In the Supreme Court of Florida

FRANK A. WALLS,

Appellant,

v. CASE NO. SC15-1449

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, FRANK A. WALLS, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Walls was convicted at a retrial of the murder of Edward Alger and Ann Peterson and sentenced to death for the murder of Peterson. *Walls v. State*, 641 So.2d 381, 391 (Fla.1994)("*Walls II* "); *see also Walls v. McNeil*, 2009 WL 3187066, *1-*3 (N.D.Fla. Sept. 30, 2009)(detailing procedural history); *Walls v. Buss*, 658 F.3d 1274, 1276-77 (11th Cir. 2011)(detailing procedural history).

During the early morning hours of July 22, 1987, in Okaloosa County, a neighbor heard loud noises coming from the mobile home of the victims, Edward Alger and Ann Peterson. When Alger failed to report for duty at Eglin Air Force Base, where he worked, his superior officer Sergeant John Calloway went to Alger's home. The body of a nude female was discovered in the front bedroom. Calloway left immediately to telephone police. When investigators arrived, they identified the woman as Peterson. She was lying face down on the floor of the front bedroom, shot twice in the head. Alger's nude body was found on the floor of the second bedroom. His feet were tied with a curtain cord and a piece of the same cord was tied to his left wrist. Alger had been shot three times and his throat cut. *Walls v. McNeil*, No. 3:06-cv-237-MCR, 2009 WL 3187066, at *1 (N.D.Fla. Sept.30, 2009).

In his confession, Walls indicated that he deliberately woke up the two victims by knocking over a fan after entering the house to commit a burglary. Then he forced Alger to lie on the floor and made Peterson tie him up so that his hands were "behind the back, ankles shackled." He next forced Peterson to lie on the floor so he could tie her up in the same manner. Walls stated the Alger later

got loose from his bindings and attacked Walls. During the fight, Walls tackled Alger, forced him to the floor, and "caught [Alger] across the throat with the knife." Alger continued struggling with Walls and succeeded in biting him on the leg. At this point, Walls apparently dropped his knife. Walls then pulled out his gun and shot Alger several times in the head.

Walls returned to Peterson. He found her "laying in there crying and everything, asked—asked me some questions." Walls said he could not understand what she was saying, so he removed her gag. She asked if Alger was all right. Walls said:

> I told her no. I told her what was going on, and I said, I came in here, and I didn't want to hurt none of y'all. I didn't want to hurt you, but he attacked my ass, and things just happened.

Walls then untied Peterson, and "started wrestling around with her." During this second struggle, he ripped off Peterson's clothing. Walls' confession stated:

> [Peterson] was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses.
>
> * * * *
>
> I—all I know is just—all I know I just went out, and I just pulled the trigger a couple of times right there behind her head.
>
> * * * *
>
> I mean close range, I mean shit, it's got powder burns (unintelligible) and everything.

Walls stated that after the first shot, Peterson was "doing all kinds of screaming." He then forced her face into a pillow and shot her a second time in the head. *Walls v. McNeil*, No. 3:06-cv-237-MCR, 2009 WL 3187066, at *1-*2 (N.D.Fla. Sept.30, 2009.)

Penalty phase

At the penalty phase of the retrial, the three mental health experts testified. *Walls v. State*, 926 So.2d 1156, 1170, n.3 (Fla. 2006)(noting these experts were psychologist Dr. Edward Chandler, psychiatrist Dr. Eugene Valentine, and neuropsychologist Dr. Karen Hagerott). Psychiatrist Dr. Eugene Valentine testified that Walls suffered from bipolar disorder and the conduct disorder of socialized aggression. Dr. Valentine also testified that he had performed a Computerized Axial Tomography scan and two electroencephalograms on Walls in 1985. Psychologist Dr. Edward Chandler testified that his testing was suggestive of mild cerebral dysfunction or brain damage.

Neuropsychologist Dr. Hagerott testified that Walls has significant neuropsychological deficits, organic brain damage, and an organic personality disorder. *Walls*, 926 So.2d at 1171. Dr. Hagerott, who relied on the test that Dr. Larson performed after the crime, testified that, using the Wechsler Adult Intelligence scale revised, Walls had a verbal score of 72 and a nonverbal of 75 (T. 850-851). She testified that Walls was borderline retarded. On cross-examination, she admitted that only persons with scores

below 70 are actually retarded and Walls' score was above 70. (T. V 867-868).

Dr. Chandler, who had given Walls a series of mental health tests in 1984, approximately three years prior to these crimes, when Walls was approximately 17 years old, testified that Walls had an average IQ. (T. V. 787-822). Dr. Chandler relied on previously performed IQ tests. (T. V. 793). Dr. Chandler reported that Walls' IQ was 101 and 102 on the Weschsler Intelligence scale (T. V. 795). Dr. Chandler testified that Walls' IQ is "right in the middle of the average range". (T. V. 795).

In the sentencing order, the trial court found as nonstatutory mitigating evidence that Walls suffers from apparent brain dysfunction and brain damage, has a low IQ, and was classified as emotionally handicapped. *Walls*, 926 So.2d at 1171 (citing *Walls*, 641 So.2d at 386). The Florida Supreme Court affirmed the convictions and death sentence. *Walls v. State*, 641 So.2d 381, 391 (Fla. 1994)("*Walls II*").

Initial postconviction motion

Walls filed an initial motion for postconviction relief. The postconviction court denied relief on all claims, and the Florida Supreme Court affirmed. *Walls v. State*, 926 So.2d 1156 (Fla. 2006)("*Walls III*"). The Florida Supreme Court, however, concluded that "Walls may still file a rule 3.203 motion for a determination of mental retardation as a bar to execution in the trial court and is entitled to an evidentiary hearing on that motion." *Walls*, 926 So.2d at 1173-74 (citing Fla. R.Crim. P. 3.203(e)).

First motion and evidentiary hearing testimony

Walls filed a rule 3.203 motion in state court. At the evidentiary hearing on mental retardation, the defense presented the testimony of Dr. Jethro Toomer, a forensic psychologist. (PC Vol. II 188-189)[1]. The State stipulated as to Dr. Toomer's qualifications. (PC Vol. II 190). Dr. Toomer's CV was introduced as defense exhibit #1. (PC Vol. II 191). Dr. Toomer examined Walls for mental retardation on June 7, 2007. (PC Vol. II 191). Dr. Toomer directly testified that his opinion was that Walls "did not meet the three prongs that are required for rendering a diagnosis of mental retardation." (PC Vol. II 192). Dr. Toomer determined Walls' adaptive functioning by employing the scales of independent behavior given to both Walls and his mother, Miss Monica Walls. (PC Vol. II 192). He reviewed prior educational and psychological documents and prior transcripts from the legal proceedings. (PC Vol. II 192). Dr. Toomer noted Walls was given prior IQ tests on two occasions which showed Walls IQ was average. (PC Vol. II 193). In 1980, when Walls was 12 years old, Walls' IQ was assessed as a "full scale IQ of 102." (PC Vol. II 193). In 1982, when Walls was 14 years old, Walls' IQ was assessed as a full scale IQ of 101. (PC Vol. II 193). More recently in 1991, Dr. Toomer testified, Walls' IQ was a full scale of 72. (PC Vol. II 194). Walls was born on October 12, 1967. (PC Vol. II 194). Dr. Toomer did not perform his own IQ testing. (PC Vol. II 194). The IQ tests showed a "kind of progressive downward pattern." (PC Vol. II 194). Dr. Toomer

[1] The page reference is to the number at the bottom right hand side of the page of the record of the hearing.

attributed the downward pattern to Walls' "organically based impairment." (PC Vol. II 194). This refers to organic brain impairment (PC Vol. II 195). Dr. Toomer found that Walls met the adaptive functioning prong of the test for mental retardation. (PC Vol. II 195). Walls manifested "significant limitations in adaptive functioning. (PC Vol. II 198). Dr. Toomer found that Walls suffered adaptive deficits prior to age 18. (PC Vol. II 198). Dr. Toomer explained that the standard error was five (5) points. (PC Vol. II 198-199). A Wexler IQ score of 70 could actually represent a range between 65 and 75. (PC Vol. II 199). The standard error is in the DSM-IV. (PC Vol. II 199). So, Walls' IQ score of 72 could represent an actual IQ of 69 and 79. (PC Vol. II 199-200). Dr. Toomer wrote a report that was introduced as defense exhibit #2. (PC Vol. II 200-201). Walls' thought processes were "somewhat scattered" and "poorly organized." (PC Vol. II 201). Walls experienced oxygen deprivation at birth. (PC Vol. II 203). Walls' high order thought processes were impaired and his behavior was "erratic," "impulsive," and "unpredictable." (PC Vol. II 204). Walls suffered from anxiety. (PC Vol. II 205). Walls was not "oppositional or resistent" with Dr. Toomer. (PC Vol. II 206). Rather, Walls was "cooperative." (PC Vol. II 206). The prosecutor objected to testimony about Walls' anxiety as irrelevant to the issue of mental retardation and the trial court sustained the objection. (PC Vol. II 206). Walls has a diagnostic history of cerebral dysfunction and organically based deficits. (PC Vol. II 207). Dr. Toomer concluded that Walls meets the third criteria, adaptive functioning, for mental retardation found in the DSM-IV.

(PC Vol. II 207-208). Dr. Toomer gave Walls the Scales of Independent Behavior Revised (SIBR) to determine his adaptive functioning. (PC Vol. II 208). Walls had limitations in thirteen (13) adaptive skills. (PC Vol. II 209). Dr. Toomer also administered the SIBR test to Walls' mother on June 11, 2007. (PC Vol. II 210). Walls' adaptive functioning is comparable to a seven (7) year old. (PC Vol. II 211-212). Dr. Toomer reviewed Dr. McClaren's report. (PC Vol. II 212). Dr. McClaren's IQ tests conducted in 2007 showed Walls' IQ to be 74. (PC Vol. II 217, 241).

Dr. Toomer admitted on cross that Walls did not meet the first prong which is significant sub-average intellectual functioning. (PC Vol. II 219-220). Dr. Toomer testified that adaptive functioning is determined prior to age 18. (PC Vol. II 221). Dr. Toomer directly testified that Walls did not meet the criteria for mental retardation. (PC Vol. II 221). The defense rested. (PC Vol. II 221).

The State called Dr. Harry McClaren, a forensic psychologist, as its expert. (PC Vol. II 222). The defense stipulated to his expertise. (PC Vol. II 222). Dr. McClaren examined Walls on November 14 and November 15, 2006. (PC Vol. II 223). Dr. McClaren reviewed the penalty phase testimony of Drs. Chandler, Valentine and Hagerott. (PC Vol. II 224). Dr. McClaren also reviewed Walls' confession to Investigator Vinson. (PC Vol. II 224). He also reviewed the medical records of Dr. Ted Marshall and Dr. Lewis Perillo. (PC Vol. II 224). He reviewed Walls' high school records from Okaloosa County schools. (PC Vol. II 224). He reviewed employment records, homebound school records and HRS files. (PC

Vol. II 225). Dr. McClaren gave Walls a Wexler Adult intelligence Scale - 3rd edition. (PC Vol. II 226-227). He gave the scale of independent living test to a correctional officer who had known Walls for three (3) years. (PC Vol. II 227). Walls refused to complete the scale of independent living test, becoming "more and more agitated, argumentative, and angry." (PC Vol. II 227). Walls did not want to confine himself to the test choices. (PC Vol. II 228). Even after Dr. McClaren explained that the choices were necessary for an accurate score, Walls refused to abide by the parameters. (PC Vol. II 228). Dr. McClaren administered the test to a correctional officer who knew Walls. (PC Vol. II 229). Dr. McClaren testified that Walls' full scale IQ was 74. (PC Vol. II 229,241). Dr. McClaren testified that Walls did not meet the first criteria for mental retardation, the significant, subaverage intellectual functioning prong. (PC Vol. II 229). Using the rating from the correctional officer, Dr. McClaren testified that Walls was "low average" in adaptive functioning. (PC Vol. II 229). Walls "clearly" had some deficits in adaptive functioning but they did not appear to be at the level of mental retardation. (PC Vol. II 230). As to the third prong - manifestation prior to 18 years of age, Dr. McClaren explained that "it was hard to know" because the issue of Walls being retarded never came up. (PC Vol. II 230). Walls' poor performance in school and at work were not related to a low IQ. (PC Vol. II 230). Walls was never tested for adaptive functioning prior to 18. (PC Vol. II 230). Dr. McClaren testified that Walls "absolutely" did not meet the definition of mental retardation in the statute and rules. (PC Vol. II 230).

On cross, Dr. McClaren testified that the correctional officer was named John Lakes. (PC Vol. II 232). Dr. McClaren testified that this was the first time he had not been able to get a person to calm down and work with him. (PC Vol. II 233). Dr. McClaren did not inform Walls that evidence could be excluded because of his refusal. (PC Vol. II 233). Dr. McClaren did not think the self reporting in that test important to the final assessment. (PC Vol. II 234). That data was not critical. (PC Vol. II 234). Dr. McClaren went on to different testing. (PC Vol. II 235). Officer John Lakes had been around Walls five days a week for three years. (PC Vol. II 236). Dr. McClaren spoke with Officer Lakes for about one hour regarding Walls. (PC Vol. II 236). Dr. McClaren did not find malingering because there was only a "hint of it." (PC Vol. II 241). Walls was "pretty volatile," which may account for those results. (PC Vol. II 242). The trial court overruled the State's prior objection based on Walls' refusal to cooperate, pursuant to 3.203(c)(5), finding Walls did not intentionally not cooperate. (PC Vol. II 195-196, 244). The trial court admitted the defense expert's testimony in its entirety. (PC Vol. II 245).

The trial court's ruling on the first motion

Following the evidentiary hearing, the trial court found:

> Pursuant to the Florida Supreme Court's order and the Defendant's instant motion, the Court conducted an evidentiary hearing on July 9, 2007 with respect to whether the Defendant is mentally retarded and, therefore, ineligible for the death penalty.
>
> Mental retardation, as defined in 3.203(b), provides: As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and

manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purposes of this rule, means 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.

In order to demonstrate mental retardation, a defendant must prove the following three elements: (1) significant subaverage general intellectual functioning; (2) deficits in adaptive behavior; and (3) manifestation before age 18. *Burns v. State*, 944 So.2d 234, 245 (Fla. 2006).

The Defendant called Dr. Jethro Toomer to testify on the issue of the Defendant's mental condition. Dr. Toomer, a clinical psychologist, met with Mr. Walls on June 7, 2007 at defense counsel's request. Dr. Toomer found that the Defendant did *not* meet the criteria as outlined in Rule 3.203(b) and was not, consequently, mentally retarded.

Dr. Toomer arrived at his conclusion based on the personal interview of the Defendant as well as his review of numerous documents and records, including the trial transcripts and prior medical evaluations. The Defendant's IQ, Dr. Toomer noted, had been assessed in 1980 and 1982 and he had scored a 101 and 102 respectively.[2] These scores were in the "average range" according to Dr. Toomer. Another IQ test taken in 1991, after the murders, revealed an IQ score of 72. Although this score would indicate that the Defendant was of low intelligence, it would not demonstrate mental retardation.[3]

With respect to "adaptive functioning," Dr. Toomer found that the Defendant met this part of the criteria and had significant deficits prior to age 18. The Defendant did not handle stress well, according to Dr. Toomer, and also lacked an ability to control his moods. Dr. Toomer testified that these problems were evident when the Defendant was a child.

The State's expert, Dr. Harry McClaren, said that he also had personally examined Mr. Walls in order to determine whether he was mentally retarded. In addition to conducting a personal examination, Dr. McClaren also examined the trial transcripts and the Defendant's prior medical records in order to make his determination.

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[2] As the Defendant was born in October of 1967, he would have been approximately 12 when the first IQ test was taken.

[3] According to the *Diagnostic and Statistical Manual of Mental Disorders*, significantly subaverage intellectual functioning is characterized by an IQ of 70.

> Although Dr. McClaren believed that the Defendant had some limitations with respect to adaptive behavior, he did not believe that he met the standard for mental retardation. With respect to his intelligence level, Dr. McClaren said that, based on the test he administered, the Defendant presently had an IQ of 74. He also noted that past IQ tests conducted on the Defendant prior to age 18 showed an IQ of 101 and 102. Dr. McClaren's ultimate opinion was that the Defendant was not mentally retarded since he met none of the criteria as outlined in Rule 3.203(b).
>
> In evaluating a claim under Rule 3.203, it is unclear to the Court whether the Defendant is required to prove his case by "clear and convincing" evidence, or merely by a "preponderance" of the evidence. Rule 3.203 is silent on the burden of proof and existing case law has yet to settle the issue. Erring on the side of caution, the Court has reviewed the evidence under both burdens of proof. Regardless of which burden is used, the Court finds that there is no evidence which would support a finding that the Defendant is mentally retarded.
>
> The main barrier with respect to the Defendant's claim is the fact that there is no evidence that he has ever exhibited significantly subaverage general intellectual functioning. The Defendant's own expert could not testify that the Defendant was retarded as that term is defined under Florida law due to the fact that he did not have a significantly subaverage intellect. As a result, the Defendant has failed to demonstrate that he is mentally retarded and his claim is without merit.

(PC Vol. I 164-169).

The Florida Supreme Court's decision

The Florida Supreme Court affirmed the trial court's denial of the first motion, stating that "there is no evidence that Walls has ever had an IQ of 70 or below." *Walls v. State*, 3 So.3d 1248 (Fla. 2008)("*Walls IV*").

Federal habeas proceedings

Walls also filed a federal habeas petition. *Walls v. McNeil*, 2009 WL 3187066 (N.D.Fla. Sept. 30, 2009); *Walls v. Buss*, 658 F.3d

1274, 1276-77 (11th Cir. 2011)(addressing two issues on appeal from the denial of the federal habeas petition).

The current successive motion

On May 26, 2015, Walls, represented by registry counsel Harry Brody, filed a successive postconviction motion raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014). (PC Vol. I 1-7). On May 27, 2015, Walls filed an amended successive postconviction motion based on *Hall*. (PC Vol. I 15-22).[4] The State filed an answer asserting that the successive motion should be summarily denied as untimely because *Hall* is not retroactive and that Walls was not intellectually disabled, as previously determined by both the trial court and this Court. (PC Vol. I 23-41). The trial court summarily denied the successive motion. (PC Vol. I 46-50). This appeal follows.

[4] As the trial court noted, there is no substantive difference between the original and amended successive motions. (PC Vol. I 46, n.1).

SUMMARY OF ARGUMENT

The trial court properly summarily denied the successive motion raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014). First, the successive motion was untimely because *Hall* is not retroactive. Second, the motion is barred by the law-of-the-case doctrine. Walls already had a hearing at which he was permitted to present evidence regarding all three prongs of the test for intellectual disability. Walls is not intellectually disabled, as previously determined by the trial court and affirmed by this Court. Third, *Hall* does not apply to cases, such as this, where the IQ scores prior to the defendant's eighteenth birthday were over 75. Walls' full scale I.Q. was 101 or 102 before his eighteenth birthday, which is in the normal range of intellectual ability. Here, as in *Henry v. State*, 141 So.3d 557 (Fla. 2014), the successive motion was properly summarily denied because *Hall* does not apply to this case.

Walls is actually raising a claim that the Eighth Amendment prohibition on executing the intellectually disabled should be expanded to include other types of brain impairments, not a straight claim of intellectual disability. This Court has repeatedly refused to expand the prohibition. The prohibition is limited to intellectual disability under both the federal and state constitutions. The trial court properly summarily denied the successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING A CLAIM OF INTELLECTUAL DISABILITY BASED ON *HALL V. FLORIDA*, 134 S.Ct. 1986 (2014)? (Restated)

The trial court properly summarily denied the successive motion raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014). First, the successive motion was untimely because *Hall* is not retroactive. Second, the motion is barred by the law-of-the-case doctrine. Walls already had a hearing at which he was permitted to present evidence regarding all three prongs of the test for intellectual disability. Walls is not intellectually disabled, as previously determined by the trial court and affirmed by this Court. Third, *Hall* does not apply to cases, such as this, where the IQ scores prior to the defendant's eighteenth birthday were over 75. Walls' full scale I.Q. was 101 or 102 before his eighteenth birthday, which is in the normal range of intellectual ability. The trial court properly summarily denied the successive postconviction motion.

Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013)(citing *Seibert v. State*, 64 So.3d 67, 75

(Fla. 2010))). Because a trial court ruling on a postconviction motion is required to accept all factual assertions as true, there are no factual findings from the trial court for an appellate court to defer to. *Barnes*, 124 So.3d at 911 (noting that courts accept the movant's factual allegations as true). The standard of review, therefore, necessarily is *de novo*.

The postconviction court's ruling

The trial court summarily denied the successive motion. (PC Vol. I 46-50). The trial court noted that to establish intellectual disability, a defendant must show three prongs: 1) significantly subaverage general intellectual functioning; 2) existing concurrently with deficits in adaptive behavior; and 3) manifested during the period from conception to age 18. (PC Vol. I 48). The trial court noted that in *Hall*, the United States Supreme Court explained that Florida's "rigid rule" of 70 or below on I.Q. tests created an unacceptable risk that an intellectually disabled person could be executed. (PC Vol. I 48). The Supreme Court in *Hall* expanded the range of I.Q. scores to 75 to cure this risk. (PC Vol. I 48).

The trial court first addressed the retroactivity of *Hall* relying on *Haliburton v. State*, 163 So.3d 509 (Fla. 2015)(unpublished). (PC Vol. I 48-49). Alternatively, the trial court addressed the merits of the claim, concluding Walls was not entitled to any relief. (PC Vol. I 49). The trial court noted that Walls' I.Q. scores prior to his 18th birthday were 102 and 101. (PC Vol. I 49). The trial court noted these scores did not place Walls

in the range of concern at issue in *Hall*. (PC Vol. I 49). The trial court also reasoned that Walls already received a hearing on intellectual disability, at which he was permitted to present evidence regarding each of the three prongs. (PC Vol. I 49). The trial court noted that the defense's own expert at the prior hearing, Dr. Toomer, testified that Walls did not establish the onset-before-18 prong. (PC Vol. I 49 citing pages 40-41 of the July 10, 2007 hearing). This trial court noted the trial court at the prior hearing, found no evidence of intellectual disability. (PC Vol. I 49). Because Walls' I.Q. scores did not place him within the scope of *Hall* and he had already had a full hearing on the issue, the trial court denied the successive motion. (PC Vol. I 50).

The non-retroactivity of *Hall*

The successive rule 3.851 motion was untimely. A successive motion is untimely unless the Defendant can establish one of two exceptions to filing successive motions - newly discovered evidence or a fundamental constitutional right that has been held to be retroactive. *See* Fla. R. Crim. Pro. Rule 3.851(d)(2). Walls does not claim any newly discovered evidence and *Hall* is not retroactive. Therefore, the successive motion is time barred.

Cases are presumed to be prospective only. *Wuornos v. State*, 644 So.2d 1000, 1007, n.4 (Fla. 1994)(explaining that "new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise."). The Florida Supreme Court rarely finds a change in decisional law requires retroactive application. *Hughes v. State*, 901 So.2d 837,

846 (Fla. 2005)(quoting *Mitchell v. Moore*, 786 So.2d 521, 529 (Fla. 2001)).

Hall is not retroactive. *Hall* did not create a new constitutional right; *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), created the new constitutional right. While *Atkins* itself established a fundamental right, *Hall*, which merely involved the procedural right to a fuller hearing regarding intellectual ability, did not establish a fundamental right. *Compare In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003)(holding *Atkins* is retroactive), with *In re Henry*, 757 F.3d 1151, 1159 (11th Cir. 2014)(observing that the Supreme Court has not made *Hall* retroactive). *Hall* is merely an application of *Atkins*. *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015)("*Hall* merely provides new procedures for ensuring that States do not execute members of an already protected group.").

Walls' reliance on *Haliburton v. State*, 163 So.3d 509 (Fla. 2015)(unpublished), is misplaced. The Florida Supreme Court did not directly address the retroactivity of *Hall* in *Haliburton*. Contrary to the reasoning that there was an implicit holding by the Florida Supreme Court in *Haliburton*, there is no such thing as an implicit holding. *Cf. Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002)(observing that the Florida Supreme Court does not intentionally overrule itself *sub silentio*). When a court does not address a threshold matter in its opinion, such as retroactivity, the case does not stand for any proposition.

Hall is not retroactive and thus no exception to the time bar applies. The successive motion, therefore, was untimely.

The law-of-the-case doctrine

The successive motion was barred by the law-of-the-case doctrine. Under the law-of-the-case doctrine, all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts. *Owen v. State*, 862 So.2d 687, 694 (Fla. 2003). The Florida Supreme Court already determined that Walls was not intellectually disabled. The Florida Supreme Court concluded "that the trial court's finding that Walls is not mentally retarded is supported by competent, substantial evidence and affirm the denial of relief." *Walls v. State*, 3 So.3d 1248 (Fla. 2008). While the Florida Supreme Court cited *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000), in its decision, that does not alter the fact that the analysis is the same in the wake of *Hall* in this particular case. The only two relevant IQ scores, which are those scores prior to Walls' eighteenth birthday are, 101 and 102. *Hall* does not apply to cases with normal IQ scores. Both the trial court and the Florida Supreme Court have previously rejected this claim and there is no valid reason to revisit those determinations.

Furthermore, Walls already had a hearing at which he was permitted to present evidence regarding all three prongs of the test for intellectual disability. Both experts testified regarding the adaptive functioning prong at the prior hearing. The defense expert, Dr. Jethro Toomer, testified that Walls manifested "significant limitations in adaptive functioning." (PC Vol. II 198). Dr. Toomer found that Walls had limitations in thirteen (13) adaptive skills. (PC Vol. II 208; 209; 211-212). On the other

hand, the State's expert, Dr. McClaren, using information from a correctional officer, testified that Walls was "low average" in adaptive functioning. (PC Vol. II 229). The State's expert testified that while Walls "clearly" had some deficits in adaptive functioning, they did not appear to be at the level of mental retardation. (PC Vol. II 230).

In *Hall v. Florida*, 134 S.Ct. 1986 (2014), the United States Supreme Court held that a defendant with a full scale I.Q. score between 71 and 75 must be permitted the opportunity to present evidence regarding the other two prongs of the test for intellectual disability. Such defendants are entitled to a hearing regarding the adaptive-functioning and onset-before-age-eighteen prongs. The *Hall* Court reasoned that based on the standard error of measurement (SEM), a defendant with an I.Q. score as high as 75 could still theoretically be intellectually disabled. *See also Atkins v. Virginia*, 536 U.S. 304, 309 n.5, 122 S.Ct. 2242, 2245, n.5 (2002)(observing an "IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.").

The basic holding of *Hall* is that defendants with IQ scores below 75 are entitled to a full hearing. But neither of these criteria apply to Walls' case. His IQ scores before his eighteenth birthday were in the normal range of 101 and 102 which is significantly above the 75 cut-off established by the Court in *Hall*. Moreover, *Hall* merely entitles defendants in the 71 to 75 range to a full hearing at which they may present evidence regarding all three prongs of the test for intellectual disability.

Walls already had a full hearing at which he was permitted to present any and all evidence of his intellectual disability including adaptive functioning. Walls presented evidence regarding all three prongs at the prior hearing. Walls was not precluded from presenting evidence regarding adaptive functioning at the prior hearing, as occurred in *Hall*. There was no *Hall* error at the prior hearing. *Hall* entitles a defendant to a full hearing on all three prongs and Walls already receive such a hearing. There was no *Hall* error in the prior litigation.

Both the trial court and the Florida Supreme Court have already rejected this *Atkins* claim for reasons that are in no way impacted by the decision in *Hall*. The trial court's and the Florida Supreme Court's prior determination that Walls is not intellectually disabled remain valid in the wake of *Hall*. The claim is barred by the law-of-the-case doctrine.

Merits

Walls is not intellectually disabled, as determined by both the trial court and the Florida Supreme Court previously. To establish intellectual disability, a defendant must show "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." *Henry v. State*, 141 So.3d 557, 559 (Fla. 2014)(citing § 921.137(1), Fla. Stat. (2013)). Walls meets none of the three prongs.

In 1980, Walls' IQ was assessed as a "full scale IQ of 102." (PC Vol. II 14). In 1982, Walls' IQ was assessed as a full scale IQ of

101. (PC Vol. II 14). In 1991, Walls' I.Q. was determined to be a full scale of 74 but here the only relevant I.Q. scores are the 101 and the 102, because those were his IQ scores before his eighteenth birthday, which is significantly above the 75 cut-off figure. *Hall*, 134 S.Ct. at 1992 (listing Hall's various IQ scores over 40 years as ranging from 60 to 80). The definition of intellectual disability requires onset of the condition before age 18. As the trial court found and the record establishes, Walls cannot met the onset-before-18 prong. *Hall* simply does not apply to a case with such scores. Walls is not intellectually disabled.

Florida Supreme Court post-*Hall* precedent

In *Henry v. State*, 141 So.3d 557 (Fla. 2014), this Court held a capital defendant was not entitled to an evidentiary hearing to determine if he was intellectually disabled. Henry, as part of warrant litigation, filed a 3.203 motion raising a claim of intellectual disability based on the United States Supreme Court's recent decision in *Hall*. The trial court summarily denied the motion as untimely.

Henry had an I.Q. score of 78. Three doctors, who had evaluated Henry during the warrant litigation, concluded Henry's "clinical presentation during the evaluation was consistent with intellectual functioning at or above what would be predicted based on his prior IQ test result of 78 (7th percentile)." *Henry*, 141 So.3d at 559. He scored on the average range on a mini-Mental State Examination. The Court also found that the record showed no deficits in adaptive functioning. *Id.* at 560. To the contrary, "Henry was able to drive

a car, develop personal relationships, participate in financial transactions, discuss adult concepts, and engage in goal-directed behavior." *Id*. The Court also observed that Henry's *pro se* pleadings and his oral advocacy further refuted any claim that he has concurrent deficits in adaptive functioning. *Id*. This Court affirmed the summary denial of the motion.

Here, as in *Henry*, the trial court properly summarily denied the motion. Here, as in *Henry*, the defendant's I.Q. is above 75. And, here, as in *Henry*, there is no evidence of deficits in adaptive functioning. The facts of the crime do not show intellectual disability. Walls admitted in his confession that he killed Peterson because he "didn't want no, uh, no witnesses." Murdering a person in recognition that a living victim can identify him and testify against him is not the typical behavior of an intellectually disabled defendant. As in *Henry*, Walls engaged "in goal-directed behavior." Under the Florida Supreme Court precedent of *Henry*, the trial court properly declined to holding a second hearing. The trial court properly summarily denied the motion.

Impairments other than intellectual disabilities

Walls has "organically based impairments," not intellectual disability. According to the defense expert, Dr. Toomer, who testified at the evidentiary hearing regarding mental retardation, Walls' IQ tests showed a "kind of progressive downward pattern." (PC Vol. II 194). Dr. Toomer attributed the downward pattern to Walls' "organically based impairment." (PC Vol. II 194). The defense expert, Dr. Toomer, testified that Walls has a diagnostic

history of cerebral dysfunction and organically based deficits. (PC Vol. II 207).

Walls actually is seeking to expand *Atkins,* not to apply *Hall*. He wants *Atkins* to include other types of intellectual impairments rather than being limited to intellectual disability. But the Florida Supreme Court has repeatedly rejected attempts to expand *Atkins* beyond intellectual disabilities. *Frances v. State*, 143 So.3d 340 (Fla. 2014)(noting "this Court has previously rejected defendants' attempts to extend *Atkins* to mental impairments that are not mental retardation" citing *Henyard v. State*, 992 So.2d 120 (Fla. 2008); and *Schoenwetter v. State,* 46 So.3d 535, 563 (Fla. 2010)); *Johnston v. State*, 27 So.3d 11, 26 (Fla. 2010)(rejecting an attempt to extend *Atkins* to mental illness and neurological impairments citing *Lawrence v. State*, 969 So.2d 294, 300, n.9 (Fla. 2007); and *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007)).

The United States Supreme Court in *Hall* did ***not*** expand the Eighth Amendment prohibition on executions to any other form of mental impairment. *Atkins* is still limited to intellectual disability in the wake of *Hall*. Under Florida's constitution, courts are required to interpret the State's cruel and unusual punishment provision in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014)(noting that, under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). This Court may not independently expand the holding of *Atkins* or *Hall*. The Eighth

Amendment prohibition on executions extends to intellectual disabilities only.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN RULING THAT THERE WAS NO ONSET OF BEFORE AGE 18? (Restated)

Walls asserts that the postconviction trial court erred in considering only the IQ score in its determination of the third prong of the test for intellectual disability, which is the age of onset. Opposing counsel asserts that the postconviction trial court "ruled that the only evidence that can be considered in determining age of onset is an IQ score." IB at 30-31. No, the postconviction court did not rule that the only evidence of onset before age 18 is the IQ score. An IQ score below 75 prior to the defendant's eighteenth birthday is a prerequisite to a determination of onset but it is not the exclusive requirement. In other words, while a low IQ score is necessary evidence, it not the "only" evidence of onset.

And while the State agrees that poor academic performance in school as a child is "potentially" evidence of onset, it is not when the IQ scores before a person's eighteenth birthday are 101 and 102, as in this case. A child with perfectly normal intellectual functioning, as determined by IQ scores from tests taken as a child, necessarily fails to establish the onset prong and therefore, necessarily fails to establish intellectual disability.

Walls may not rely on IQ scores taken after his eighteenth birthday to establish onset or a "downward spiral." IB at 33. Walls was over 18 years-old in 1991 when his IQ score of 72 was obtained. This is not, and cannot be, evidence of onset before age

18. Walls simply cannot establish onset in the face of IQ scores of 101 and 102 taken before he was 18 years-old. Such scores conclusively, and irrefutably, establish Walls was not intellectually disabled as a child.

While the United States Supreme Court in *Hall* clarified that adaptive functioning deficits should be considered in a "borderline" case, Walls is not a borderline case. IB at 34. There simply is no possible way for Walls to establish the third prong of the test for intellectual disability in light of his IQ scores of 101 and 102. As the trial court properly found, Walls is not intellectually disabled.

Walls' reliance on *Conner v. GDCP Warden*, 784 F.3d 752 (11th Cir. 2015), is misplaced. IB at 31. As opposing counsel acknowledges, the Eleventh Circuit court "ultimately found that Conner was not intellectually disabled." IB at 31. Furthermore, while the district court allowed Conner to present evidence regarding the other two prongs even though the defendant's IQ was was 75, Walls already had that opportunity. Walls had an opportunity to establish the two other prongs, including onset, at the first intellectual disability hearing. There is no reason for a second hearing. The Eleventh Circuit certainly did not hold, or even hint, that two evidentiary hearings were constitutionally required. Accordingly, the trial court properly summarily denied the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to Baya Harrison III, Special Assistant Capital Collateral Regional Counsel, P.O. Box 102, Monticello, FL 99568, email: bayalaw@aol.com this 12th day of November, 2015.

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CERTIFICATE OF FONT AND TYPE SIZE

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