, the state would have had to undergo discovery, pleadings, a hearing, etc., on the same intellectual disability issue once more, creating cumulative and repetitive labor. That is not the case here. Mr. Foster is entitled to the finality of this Court's mandate in providing him an evidentiary hearing so he

may establish that he suffers from intellectual disability and his death sentences are unconstitutional.

Most importantly, under Appellee's approach of applying an intervening change in the law, strict adherence to *Thompson* and *Nixon* would result in a due process violation where Mr. Foster would be denied the reliance of this Court's previous mandate to hold his first and only evidentiary hearing on his intellectual disability claim.

CONCLUSION

Based upon his arguments, Mr. Foster respectfully requests that this Court reverse the circuit court and remand for an evidentiary hearing on Mr. Foster's claim that he is intellectually disabled, and his death sentences violate the constitution.

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 18th day of December, 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
Linda McDermott