IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1752

WILLIAM THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Thompson appeals the circuit court's summary denial of his successive motion for postconviction relief, arguing that the Eighth Amendment precludes Mr. Thompson's execution due to intellectual disability as defined by *Hall v. Florida*, 134 S. Ct. 1986 (2014).

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "R1" refers to the record on direct appeal to this Court from the 1976 sentencing; "R2" refers to the record on direct appeal to this Court from the 1978 sentencing; "R3" refers to the record on direct appeal to this Court from the 1989 resentencing; "PCR-I" refers to the postconviction record concerning SC03-2129 on appeal to this Court from the denial of the 3.850 motion. "PCR-II" refers to the postconviction record concerning SC05-279 on appeal to this Court from the denial of the 3.850 motion; "PCR-III" refers to the postconviction record of SC07-2000 on 3.850 appeal to this Court; "PCR-IV" refers to the postconviction record of SC-09-1085 on 3.851 appeal to this Court; "T1" refers to the transcript of the first day of the evidentiary hearing held with respect to SC07-2000, conducted on April 13, 2009; "T2" refers to the transcript of the second day of the evidentiary hearing of the same, conducted on April 27, 2009; "PCR-V" refers to the present record on appeal, SC15-1752, which includes the transcript of the case management

conference. “PCR-V. Supp” refers to the supplemental record for the present record on appeal. All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson requests that oral argument be heard in this case. Mr. Thompson is under sentence of death. This Court has generally granted oral argument in capital cases similarly postured. Oral argument is necessary to fully develop the claims at issue in this case, on which Mr. Thompson’s life will turn. Mr. Thompson is entitled to “a fair opportunity to show that the Constitution prohibits [his] execution.” *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Thus, pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Thompson respectfully moves this Court for oral argument on his appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF CASE AND FACTS

Procedural History

On June 24, 1976, after Mr. Thompson and a co-defendant, Rocco Surace, pled guilty to charges of first degree murder, kidnapping and involuntary sexual battery, Mr. Thompson and Mr. Surace were both sentenced to death (R1. 887-89). Mr. Thompson was also sentenced to life imprisonment on the remaining charges, to run concurrent to his death sentence (R1. 887).

On direct appeal, this Court allowed Mr. Thompson to withdraw his plea and remanded the case for a new trial, because Mr. Thompson was prejudiced by an "honest misunderstanding which contaminated the voluntariness of the pleas." *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). After remand, Surace, who had also been granted a new trial, pled not guilty, was tried and convicted of second degree murder, and received a life sentence. *Surace v. State*, 378 So. 2d 895, 896 (3rd DCA 1980). Mr. Thompson again pled guilty to the charges against him on September 18, 1978 (R2. 39-57), his penalty phase jury recommended a death sentence on September 20, 1978 (R2. 198a, 562-64), and the trial court sentenced Mr. Thompson to death, along with life imprisonment for the remaining charges, to run concurrently (R2. 199a, 567-73).

Mr. Thompson's plea and death sentence were affirmed on direct appeal. *See Thompson v. State*, 389 So. 2d 197 (Fla. 1980).

Mr. Thompson then filed a motion under Florida Rule of Criminal Procedure 3.850, which the trial court denied. This Court affirmed the denial. *See Thompson v. State*, 410 So. 2d 500 (Fla. 1982). Mr. Thompson sought federal habeas corpus relief. The U.S. district court denied relief, and the U.S. Court of Appeals for the Eleventh Circuit affirmed. *See Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986).

Mr. Thompson filed a second Rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of non-statutory mitigating circumstances in the penalty phase rendered his sentence of death unconstitutional. The trial court denied relief, but this Court reversed relying on *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and remanded for resentencing. *See Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987).

In its closing argument at the subsequent resentencing in 1989, the State argued that "**Mr. Thompson is a retarded bump on a log**" (R3. 3084 (emphasis added)). Mr. Thompson's jury was instructed on all of the statutory aggravating circumstances, regardless of applicability (R3. 3116–17). On June 6, 1989, Mr. Thompson's jury recommended death by a vote of seven to five (R3. 3192-94). Since there was only a general verdict form, there was no indication of which aggravators the jury found. On August 25, 1989, the trial court imposed a sentence of death, and Mr. Thompson received life sentences for the remaining counts, to

run consecutive to each other (R3. 3336). *See Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

This Court affirmed Mr. Thompson's death sentence. *See Thompson v. State*, 619 So. 2d 261 (Fla. 1993).[1]

On November 8, 1995, Mr. Thompson timely filed a Rule 3.850 motion, which was summarily denied because the trial court mistakenly believed that Mr. Thompson had not verified the pleading. After being remanded on that issue from this Court, the circuit court summarily denied Mr. Thompson's motion.[2] This Court affirmed the denial. *See Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

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[1] The issues raised on direct appeal were as follows: (1) the trial court erred in ruling the State's chief witness was unavailable; (2) the trial court erred by failing to grant Thompson's motion to strike the jury panel and failing to conduct individual voir dire; (3) the trial court erred by permitting the State to introduce Thomson's prior inconsistent testimony; (4) the trial court erred in allowing the State to introduce gruesome photographs; (5) the trial court erred in unfairly limiting the testimony of defense witnesses; and, (6) the trial court erred in sentencing Thompson to death in violation of his due process and equal protection rights. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

[2] Thompson raised the following claims: (1) denial of his rights under *Spalding v. Dugger*; (2) denial of access to public records; (3) lack of reliable transcript of his appeal; (4) denial of proper direct appeal due to omissions in the record; (5) guilty plea was not knowing, intelligent and voluntary; (6) no competent mental health expert was appointed; (7) failure to conduct an adequate competency evaluation; (8) Thompson was incompetent during his plea, sentencing and direct appeal; (9) a *Lackey* claim; (10) Thompson did not make a knowing, intelligent and voluntary waiver of any rights; (11) counsel had a conflict of interest and violated Thompson's Sixth Amendment right; (12) Thompson was denied adversarial testing on his first trial; (13) Thompson was denied adversarial testing on his second trial and penalty phase; (14) gruesome photographs prevented

Mr. Thompson filed a petition for writ of habeas corpus on June 14, 2001. *Thompson v. Secretary for Dept. of Corrections*, 320 F.3d 1228 (2003). On December 14, 2001, the district court dismissed the petition as "mixed," meaning it contained both claims exhausted in state court and unexhausted claims. *Id*. at 1229. Mr. Thompson had raised issues regarding intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), which had been recently granted certiorari and which directly applied to Mr. Thompson. *Id*. The Eleventh Circuit affirmed on appeal, but that affirmance was vacated by the U.S. Supreme Court. *Thompson v. Crosby*, 544 U.S. 957 (2005).

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a fair trial; (15) newly discovered evidence; (16) a *Brady* claim; (17) trial counsel was ineffective; (18) impermissible burden shifting; (19) failure to find mitigation in the record; (20) prosecutorial misconduct; (21) failure of Florida's capital sentencing statute to prevent arbitrary and capricious imposition of the death penalty; (22) erroneous failure to disqualify assistant state attorney; (23) improper automatic aggravating circumstance; (24) ineffective assistance of counsel at the guilt phase of Thompson's trial; (25) ineffective assistance of counsel at penalty phase; (26) an *Ake v. Oklahoma* claim; (27) a *Caldwell v. Mississippi* claim; (28) cold, calculated and premeditated aggravating circumstance is unconstitutionally vague; (29) constitutionally inadequate harmless error analysis; (30) no limiting construction on the heinous, atrocious, or cruel aggravating circumstance; (31) overbroad and vague aggravating circumstances; (32) failure to find statutory mitigating circumstances; (33) non-statutory aggravating circumstances; (34) improper doubling of aggravating circumstances; (35) cumulative error occurred; (36) failure by the court to define "reasonable doubt;" (37) failure to request instruction regarding length of life sentence; (38) inability to interview jurors; (39) juror misconduct; (40) failure by the trial court to strike the jury panel; (41) misleading of jury as to reasons for resentencing; (42) erroneous introduction of previous testimony by chief state witness; (43) invalid jury instruction on expert testimony; and, (44) failure by the trial court to allow testimony of prior judge at resentencing. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

The Supreme Court remanded for proceedings consistent with the dictates of *Rhines v. Weber*, 544 U.S. 269 (2005), allowing exhaustion and refiling. *Thompson v. Crosby*, 544 U.S. 957 (2005). On September 26, 2005, the Eleventh Circuit vacated the dismissal of the petition and remanded to the district court. *See Thompson v. Secretary for Dep't. of Corrections*, 425 F.3d 1364 (11th Cir. 2005). On November 18, 2005, the district court denied Mr. Thompson's request for a stay to pursue his *Atkins* claim in state court. *Thompson v. Secretary for Dept. of Corrections*, 517 F.3d 1279 (2008). On December 19, 2005, Mr. Thompson elected to dismiss his unexhausted claims and proceed with his exhausted claims. On July 21, 2006, the district court denied the petition. *Id*.

State proceedings relating to intellectual disability (sometimes referred to as "ID")[3] occurred alongside these federal proceedings. On November 15, 2001, Mr. Thompson filed a Rule 3.850 motion, shortly after the enactment of Florida Statutes § 921.137, which precluded execution of the intellectually disabled in Florida and was signed into law on June 12, 2001, one day before Mr. Thompson's federal habeas petition was due (PCR-I. 67). The State never responded.

An amended Rule 3.850 motion was filed on June 18, 2003 (PCR-I. 3). After a series of proceedings relating to whether the motion was properly filed, this

[3] In line with the changes acknowledged in the Diagnostic Statistical Manual-V, this brief uses the term "Intellectually Disabled" or "Intellectual Disability" or "ID" when referring to "Mental Retardation."

Court ordered Mr. Thompson to shorten the motion (PCR-II. 14). He did, and an amended motion was timely filed on August 9, 2004 (PCR-II. 6). The lower court summarily denied Mr. Thompson's motion (PCR-II. 26). Mr. Thompson filed a timely motion for rehearing which was denied, and Mr. Thompson filed a Notice of Appeal to this Court on February 3, 2005 (PCR-II. 39).

On July 9, 2007, this Court reversed the trial court's summary denial and remanded to the circuit court "in order to allow Mr. Thompson to plead and prove the elements necessary to establish [intellectual disability], **specifically including the threshold requirements set forth in *Cherry v. State***, 32 Fla. L. Weekly S151 (Fla. April 12, 2007)." *Thompson v. State*, No. SC05-279, 1 (Fla. July 9, 2007) (emphasis added); (PCR-III. 669). The order further stated that "[t]he trial court shall proceed in an expedited manner, and any evidentiary hearing must be held and an order entered within ninety (90) days of the date of this order." *Id*. at 2.

On August 8, 2007, Mr. Thompson filed a Rule 3.851 motion, which included an intellectual disability claim (PCR-III. 545).[4] On August 27, 2007, the

[4] The motion raised the following claims: (CLAIM I) the death sentence imposed upon Thompson, an intellectually disabled person, violates the Florida and United States constitutions; (CLAIM II) because Thompson has been on death row for 31 years, executing him violates the Eighth and Fourteenth amendments to the United States Constitution and corresponding provisions of the Florida Constitution; (CLAIM III) Florida's lethal injection procedure is unconstitutional; (CLAIM IV) newly discovered evidence shows Thompson's sentence is unconstitutional (PCR-III. 545).

circuit court denied the postconviction motion, without a hearing on the claim of intellectual disability, on the grounds that Mr. Thompson was not entitled to a hearing under Florida Rule of Criminal Procedure 3.203(e), because he did not properly plead intellectual disability (PCR-III. 679). According to the circuit court order, under *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), Mr. Thompson was required to allege in his motion that his IQ was under 70 (PCR-III. 667). The court denied Mr. Thompson's timely motion for rehearing (PCR-III. 712). Mr. Thompson timely appealed to this Court (PCR-III. 714).

Meanwhile, on February 25, 2008, the Eleventh Circuit denied Mr. Thompson's appeal of the district court's denial of his federal habeas petition, and on March 9, 2009, the United States Supreme Court denied Mr. Thompson's pending application for writ of certiorari with two dissenting opinions. *See Thompson v. McNeil*, 556 U.S. 1114 (2009); *Thompson v. Secretary for Dept. of Corrections*, 517 F.3d 1279 (2008).

On February 27, 2009, this Court remanded Mr. Thompson's case, once again ordering the circuit court to conduct a hearing on Mr. Thompson's intellectual disability claim (PCR-IV. 17).[5]

[5] That evidentiary hearing was heavily circumscribed by the circuit court's onerous scheduling decisions. The circuit court set the evidentiary hearing for April 13, 2009. The court issued an order requiring Thompson, to have any mental health expert evaluation completed prior to the March 13, 2009 hearing (less than two weeks from the court's order). The order further required Thompson to timely

Prior Evidentiary Hearing on Intellectual Disability

The evidentiary hearing took place April 13, 2009 and April 27, 2009 (T1.; T2.). Mr. Thompson was permitted to present limited testimony and exhibits. As for exhibits, Mr. Thompson was permitted to present education records and a background pack of materials used by mental health experts in evaluating Mr. Thompson, with certain items removed (T. 23-32). As for testimony, Mr.

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obtain a report from the mental health evaluator and forward that report to the State. No time restrictions were placed on the State to obtain its expert and build its case. The order further stated that the circuit court would not request an extension from this Court on the ninety-day time period, although no extension had been requested by the parties, because the parties had "more than 4 years to prepare for an evidentiary hearing" (PCR-IV. 17).

On March 9, 2009, Thompson objected to the court's order truncating this Court's time limits. He filed a motion to extend the time in which to procure a mental health expert and to reset the scheduled March 13, 2009 status hearing, explaining to the court that he would be unable to find a competent expert who could drop appointments, fly to death row, conduct an extensive intellectual disability evaluation, and prepare a report before March 13, 2009 (PCR-IV. 35). He also objected to the stringent timeline being applied only on Thompson, while the State would have an additional month to find an expert prior to the evidentiary hearing (PCR-IV. 35).

On March 10, 2009, the circuit court granted Thompson's motion, reset the March 13, 2009 status hearing for March 26, 2009, and extended Thompson's deadline for submitting his witness list (PCR-IV. 38). The order moved Thompson's deadline for conducting his mental health evaluation to March 26, 2009 (PCR-IV. 38).

The status conference took place on March 26, 2009 where Thompson requested the full ninety-day time period granted by this Court to have his intellectual disability proceedings. The Court refused to extend the time period stating that it would add a second date, April 25, 2009, a date Thompson's procured mental health expert was not available to testify (PCR-IV. 1242). On March 27, 2009, the circuit court extended the time for Thompson to submit his mental health expert's report to the State to April 1, 2009, because the expert could not evaluate Thompson and do a report on the same day (PCR-IV. 65).

Thompson presented his grade school teacher and principal, William Weaver, Dr. Faye Sultan, and Dr. Stephen Greenspan, but, as described below, the court cutoff Dr. Greenspan's testimony before he reached its substance, restricting the development of Mr. Thompson's intellectual disability claim (*See* T1.; T2.).

Weaver, testified to Mr. Thompson's school records where he was identified as mildly intellectually disabled and at one point placed in a class for the educable mentally retarded ("EMR"). His mother was advised upon his entry into preschool that he was mildly intellectually disabled and would benefit from delaying his entry into school (T. 38). She did not follow this advice.

Mr. Thompson's IQ scores were consistent and in a range far below 80, which at the time in Ohio made a student eligible for EMR classes. He was in an EMR class in the third grade (T. 39), prior to moving to Weaver's school district. In the third grade, Weaver attributed any improvement in Mr. Thompson's performance to the lower level of difficulty in the special needs class (T. 57). Mr. Thompson also attended EMR classes in the fourth grade because he was at a school that provided such classes. When Mr. Thompson was transferred to Weaver's district, that district did not offer EMR classes (T. 39, 44). As a result, Mr. Thompson attended regular classes, where he received grades of Ds and Fs (T. 40).

Mr. Thompson was given IQ testing multiple times in school. School psychologists told Weaver that Mr. Thompson should be in EMR classes (T. 70). Despite these requests, Mr. Thompson was "retained" in the first, fifth, and eighth grades (T. 40). His mental age was a couple of years below his chronological age when he was a child; he had a significant developmental delay (T. 49-50). His attention span was short (T. 52). As Mr. Thompson went further in school, his academic performance got worse, and Ds turned to Fs (T. 50). He flunked the fifth grade but was advanced to or "placed" in, rather than passing up to, the sixth (T. 50). He was eighteen in the eighth grade while his classmates were fourteen, which was Mr. Thompson's last year in school (T. 50). He dropped out before ninth grade (T. 50).

Following Weaver's testimony, Mr. Thompson called Dr. Faye Sultan, a clinical psychologist. Dr. Sultan evaluated Mr. Thompson and concluded that Mr. Thompson has as intellectual disability (T. 139).

Dr. Sultan's evaluation occurred on March 20, 2009 (T. 99). She administered the WAIS-IV (T. 98-99). She explained that scoring of IQ tests must be normalized or keyed to the current level of human intelligence, which rises incrementally over time, and rose in the fifteen years that the WAIS-III was being used, making the WAIS-IV the most accurate test currently available (T. 98-99). Mr. Thompson cooperated with the administration of the exam and it was an

accurate administration (T. 102). Mr. Thompson was working to the best of his ability and not malingering (T. 102-04).

Dr. Sultan stated that the onset of intellectual disability for Mr. Thompson before the age of eighteen "was made abundantly clear in the school records" (T. 85).

The trial court ruled that Dr. Sultan could not testify to information she obtained interviewing Mr. Thompson's family and friends about his adaptive functioning because such information was hearsay (T. 117-19, 127). Later, the court changed that ruling to permit testimony about such information as long as Dr. Sultan did not say who told her the information or what they said (T. 135).

Dr. Sultan found that Mr. Thompson's full scale IQ score "falls somewhere between 68 and 76, at the 95th percent confidence interval" (T. 100-01). The psychological community measures IQ based on a confidence interval, establishing a range of IQ scores in which the subject's IQ falls, in recognition of the limited degree of confidence with which an IQ score can be determined (T. 101). Within that range, Dr. Sultan reviewed the other data to conclude that Mr. Thompson's IQ was 71 (T. 101).

Since Mr. Thompson's IQ was within the range of potential intellectual disability, Dr. Sultan had to consider his adaptive functioning to determine if he was intellectually disabled (T. 113). Since Mr. Thompson has been on death row

for so many years, Dr. Sultan had to do a retrospective adaptive behavior analysis, in which she gathered as much information from as many people familiar with Mr. Thompson as possible to answer questions, such as when did Mr. Thompson first learn to walk, when did he become toilet trained, and how he responded to instruction at different ages (T. 117). Dr. Sultan explained that retrospective analysis in such situations is standard practice in her professional field when there is no concurrent adaptive functioning behavior to analyze (T. 181). Dr. Sultan found the school records to be an excellent source of information with extensive IQ testing by several psychologists (T. 104). For further data, Dr. Sultan interviewed Weaver, Mr. Thompson's mother and Donna Adams, Mr. Thompson's common law wife prior to his arrest, and reviewed records of Mr. Thompson's previous psychological evaluations (T. 104-05).

At the age of fifty-seven, Mr. Thompson functioned at the same intellectual level as he was at age ten, which shows onset before the age of eighteen and excludes an injury later in life as a possible cause of Mr. Thompson's poor intellectual functioning (T. 107). As Mr. Thompson got older, "the discrepancy between his chronological age and his mental age grew" (T. 108). Mr. Thompson has the mental skills of roughly a twelve-year-old, which are reading on a sixth to seventh grade level and writing grammatically correct sentences and paragraphs (T. 108).

Dr. Gregory Prichard then testified as the State's expert in forensic psychology. Dr. Prichard evaluated Mr. Thompson on April 6, 2009, less than two weeks after Mr. Thompson took the WAIS-IV IQ test (T. 194). Dr. Prichard concluded Mr. Thompson was not intellectually disabled, measuring his full scale IQ score to be 88 (T. 198).

After Dr. Prichard, the defense called Dr. Stephen Greenspan. Dr. Greenspan co-edited a leading text published by the AAIDD, defining and diagnosing intellectual disability (T2. 97). As related in a later proffer from counsel, it was intended that Dr. Greenspan would discuss how Mr. Thompson's deficits in adaptive functioning weigh into and help explain his IQ scores, along with how the data supports Dr. Sultan's methodology, that Dr. Prichard failed to do a complete evaluation, that Dr. Prichard failed to consider the Flynn Effect or practice effect, and that Dr. Prichard failed to do adaptive functioning testing even though there were varying IQ scores (T2. 121-23). In other words, Dr. Greenspan would provide expert guidance to the court in the manner that the scientific community would assess the intellectual disability evidence, IQ scores, and methodology of the experts. But before Dr. Greenspan reached the substance of his testimony, the court excluded his testimony, finding it to be irrelevant, because Dr. Greenspan had not personally evaluated and diagnosed Mr. Thompson (T2. 115). The court further refused to permit testimony that went to show whether an IQ score above 70—

recognized by the Department of Children and Family Services and this Court as the strict threshold for intellectual disability—might be viewed by a mental health professional under prevailing psychological testing standards to represent intellectual disability in a certain case (T2. 115):

> THE COURT: If he can't evaluate him with regard to whether or not he is mentally retarded then his information really is irrelevant.
>
> PRIOR COUNSEL: Judge, he can make -- without making a diagnosis, he can comment on the data and methodology used by the experts under Florida law [and] give an opinion about whether the data and the methodology used by the experts was valid or not. Regardless of whether he saw Mr. Thompson.
>
> THE COURT: The standards are set up by Department of Children and Family Services according to the mandate of the Florida Supreme Court.
>
> PRIOR COUNSEL: Correct.
>
> THE COURT: And I guess if you want to proffer that because you're contesting the standards that have been set up –
>
> PRIOR COUNSEL: I am doing that, yes.
>
> THE COURT: I will allow you to proffer that, but I am going to not take it into consideration in my ruling as to whether or not Mr. Thompson, under the instant law, because that is not the purpose of this hearing.
>
> PRIOR COUNSEL: So the purpose of the hearing is just to have a [recitation] of IQ scores and then go home? I thought we were supposed to get a hearing about all the issues, about the underlying issues about what's going on with Mr. Thompson. He has inconsistent scores.

> Certainly there are differences in expert opinions about whether he is mentally retarded or not.

(T2. 115-16). Thus, counsel argued that the purpose of the hearing was not just to take IQ scores as the unqualified final word on intellectual disability, but to fully develop evidence regarding the nature of intellectual disability and its diagnosis as recognized by the scientific community (T2. 116), which Dr. Greenspan was there to discuss. But the court ruled that any questioning of *Cherry's* strict cutoff of 70 was an impermissible subject of inquiry.

When given the opportunity to respond, the prosecutor declined to make an argument stating, "You [the judge] are making my argument beautifully. Thank you" (T2. 125).

In closing, the State argued as to the IQ scores that "[t]he plain language of the statute requires an IQ t[w]o standard deviations below the mean. As you heard, that means an IQ of 70. . . . Each one of [Mr. Thompson's scores] are above 70. So you have a complete failure of proof . . . ." (T. 138).

In closing, defense counsel urged the court to consider that there are more scores in the 70s than in the 80s in this case and that Dr. Prichard failed to evaluate Mr. Thompson's adaptive functioning to determine the significance of those scores or offer any explanation (T2. 131). Dr. Sultan considered adaptive functioning data to reach her diagnosis (T2. 134). Counsel urged the court to consider that in another case, the State's expert, Dr. Prichard, had himself found an individual who

had a measured IQ above 70 and who had once worked as a roofer to be intellectually disabled, though he used those same facts in this case to determine Mr. Thompson is not intellectually disabled (T2. 133).

Disposition of Prior Proceedings

On May 21, 2009, the circuit court issued an order denying relief (PCR-IV. 823). The court stated that "[i]n *Cherry v. State*, . . . the Florida Supreme Court determined that to be legally mentally retarded for purposes of avoiding execution, a person would need to have an IQ of 70 or below" (PCR-IV. 833), and Mr. Thompson's measured IQ was "above the threshold of 70" (PCR-IV. 834). The court also relied on Dr. Prichard's testimony that "since the Defendant's IQ was above 2 standard deviations below the mean, and all 3 prongs of the test must be met, there was no need to test further" (PCR-IV. 835). Then, the court quoted *Cherry* for the proposition that when courts find a defendant "does not meet this first prong . . . , **we do not consider the two other prongs** . . . ." (PCR-IV. 835 (emphasis added)). That ruling, based on cited, binding Florida Supreme Court precedent, and consistent with the court's restriction of the evidentiary development at the hearing, was necessarily the termination point for the court's analysis. The court ruled that under *Cherry*, it could not consider the other prongs.

Yet, after spending the entirety of the roughly four total pages of analysis in its final order discussing the first prong,[6] IQ, and *Cherry*, the court mentioned the other two prongs, *without analysis*, in its final and concluding paragraph:

> Having heard and reviewed the evidence, this Court finds the Defendant is not mentally retarded. His IQ not only exceeds 70, but evidence suggests strongly his actual IQ could be in the 80's. He does not have deficits in adaptive functioning and has failed to prove onset before the age of 18. Defendant has not demonstrated by clear and convincing evidence that he is mentally retarded under the laws of the State of Florida. Therefore his claim is ***denied***.

(PCR-IV. 836 (emphasis in original)).

Mr. Thompson appealed and the court's denial was affirmed by this Court on May 6, 2010. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010) (unpublished opinion). This Court's holding was also based strictly on *Cherry*: "we hold that there is competent, substantial evidence to support the circuit court's factual findings that Mr. Thompson is not mentally retarded, based on this Court's definition of the term as set forth in *Cherry*." *Id*. at 219. True to *Cherry*, this Court did not itself analyze or even address the other two prongs of the intellectual

[6] The court acknowledged that the defense urged for consideration of the standard error of measurement, as opposed to a strict cutoff at 70, but, noting that this Court had rejected that argument in *Cherry* (PCR-IV. 835), concluded that "[e]very expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not [intellectual disability]" (PCR-IV. 836 (citations omitted)).

disability test (adaptive functioning and early onset) whatsoever. It did nothing more than incidentally quote, without comment, the lower court's conclusory—and equally incidental and unreasoned—mention of the other two prongs in its concluding paragraph. *Id*.

Current proceedings

On May 26, 2015, Mr. Thompson filed the Rule 3.851 postconviction motion at issue in this appeal (PCR-V. 74). In that motion to vacate he challenged his sentence of death as unconstitutional on the basis of *Hall v. Florida*, 134 S. Ct. 1986 (2014) . Mr. Thompson highlighted the conclusions in *Hall* in which the Supreme Court described the purpose for the new rule:

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." . . . The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world.
>
> *Hall*, 134 S. Ct. at 2001.

(PCR-V. 90). The State filed a response to Mr. Thompson's motion on June 5, 2015. (PCR-V. 100). Although the Supreme Court, in a strongly worded opinion, overturned Florida's application of *Atkins* and struck down the methods in which

Florida determines intellectual disability, the State's response characterized the Supreme Court's holding as "merely" finding the old standard unconstitutional (PCR-V. 121).

Within its response, the State incorrectly asserted that *Hall* is not applicable to Mr. Thompson's case (PCR-V. 119). When addressing the merit of Mr. Thompson's intellectual disability, the State relied only on a few of Mr. Thompson's IQ scores, regardless of testing conditions and other factors that would properly bear on IQ pursuant to *Hall*. The State did not address how multiple scores should be interpreted or considered, or the fact that many of Mr. Thompson's scores are below 80 (*See* PCR-V. 100-124). Additionally, the State did not acknowledge or mention that many of Mr. Thompson's scores in the 70s were obtained during testing in grade school (T. 85; PCR-V. 82). The State's argument essentially offered a new bright-line, *Cherry*-like cutoff and ignored the purpose of the *Hall* decision (PCR-V. 123). Notwithstanding the incorrect analysis of *Hall*, the State also falsely argued that Mr. Thompson was not denied relief on his intellectual disability claim based solely on the first prong of *Cherry* (PCR-V. 123).

On June 8, 2015, this case was assigned to Judge Tinkler-Mendez, who was not the judge who presided over the limited *Atkins* evidentiary hearing in 2009

(PCR-V. 125). Judge Tinkler-Mendez would rule on Mr. Thompson's claim without observing a single witness.

The newly appointed circuit court held a case management conference on July 2, 2015 in which both counsel for Mr. Thompson and the State offered oral argument (*See* PCR-V. 164-203). No witness testimony, lay or expert, was presented at the hearing.

Counsel for Mr. Thompson argued for further evidentiary development in light of the Supreme Court's decision in *Hall*, reminding the lower court that any prior hearing conducted under the unconstitutional standard was no longer valid (PCR-V. 168). Counsel highlighted the Supreme Court's opinion in *Hall* regarding the important role science plays in determining a person's intellectual functioning and or disability (PCR-V. 180-181). Counsel further argued that the Florida Supreme Court and the circuit court could not make a finding of Mr. Thompsons's intellectual disability, "because Florida Supreme Court didn't listen to the consensus in the psychological community about how to assess intellectual disability" (PCR-V. 190). Specifically, counsel pointed out that although Mr. Thompson has many IQ scores over the span of his lifetime, without expert testimony, the court is unable to determine the significance of the results (PCR-V. 176). Before ruling on the matter, the court did not permit Mr. Thompson to offer

expert testimony regarding the complex nature of intellectual disabilities and the relationship between multiple IQ scores and adaptive functioning.

The court responded to Mr. Thompson's argument regarding the need for specialized training and testimony to explain IQ scoring and testing by asking counsel to *simply average up* all of Mr. Thompson's scores (PCR-V. 189-190). The court's mistaken layperson's approach was itself the best indication of the need for the assistance of expert witnesses. Accordingly, counsel responded that such an inquiry would be "a meaningless question, that's not science." Counsel encouraged the court not to be led "down the rosy path again to not apply scientific principles to assess intellectual disability" such that "once again the court is going to be applying *Atkin's* in an unconstitutional manner, applying *[H]all* in an unconstitutional manner" (PCR-V. 191).

During the oral argument, the State continued to essentially assess Mr. Thompson's case under the *Cherry* standard, focusing on a select few IQ scores (PCR-V. 183). The State argued again and again that regardless of the change in law, some of Mr. Thompson's scores are above 75, and therefore he is not entitled to a hearing (PCR-V. 187).

One of the scores the State relied on came from a test administered by its own postconviction expert, Dr. Prichard (PCR-V. 183). Counsel for Mr. Thompson reminded the court that the testing was incomplete and Dr. Prichard did not

conduct any adaptive functioning testing because he found Mr. Thompson's IQ to be above the strict 70 cut-off (PCR-V. 191).

The State argued that Mr. Thompson "lost on the first prong badly enough [Judge Scola] didn't even have to consider the other two prongs" (PCR-V. 183). Further, the State argued that even if a defendant had a slightly higher IQ and a court allowed the introduction of evidence regarding adaptive functioning, *Hall* "didn't say anything about declaring anyone retarded once you give them that opportunity . . . ." (PCR-V. 183). It is not surprising that the State characterizes the Supreme Court's ruling that Florida's application of *Atkins* is unconstitutional as "not [of] fundamental significance" (PCR-V. 186).

In the State's attempt to explain the complexity in calculating the standard error of measurement for different tests, the State essentially highlighted the need for expert testimony. The State argued, "then the standard error of measure actually has to be calculated for each point. Particularly at the lower ends of the IQ score it tends to be minus one plus number and plus larger number" (PCR-V. 184). Counsel for Mr. Thompson responded to the State's attempted analysis,

> the very fact we are having a[n] argument right now, right here about the science where the lawyers are trying to describe the science to the Court shows that we need experts to come before Your Honor and testify so that you can see them[,] measure their credibility[,] and decide for yourself under the Eighth Amendment under *Hall* whether or not this evidence satisfied the standard.

(PCR-V. 192).

Judge Tinkler-Mendez asked the State if they felt Judge Scola made findings on all three prongs in the 2009 proceeding, despite her order in which Judge Scola clearly rests her reasoning on the first prong of the now unconstitutional standard in *Cherry* (PCR-V. 183, 186).

On July 10, 2015, the lower court issued an order summarily denying relief after oral argument but without evidentiary development (PCR-V. 126). The lower court "review[ed] Court Files and documents, and heard oral arguments" (PCR-V. 126). Just as the State argued at the case management, the lower court similarly dismissed Mr. Thompson's range in IQ scores, stating that "[s]ince his IQ scores were over 80, and the range for intellectual deficits would be up to 75, Defendant does not meet the first prong" (PCR-V. 127). This Court focused on scores obtained later in Mr. Thompson's life and loosely characterized them as "generally over 80" (PCR-V. 1-127). As argued by prior counsel and noted above, Mr. Thompson has several IQ scores under 80 and some under 75, six scores of which are results of tests administered while in grade school (PCR-V. 82). Most of Mr. Thompson's IQ scores were collected during childhood, well in advance of any pending court proceeding and for the purposes of garnering assistance for a child struggling in basic school instruction (PCR-V. 82).

The lower court ruled that "[a]s Defendant does need meet the second or third prongs of the test, his IQ [i.e., the first prong of the test] is irrelevant in determining intellectual disability" (PCR-V. 128). The lower court ruled that *Hall* applies only to the first prong, IQ, and "has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning, and onset of the intellectual disability prior to the age of 18" (PCR-V. 126). The lower court ruled that "the Defendant was afforded a full and complete evidentiary hearing on the question of whether or not he is intellectually disabled" and "Despite claims now to the contrary, . . . the Defendant did have the opportunity to present evidence on all three prongs as proscribed by *Hall*" (PCR-V. 127).

Mr. Thompson filed a motion for rehearing on July 27, 2015 (PCR-V. 129). The motion for rehearing was denied on August 27, 2015 (PCR-V. Supp 15).

Mr. Thompson timely filed the instant appeal (PCR-V. 146).

Subsequent Developments in the Law

Subsequent to the circuit court's summary denial of this claim, this Court decided *Oats v. State*, No. SC12-749, slip op. (Fla. Dec. 17, 2015). *Oats* was the first opinion issued by this Court addressing the impact of *Hall* in Florida. The circuit court's consideration of *Hall* in this case is, in several respects, directly counter to *Oats*.

Like the lower court here, the lower court in *Oats* failed to address each prong of the intellectual disability test, leading this Court to rule that "in light of the United States Supreme Court's decision in *Hall*, the circuit court's order should have addressed all three prongs of the intellectual disability test." *Id*. at 3. In *Oats*, this Court remanded to allow for evidentiary development in part because the circuit court had "failed to consider all of the evidence presented," relating to all the prongs of intellectual disability. *Id*. at 2. This is contrary to the circuit court's ruling in this case that "[a]s Defendant does need meet the second or third prongs of the test, his IQ [i.e., the first prong of the test] is irrelevant in determining intellectual disability" (PCR-V. 128).

The *Oats* remand was ordered despite the State's arguments that *Hall* bears only on the first prong of the intellectual disability test. Oats was denied relief on the third prong only, and the first prong was "not in genuine dispute." *Oats*, No. SC12-749, slip op. at 2. This is contrary to the circuit court's ruling in this case that *Hall* applies only to the first prong, IQ, and "has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning, and onset of the intellectual disability prior to the age of 18" (PCR-V. 126).

In *Oats*, this Court ruled that "[a] remand of this proceeding is particularly necessary in light of the dispositive opinion in *Hall*, in which the United States

Supreme Court . . . provided additional guidance pertaining to the necessary showing under *Atkins v. Virginia* . . . for establishing ineligibility for the death penalty as a result of an intellectual disability." *Oats*, No. SC12-749, slip op. at 4-5. This is contrary to the circuit court's rulings in this case that "the Defendant was afforded a full and complete evidentiary hearing on the question of whether or not he is intellectually disabled" prior to *Hall* being issued and that "[d]espite claims now to the contrary, . . . the Defendant did have the opportunity to present evidence on all three prongs as proscribed by *Hall*" (PCR-V. 127).

In *Oats*, this Court found that it was proper to consider that the State had commented in a pre-*Atkins* proceeding that Oats was "mildly mentally retarded . . . No doubt about that." *Oats*, No. SC12-749, slip op. at 4. Here, the State made a similar comment at Mr. Thompson's pre-*Atkins* trial, stating that Mr. Thompson was "**a retarded bump on a log**" (R3. 3084 (emphasis added)). The circuit court declined to consider that statement in this case.

SUMMARY OF THE ARGUMENTS

1. The lower court erred in summarily denying Mr. Thompson's motion, because *Hall v. Florida* requires further evidentiary development and full and fair consideration of the evidence, based on scientific principles, under the Eighth Amendment standard for intellectual disability articulated in *Hall v. Florida*.

2. Mr. Thompson was denied a full and fair hearing, *Brumfield v. Cain*, particularly due to a ruling that a mental health expert could not testify on Mr. Thompson's behalf as to the proper scientific method for assessing intellectual disability because such testimony was made irrelevant by *Cherry v. State*.

STANDARD OF REVIEW

Whether the lower court erred in summarily denying a Rule 3.851 motion without an evidentiary hearing is "a pure question of law and is subject to de novo review." *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008) (citing *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008)).

To the extent this Court might find the lower court's factual findings relevant to its consideration of this case, it must be noted that findings of fact are owed no deference by this Court when they are tainted by legal error. Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000). The circuit court in this case reached its findings under a conception of *Hall* that is contrary to that adopted by this Court in *Oats v. State*, No. SC12-749, slip op. (Fla. Dec. 17, 2015) . Additionally, denying further development of Mr. Thompson's intellectual disability claim because of this Court's mistake of fact as to the IQ scores provided to the court is an unreasonable determination of fact in light of the evidence presented. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015) (holding petitioner was entitled to merits consideration when underlying factual determinations on which the state trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he presented no

evidence of adaptive impairment—were unreasonable under § 2254(d)(2)).

In this case, the lower court ruled that "the Defendant was afforded a full and complete evidentiary hearing on the question of whether or not he is intellectually disabled." (Order at 2). In *Oats*, this Court ruled that "[a] remand of this proceeding is particularly necessary in light of the dispositive opinion in *Hall*, in which the United States Supreme Court . . . provided additional guidance pertaining to the necessary showing under *Atkins v. Virginia* . . . for establishing ineligibility for the death penalty as a result of an intellectual disability." *Oats*, No. SC12-749, slip op. at 4-5. The Court reached that ruling of particular necessity for further evidentiary development even though Mr. Oats had already been afforded an evidentiary hearing under the pre-*Atkins* standard for assessing intellectual disability, which involved testimony as to each of the prongs of the intellectual disability test. *See generally Oats v. State*, No. SC12-749, slip op. (Fla. Dec. 17, 2015) . The lower court's ruling in this case is directly contrary to *Oats*. *Hall* altered Florida's substantive Eighth Amendment standard for establishing intellectual disability such that a new presentation of evidence and consideration of that evidence under the proper standard is necessary. The lower court's factual findings should be set aside.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. THOMPSON'S CLAIM THAT THE EIGHTH AMENDMENT CATEGORICALLY PROHIBITS HIS EXECUTION PURSUANT TO *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA*

Mr. Thompson's case lies at the very core of *Hall's* ruling and the Eighth Amendment prohibition against the execution of the intellectually disabled.

In 2002, the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002) ruled that the Eighth Amendment categorically prohibits the execution of individuals with intellectual disability. However, the *Atkins* Court left it "up to the states to determine who" is intellectually disabled. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007). In defining intellectual disability for *Atkins* purposes, the State of Florida employs Florida Statutes § 921.137(1), which provides a three-prong test, requiring "[1] significantly subaverage general intellectual functioning existing concurrently with [2] deficits in adaptive behavior and [3] manifested during the period from conception to age 18." The first prong of the test, "significantly subaverage general intellectual functioning," is defined by the statute as "performance that is two or more standard deviations from the mean score on a standardized intelligence test . . . ," Fla. Stat. § 921.137, which represents "an IQ of 70 or below." *Cherry*, 959 So. 2d at 713.

"The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. Each IQ test has a 'standard error of measurement,' . . . . A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself." *Hall*, 134 S. Ct. at 1995 (citations omitted) . In other words, IQ tests do not reflect *actual* IQ. They provide a *measured* IQ score, reflecting a range in which an actual IQ somewhere lies.

However, in *Cherry*, this Court interpreted the first prong of Florida's intellectual disability test to create a rigid cutoff at 70. *See id*. at 1994. Under *Cherry*, ". . . a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Id*.

In this case, Mr. Thompson's *Atkins* claim was denied, and the court limited his right to present evidence, because he failed to put forth a below-70 IQ score as required by the unconstitutional *Cherry* standard. The parties argued about whether, even with an IQ score of 71, Mr. Thompson should get a full hearing and review, because his *actual* IQ might be within a standard error of measurement below his *measured* IQ. Mr. Thompson lost that argument when the circuit court ruled that "[i]n *Cherry v. State*, . . . the Florida Supreme Court determined that to be legally [intellectual disability] for purposes of avoiding execution, a person

would need to have an IQ of 70 or below" (PCR-IV. 833), and thus, because Mr. Thompson's measured IQ was "above the threshold of 70" (PCR-IV. 834), he did not qualify for further *Atkins* consideration. This Court affirmed, finding that "Mr. Thompson is not mentally retarded based on this Court's definition of the term as set forth in *Cherry*." *Thompson v. State*, 41 So. 3d 219 (Fla. 2010). To be sure, the circuit court and this Court did not look past Mr. Thompson's IQ scores.

Four years later in *Hall*, the U.S. Supreme Court stated that Florida's "strict IQ test score cutoff of 70 is the issue in this case." *Hall*, 134 S. Ct. at 1994. The Supreme Court's concern was that

> [p]ursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.

Id. It was troubling that "Florida law used the test score as a fixed number, thus barring further consideration of other evidence bearing on the question of intellectual disability." *Id*. at 1996. The Supreme Court reasoned that "Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. 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

2001. Thus, the *Hall* Court struck down *Cherry* and the rigid cutoff, and required instead that *Atkins* defendants "have the opportunity to present evidence of [] intellectual disability, including deficits in adaptive functioning over his lifetime," even where, like *Hall*, they have an IQ score of 71. *Id*. The Supreme Court concluded its remarks with a description of the purpose for the new rule:

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." . . . The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world.

Id.

The Court instructed in *Hall* that an *Atkins* defendant who tests within the SEM of the intellectual disability threshold must receive evidentiary development that comports with scientific principles and considers what other indications of his intelligence, such as adaptive functioning or placement in EMR classes as a child, suggest as to his true level of intelligence. This is precisely what the circuit court denied Mr. Thompson in this case. Mr. Thompson's evidentiary hearing was circumscribed by the circuit court's rigid adherence to *Cherry*, and there should be nothing left to say about the necessity for evidentiary development in this case.

The circuit court denied Mr. Thompson's *Atkins* claim premised on the unconstitutional rule in *Cherry*, which served to deny him full and fair evidentiary development of the proper—and constitutionally mandated—scientific assessment of each prong of an intellectual disability assessment, including adaptive functioning and early onset, and full consideration of the evidence beyond the test scores. The court in this case based its ruling on the very proposition for which *Cherry* was deemed unconstitutional. Mr. Thompson brought his instant claim to receive the evidentiary development and full consideration of his claims under the proper constitutional standard, a procedure to which he is unequivocally entitled under *Hall*.

The State argued to the circuit court prior to *Hall* that "[t]he plain language of the statute requires an IQ t[w]o standard deviations below the mean. As you heard, that means an IQ of 70. . . . Each one of [Mr. Thompson's scores] are above 70. So you have a complete failure of proof . . . ." (T. 138). The court relied on Dr. Prichard's testimony that "since the Defendant's IQ was above 2 standard deviations below the mean, and all 3 prongs of the test must be met, there was no need to test further" (PCR-IV. 835). The court even quoted *Cherry* for the proposition that when courts find a defendant "does not meet this first prong . . . , **we do not consider the two other prongs** . . . ." (PCR-IV. 835 (emphasis added)). Thus, there is no room for debate as to whether the court's later mention of the

other two prongs in its concluding paragraph constitutes a legal ruling of any effect in this case. It cannot. The court cited binding precedent for the proposition that it could not reach those prongs. Thus, it did precisely what *Hall* forbids, and nothing more. This Court affirmed that ruling, also without addressing the other two prongs.

In *Oats*, this Court remanded to allow for evidentiary development in part because the circuit court had "failed to consider all of the evidence presented." *Oats*, No. SC12-749, slip op. at 2. This is contrary to the ruling in this case, that the other prongs of the intellectual disability test and the evidence underlying those prongs should not be given full consideration. Declining to consider two prongs of the test, regardless of what the circuit court subsequently did to recount the evidence relating to those prongs, is contrary to the newly recognized constitutional standard and contrary to *Oats*. Those prongs and their attendant evidence have bearing on the first prong. The evidence underlying those prongs must not be dismissed as irrelevant simply because Mr. Thompson did not present an IQ score of 70 or below. As in *Oats*, the court failed to consider all of the evidence presented. This case must be remanded.

To whatever extent it could be argued—albeit it contrary to logic, reason, and the law of this case—that there exists some meager finding as to the other

prongs, they must certainly be based on consideration too truncated by the *Cherry* ruling to be constitutionally adequate and thus binding on these later proceedings.

The pre-*Hall* circuit court in this case acknowledged that the defense urged for consideration of the standard error of measurement, but, noting that this Court had rejected that argument in *Cherry* (PCR-IV. 835), concluded that "[e]very expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not [intellectual disability]." (PCR-IV. 836 (citations omitted)). With this analysis, the error in measuring IQ at the heart of *Hall* and *Cherry* was the basis on which Mr. Thompson's evidentiary development and consideration of his intellectual disability claim was cutoff, circumscribed, and made constitutionally inadequate. The court went so far as to say that "if the witness is not familiar with, or not using the criteria set out as a legal standard, then this Court really should not accept or receive the opinion" (T1. 90), further illustrating that the court conducted the prior proceedings with only the *Cherry* standard in mind, ignoring all evidence of Mr. Thompson's intellectual disability in clear contradiction of *Hall*.

In reviewing this prior ruling, the predecessor circuit court judge (who did not preside over the evidentiary hearing or observe any of the witnesses who testified previously in this case) made several erroneous findings in the 2015 order as to *Hall* that resulted an unconstitutional denial of evidentiary development. The

manner in which the predecessor circuit court judge denied this claim and denied evidentiary development is clearly erroneous under *Oats*.

The circuit court ruled that "[a]s Defendant does need meet the second or third prongs of the test, his IQ [i.e., the first prong of the test] is irrelevant in determining intellectual disability." (PCR-V. 128). However, in *Oats*, this Court stated that "in light of the United States Supreme Court's decision in *Hall*, the circuit court's order should have addressed all three prongs of the intellectual disability test." *Oats*, No. SC12-749, slip op. at 3. The lower court's ruling in this case is directly contrary to *Oats*. Like in *Oats*, consideration of all three prongs is necessary here. Those prongs have bearing on one another and none can be considered in a vacuum or dismissed out of hand. The lower court did a rudimentary, by-the-numbers, layperson's assessment of the IQ scores in this case without considering how the totality of the evidence and a constellation of factors weigh into the interpretation of those scores.

The lower court also ruled that *Hall* applies only to the first prong, IQ, and "has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning, and onset of the intellectual disability prior to the age of 18." (PCR-V. 126). However, in *Oats*, this Court remanded for evidentiary development pursuant to *Hall* even though Oats was denied relief on the third prong only, and the first

prong was "not in genuine dispute." *Oats*, No. SC12-749, slip op. at 2. The lower court's ruling in this case is directly contrary to *Oats*. Every prong of the test is implicated by *Hall*, and individuals denied relief under prongs other than the first prong should still receive reconsideration of their intellectual disability claims pursuant to *Hall*.

In this case, the lower court ruled that "the Defendant was afforded a full and complete evidentiary hearing on the question of whether or not he is intellectually disabled" and "[d]espite claims now to the contrary, . . . the Defendant did have the opportunity to present evidence on all three prongs as proscribed by *Hall*." (PCR-V. 127). In *Oats*, this Court ruled that "[a] remand of this proceeding is particularly necessary in light of the dispositive opinion in *Hall*, in which the United States Supreme Court . . . provided additional guidance pertaining to the necessary showing under *Atkins v. Virginia* . . . for establishing ineligibility for the death penalty as a result of an intellectual disability." *Oats*, No. SC12-749, slip op. at 4-5. The lower court's ruling in this case is directly contrary to *Oats*. *Hall* altered Florida's substantive Eighth Amendment standard for establishing intellectual disability such that a new presentation of evidence *and consideration of that evidence under the proper standard* is necessary.

In *Oats*, this Court found that it proper to consider that the State had commented in a pre-*Atkins* proceeding that Oats was "mildly mentally retarded . . .

No doubt about that." *Oats*, No. SC12-749, slip op. at 4. Here, the State made a similar comment at Mr. Thompson's pre-*Atkins* trial, stating that Mr. Thompson was "**a retarded bump on a log**." (R3. 3084 (emphasis added)). The circuit court declined to consider that statement in this case. This statement's impact has always been downplayed in this case when in fact it represents nothing less than an explicit concession of the central issue. Whether meant as an ignorant pejorative or a medical fact, the State called Mr. Thompson mentally retarded, now referred to as intellectual disability.

"From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 558 U.S. 220, 220 (2010). The legal effects of breaches of that dignity and respect by the State—making a crass joke out of a mental health condition so profoundly important to the justice system that the Eighth Amendment now categorically precludes people with that condition from execution—should not be dismissed. The State should not get a pass just because it seems like it meant its comment as an insult rather than a concession. The State made a comment, its foolishness should not eliminate its legal effect. On the contrary, it is all the more reason to hold the comment against the State. It is proper for Florida courts to consider that comment as part of their assessment of whether Mr. Thompson is intellectually disabled. Certainly that the State thinks he is

intellectually disabled should have something to do with how the courts resolve the dispute between Mr. Thompson and the State about whether he is intellectually disabled.

The Retroactivity of *Hall*

Hall is applicable to this case retroactively. Mr. Thompson's motion was properly cognizable to the circuit court pursuant to Rule 3.851(d), which allows successive motions upon the creation of a fundamental constitutional right. The Supreme Court's decision in *Hall* represents a fundamental repudiation of this Court's prior *Cherry* jurisprudence, which includes centrally this case, and as such *Hall* constitutes the creation of a fundamental right under 3.851(d). *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). While a detailed retroactivity analysis is conducted below, a simple fact demonstrates the creation of a right applicable in this case: prior to *Hall*, all Florida *Atkins* defendants who were actually intellectually disabled but had IQ test scores above 70 like Mr. Thompson were technically denied the protection of *Atkins*; after *Hall*, they are not. Thus, there is a clearly (indeed, mathematically) defined category of individuals that did not previously have a constitutional right but now do. Mr. Thompson falls in that category.

A Rule 3.851 motion was the appropriate vehicle to present Mr. Thompson's claim premised upon the change in Florida law that *Hall* represents. *See Hall v.*

State, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the U.S. Supreme Court found that the Florida Supreme Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions) (receded from in *Coleman v. State*, 64 So. 3d 1210, 1226 (Fla. 2011), on unrelated grounds).

In *Witt v. State*, this Court determined when changes in the law will be allowed to be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. Executing Mr. Thompson in violation of *Hall* will not and cannot be fair and uniform with cases that will be reviewed in accordance with *Hall*. The *Witt* Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. Because Mr. Thompson was denied relief on the very analysis *Hall* forbids, the injustice of the disposition of this case is plainly obvious. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*. (quotations

omitted). That is what would occur if Mr. Thompson is not given a hearing under *Hall*.

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," *id*. at 928, the *Witt* Court declined to follow the line of U.S. Supreme Court cases addressing the issue, which it characterized as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The U.S. Supreme Court has held that a state may indeed give one of its decisions broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008). Just this week, however, the Court clarified that it has jurisdiction to consider whether a state's retroactivity analysis runs afoul of the federal Constitution. *Montgomery v. Louisiana,* – U.S. –, No. 14-280, Slip Op., at *5 (January 25, 2016) (holding that "States may not disregard a controlling, constitutional command in their own courts.").

The *Witt* Court found that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

Under *Witt*, two "broad categories" of cases will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose

certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id*. at 929. The *Witt* court identified under *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So. 2d at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* held that only the Florida Supreme Court and the United States Supreme Court can issue rulings that rise to the level of retroactive changes to the law. *Id*. at 930.

This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931. As a general matter, there is little questioning that it is fundamentally significant that the State of Florida last year would have been constitutionally allowed to execute Mr. Thompson and Mr. Hall. But now the Supreme Court of the United States has made it clear that Florida's process in determining intellectual disability, and the State's definition of

intellectual disability, was constitutionally infirm. Because death is a significant sanction, a categorical change to who is constitutionally subject to death must be recognized as a fundamental change to the law. Further, the Court has recognized that "rules prohibiting a certain category of punishment for a class of defendants," such as is the case here, should have retroactive effect. *Montgomery*, at *6, quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

In addition, under *Witt*, this Court must consider the potential retroactivity of *Hall* within the two broad but specifically defined categories of retroactive cases created in *Witt*. The first is squarely applicable: changes of law which place beyond the authority of the state the power to impose certain penalties. Before *Hall*, it was constitutional to execute individuals that scored, as Mr. Thompson did, a 71, even if their *actual* IQ was under 70. Now, those individuals are beyond the power of the State of Florida to impose the penalty of death. Unlike many constitutional rules, where the boundaries of the protection are muddled and it is difficult to discern in close cases whether an individual was within the State's power (or, put another way, inside the constitutional protection) before a change to the scope of the rule, *Hall* presents an easy analysis because it is mathematical. Before *Hall*, a score of 71 or higher meant execution; after *Hall*, it does not. And, where an actual IQ is proven to be within the intellectual disability range, execution is constitutionally prohibited. This Court need not venture beyond the

first category of *Witt* to find *Hall* retroactive in Florida. Indeed, federal retroactivity would apply as well in light of the Court's decision in *Montgomery.*

However, *Hall* also falls in the second category. There, a case can be of sufficient magnitude to require retroactive application based on consideration of (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. The purpose served by the new rule is clear from *Hall* itself, as reflected in the Supreme Court's closing remarks: "[t]he death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id*. The purpose of the *Hall* rule is thus to preserve human decency in Florida law. This purpose clearly meets the *Witt* standard.

By the same token, the effect on the administration of justice from allowing a constitutionally sound assessment of *Atkins* claims would be appropriately limited to those individuals, who, like Mr. Thompson, were denied a full and fair assessment of their claim based on Florida's unconstitutional interpretation of *Atkins.*

Finally, the extent of reliance on the old rule is not sufficient to deny Mr. Thompson the benefit of *Hall*. It merely allows evidentiary development and full and fair consideration to defendants that were denied under an unconstitutional standard. Any interest in the finality of the rulings against these defendants cannot outweigh the need for their executions not to occur if they are categorically prohibited by the constitution. It is a consequence of this State choosing to have the death penalty that it must do what is necessary to ensure its constitutional administration.

Mr. Hall's death sentence was affirmed by the Florida Supreme Court in 1981. Mr. Thompson's death sentence was affirmed in 1993. Both were disposed of under the same precedent—*Cherry*. The U.S. Supreme Court held that the Eighth Amendment guaranteed Mr. Hall evidentiary development and full consideration under *Atkins*. That holding applies equally to Mr. Thompson.

As evidenced by *Oats*, *Hall* altered Florida's substantive Eighth Amendment standard for establishing intellectual disability such that a new presentation of evidence and consideration of that evidence under the proper standard is necessary. The many ways in which the presentation and consideration of evidence under the old standard might been affected by the *Cherry* rule cannot be fully predicted. This fundamental change in the substantive law requires new evidentiary development and consideration. Mr. Oats received that opportunity despite having been denied

on the third prong only and having had a prior evidentiary hearing in which he had the opportunity to present evidence on all three prongs under the now unconstitutional *Atkins* standard adopted by this Court in *Cherry*. Mr. Thompson deserves the same opportunity.

ARGUMENT II

MR. THOMPSON WAS DENIED A FULL AND FAIR HEARING IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE STATE AND FEDERAL CONSTITUTIONS, AND ANY RELIANCE ON THAT HEARING TO ONCE AGAIN DENY MR. THOMPSON'S *ATKINS* CLAIM IS FUNDAMENTALLY FLAWED

On February 27, 2009, this Court remanded Mr. Thompson's Rule 3.851 postconviction motion for an evidentiary hearing based on *Atkins v. Virginia,* 536 U.S. 304 (2002). It was the second remand to the prior trial judge, Judge Hogan-Scola, in this matter. After the February 2009 remand, two motions to disqualify were filed to prevent Judge Hogan-Scola from presiding over this case due to her animosity toward counsel and inability to be fair and impartial to Mr. Thompson (PCR-IV. 40, 805). Prior to this Court's 2009 decision, two other motions—a motion to disqualify and a motion to get facts—were filed against the same judge on different grounds (PCR-I. 67; PCR-II. 684). However, the recurring theme in all of these motions was that Judge Hogan-Scola was not giving Mr. Thompson full and fair consideration of his claim. Prior counsel's description of the judicial bias in the evidentiary hearing in this case was articulated to this Court pre-*Hall*. That

description is substantially relied on below to permit consideration of the shortcomings in the pre-*Hall* evidentiary hearing in light of *Hall*, and to permit consideration of the predecessor circuit judge's rulings with regard to the problems in that hearing, which renders the determination at issue before this Court by the subsequent judge procedurally and substantively flawed.

Instead of giving Mr. Thompson the 90 days allowed by this Court to complete the remand proceedings, Judge Hogan-Scola cut that in half, giving him 44 days to present evidence at an evidentiary hearing (*See* PCR-IV 16, 20). During that hearing, Judge Hogan-Scola limited the testimony of both defense experts to the extent that those experts could testify about the definition of mental retardation because their testimony was "irrelevant," and because the defense experts were not "legal experts" (T1. 80; 86-88). The State's expert, however, was allowed to testify as to the legal definition of mental retardation (T2. 86-87).

Dr. Sultan, the only expert to do an adaptive functioning exam, was precluded from testifying about what she had learned from the witness interviews she had conducted on the basis of hearsay, even though hearsay is regularly relied upon by experts in her field (T1. 127).

Dr. Greenspan was completely excluded from testifying on grounds discussed below, which are particularly important because the Judge Tinkler-Mendez also addressed the issue of Dr. Greenspan's exclusion (PCR-V. 185).

After hearing evidence for two days, Judge Hogan-Scola made statements on the record that showed she had prejudged the facts of this case and was not approaching the case in a purely impartial posture. *Cf. Valltos v. State*, 707 So. 2d 343 (Fla. 2d DCA 1997). Mr. Thompson filed a writ of prohibition to this Court to preclude Judge Hogan-Scola from deciding his case. He filed a motion for stay in the trial court noticing it of the writ. Instead of considering the stay motion, Judge Hogan-Scola refused to grant it and instead hurried to issue her opinion before this Court could rule on the writ (PCR-IV. 819, 823).

Because Judge Hogan-Scola had already ruled on the *Atkins* hearing, this Court denied Mr. Thompson's writ as moot. *Cf. Brown v. Rowe*, 118 So. 2d 9 (1928) (cited in *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978)).

Mr. Thompson argued that the basis for writ was that on March 2, 2009, the first business day after this Court's remand, Judge Hogan-Scola ordered a status hearing that afternoon, even though prior counsel was unavailable and in court on an evidentiary hearing in Daytona Beach (a case also on remand from this Court on a tight deadline) (PCR-IV. 33). After learning of counsel's unavailability, Judge Hogan-Scola issued an order that Mr. Thompson was to name a mental retardation expert, have an evaluation and IQ test completed by March 13, 2009, and then have a report completed and turned over to the State as soon as possible (PCR-IV.

21). The evidentiary hearing was set for April 13, 2009, 44 days after this Court's order (*See* PCR-IV. 16; 20). The State was given no deadlines whatsoever.

On March 8, 2009, Mr. Thompson filed another motion to disqualify because he had a legitimate and reasonable fear that Judge Hogan-Scola would continue to marginalize defense counsel and truncate his hearing to the extent that he could not have due process or a full and fair hearing (PCR-IV. 40). He cited four grounds for disqualification:

> 1. Judge Hogan-Scola's accusation in August, 2007 that defense counsel was unethical and unprofessional when she referred counsel to the Code of Professional Conduct for perceived unethical and unprofessional behavior.
>
> 2. Judge Hogan-Scola's repeated *ex parte* contact with the prosecution without notice to the defense;
>
> 3. Judge Hogan-Scola's employment as a prosecutor in the Dade County State Attorney's Office during the time of Mr. Thompson's 1989 resentencing from which much of the testimony regarding mental retardation was admitted;[7] and

[7] Note that this circumstance is currently pending before the U.S. Supreme Court in *Terrance Williams v. Pennsylvania* (No. 15-5040). *Williams* promises to better describe the constitutional implications of a judge presiding over a case previously prosecuted by an office that employed the judge. Particularly, *Williams* promises to define the Eighth Amendment contours of this issue, in the capital context, where constitutional protections are heightened beyond what would have been called for in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). *Certiorari* was granted in *Williams* on October 1, 2015, and oral argument is scheduled for February 29, 2016. *Terrance Williams v. Pennsylvania* (No. 15-5040).

> 4. Judge Hogan-Scola's attempts to give Mr. Thompson only half the time allotted by this Court and place unreasonable deadlines on counsel to obtain competent mental health evaluations with no such time constraints on the prosecution.

(PCR-IV. 40).

The judge denied the motion to disqualify (PCR-IV. 49). Despite Mr. Thompson's concerns of bias and prejudice, he believed this Court had spoken and did not file a Writ of Prohibition to this Court.

When counsel informed the judge that no mental health expert was available to evaluate Mr. Thompson on such short notice, she reset the deadline from March 13 to the March 29 (PCR-IV. 33, 38). She refused to reset the evidentiary hearing from April 13, even though this Court had given 90 days to complete the hearing (until May 28, 2009). Judge Hogan-Scola said that defense counsel had "four years" to get ready for this evidentiary hearing (PCR-IV. 22), even though Mr. Thompson had been repeatedly denied an evidentiary hearing for the last eight years. Counsel did not have an opportunity to choose a qualified mental retardation expert to evaluate and test Mr. Thompson within reasonable time limits as due process dictates. The State had no time limit (PCR-IV. 46).

Dr. Faye Sultan, who had evaluated Mr. Thompson for mitigation in previous proceedings, agreed as a favor to counsel to test him by March 29, 2009. Dr. Stephen Greenspan, a nationally recognized mental retardation expert, was not

available until April. Dr. Sultan gave Mr. Thompson the WAIS IV IQ test on March 20, 2009 (T1. 99). Dr. Gregory Prichard, the State's expert, gave Mr. Thompson the Stanford Benet V on April 6, 2009 (T2. 75). Due to the practice effect of repeated testing, Dr. Greenspan could not test Mr. Thompson under the judge's time constraints (T2. 109). Dr. Greenspan was forced to rely on doctors Sultan and Prichard's testing and raw data for his opinions (T2. 109-110). As a result, he could not diagnose Mr. Thompson based on his own testing, but could only comment on the data and methodologies used by both experts and could opine about their results.

On April 13, 2009, the first day of the evidentiary hearing, Mr. Thompson presented the testimony of Dr. Sultan. From the beginning, it was clear that Judge Hogan-Scola was not going to allow her to testify about any definition of mental retardation, no less the legal definition under the Florida statute. Dr. Sultan was unable to testify about the definition of mental retardation, the American Association for Mental Retardation ("AAMR") or psychological standards for mental retardation or give any opinion about them (T1. 88). Thus, Mr. Thompson could lay no foundation for Dr. Sultan's testimony.

Dr. Sultan also was prohibited from testifying about witness interviews she conducted for the adaptive behavior prong of the mental retardation test because of the State's hearsay objections (T1. 118). Judge Hogan-Scola acknowledged that

even though hearsay is admissible in these types of proceedings and that an expert can rely on hearsay for her findings, she would only allow Dr. Sultan to testify as to the diagnostic significance of the witness information, without revealing the anecdotal information and descriptions of Mr. Thompson's behavior and circumstances that the witnesses shared with her (T1. 118-140). Without the anecdotal information and descriptions from the witnesses, the court's ruling eviscerated the probative effect of the narrative of Mr. Thompson's behavioral history provided to Dr. Sultan. Even though hearsay statements are normally relied upon by experts in these proceedings and are admissible, Judge Hogan-Scola decided that Mr. Thompson could not have the benefit of that Florida law.

Because the State had not disclosed Dr. Prichard's raw data on his testing until the first day of the April 13 evidentiary hearing, Dr. Sultan could not give her opinion of the State's testing (T1. 14). In fact, Mr. Thompson could not cross examine Dr. Prichard at all until April 27 (the only other day the judge would allow to present evidence) because Dr. Prichard's raw data was not disclosed until the morning of April 13 hearing and counsel had not had time to review it (T1. 223).

On April 27, Mr. Thompson cross examined Dr. Prichard on the telephone (T2. 6-7). It was clear from the trial judge's rulings on cross and the State's re-direct that Dr. Prichard was allowed to testify to all of the definitions Dr. Sultan

was not. Dr. Prichard testified about the definitions of mental retardation and the legal definition under Florida law (T2. 86). Specifically, the State asked Dr. Prichard his opinion as an "expert familiar with Florida law (T2. 85). He attacked the credibility of Dr. Sultan and her findings. He was allowed to speculate on facts not in evidence (such as a fictitious hearing disorder that is not documented in any of Mr. Thompson's history nor in his self-report) (T1. 171-172). Dr. Prichard was even referred to and qualified by the State as a "legal expert" during re-direct so he could comment on the Florida statutory definition, when he had not been qualified or previously offered as such an expert (T2. 85). Mr. Thompson repeatedly objected to the extent that Judge Hogan-Scola became angry, in that she raised her voice and her face got red. The judge refused to limit Dr. Prichard's opinions in any way including considering him a "legal expert."

When Mr. Thompson attempted to present Dr. Greenspan, a nationally recognized mental retardation expert, Judge Hogan-Scola again limited his ability to speak about the definition of mental retardation. The State, as it did in its motion in limine, objected to the relevance of Dr. Greenspan's testimony (T2. 88). After some time, Judge Hogan-Scola stopped the direct examination and reversed her previous ruling on the State's motion in limine—excluding Dr. Greenspan (T2. 115, 120, 125).

Mr. Thompson was forced to proffer Dr. Greenspan's testimony by oral summary (T2. 121). He was not allowed to rebut Dr. Prichard or talk about the methodology or data relied on by the two experts. Dr. Prichard's testimony was admitted without limitation. Both of Mr. Thompson's experts were severely limited in their testimony, even Dr. Greenspan who was the only psychologist qualified as a mental retardation expert.

During the hearing, Judge Hogan-Scola reminded the parties that "the Supreme Court did order us to go forward with this entire evidentiary hearing, which I originally felt was not necessary" (T2. 88). When Judge Hogan-Scola asked the State for its responsive argument, Assistant Attorney General Sandra Jaggard said she had nothing further to say because the judge had made the prosecution's arguments "beautifully" (T2. 125). *Cf. Chastine v. Broome*, 629 So. 2d 293, 295 (Fla. 4th DCA 1993) (when judge becomes participant disqualification required).

Judge Hogan-Scola's bias and prejudice are again a matter of record. On May 7, 2009, Mr. Thompson filed a second motion to disqualify to prevent the judge from any further actions or decisions in this case (PCR-IV. 805). The grounds for disqualification in this case have run the gamut from *ex parte* communications to blatant bias against Mr. Thompson to the extent that he was

foreclosed from presenting all of this evidence on his mental retardation claims (PCR-IV. 805-817).

Actual prejudice has been shown. Mr. Thompson was prevented from presenting a complete presentation of his evidence from either expert, regardless of whether they tested Mr. Thompson or not. Mr. Thompson was prevented from rebutting Dr. Prichard's testimony by the exclusion of his expert and the late disclosure of Prichard's raw data. The State was unfairly given the opportunity to qualify their psychologist during re-direct examination as a "legal expert" when they offered no proof that he was an expert on Florida law (T2. 85). *Cf. Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978). Mr. Thompson was restricted by the circuit court from presenting full evidence, based on scientific principles, of all three prongs.

Mr. Thompson was entitled to full and fair post-conviction proceeding, *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the issues by a neutral, detached judge. He did not receive it. The circumstances of this case were "sufficient to warrant fear on [Mr. Thompson's] part that he would not receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). In fact, Judge Hogan-Scola had prejudged the issues.

In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983).

The Exclusion of Dr. Greenspan

Dr. Greenspan co-edited a leading text published by the AAIDD, defining and diagnosing intellectual disability (T2. 97). Dr. Greenspan would have testified as to how Thompson's deficits in adaptive functioning weigh into and help explain his IQ scores (T2. 121-23). Dr. Greenspan would provide expert guidance to the court in how to assess the intellectual disability evidence, IQ scores, and methodology of the experts.

This could not be more in line with *Hall's* conception of the Eighth Amendment inquiry, which must requires *Atkins* courts to consider medical expertise in assessing the Eighth Amendment prohibition on execution of individual with intellectual disability:

> Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Hall, 134 S. Ct. at 1993. Remarkably, the *Hall* Court specifically stated, "[t]hat . . . state courts . . . consult and are informed by the work of medical experts in determining intellectual disability is unsurprising." *Id*. The circuit court in this case should not have baulked at Dr. Greenspan's assistance in conceptualizing the intellectual disability analysis and evidence in this case.

But before Dr. Greenspan reached the substance of his testimony, the court excluded his testimony, finding it to be irrelevant, because Dr. Greenspan had not personally evaluated and diagnosed Thompson (T2. 115). The court further refused to permit testimony that went to show whether an IQ score above 70—recognized by the Department of Children and Family Services and this Court as the strict threshold for intellectual disability—might be viewed by a mental health professional under prevailing psychological testing standards to represent intellectual disability in a certain case (T2. 115):

> THE COURT: If he can't evaluate him with regard to whether or not he is mentally retarded then his information really is irrelevant.
>
> PRIOR COUNSEL: Judge, he can make -- without making a diagnosis, he can comment on the data and methodology used by the experts under Florida law [and] give an opinion about whether the data and the methodology used by the experts was valid or not. Regardless of whether he saw Mr. Thompson.
>
> THE COURT: The standards are set up by Department of Children and Family Services according to the mandate of the Florida Supreme Court.

> PRIOR COUNSEL: Correct.
>
> THE COURT: And I guess if you want to proffer that because you're contesting the standards that have been set up –
>
> PRIOR COUNSEL: I am doing that, yes.
>
> THE COURT: I will allow you to proffer that, but I am going to not take it into consideration in my ruling as to whether or not Mr. Thompson, under the instant law, because that is not the purpose of this hearing.
>
> PRIOR COUNSEL: So the purpose of the hearing is just to have a [recitation] of IQ scores and then go home? I thought we were supposed to get a hearing about all the issues, about the underlying issues about what's going on with Mr. Thompson. He has inconsistent scores. Certainly there are differences in expert opinions about whether he is mentally retarded or not.

(T2. 115-16). When given the opportunity to respond, the prosecutor declined to make an argument stating, "You [the judge] are making my argument beautifully. Thank you" (T2. 125).

This argument was presented to the successor circuit judge in this case to no avail. The circuit court gave the following treatment to this issue:

> It is also noted that the Defense again argued that the prior trial Court erred in excluding the testimony of Dr. Greenspan because the case was evaluated under a "*Cherry* standard" and now, under a "*Hall* standard" Dr. Greenspan's testimony should be presented. It is noted that Dr. Greenspan's testimony was previously excluded **based on the rules of evidence and not because of *Cherry*. The same rules of evidence would apply in a**

> ***Hall*** **hearing and the testimony would similarly be excluded.**

(PCR-V. 128, n. 3 (emphasis added)). This analysis is rather confounding. It is true that Dr. Greenspan's testimony was excluded "based on the rules of evidence." Indeed, anything excluded from evidence is done so based on the rules of evidence. But this does not conclude the inquiry. The question is *why* it was excluded. Here, it was excluded because, given *Cherry's* strict adherence to the statutory definition's first prong, the court found it to be irrelevant. Subsequent to *Hall*, of course it is relevant—particularly so—to have an expert describe the proper evaluation of each prong of the test so that an *Atkins* court may assess the evidence in an informed and meaningful way, rather than a rudimentary way. The circuit court's ruling on this point is baseless. To say something was excluded based on the rules of evidence is no ruling at all. In a full and fair evidentiary hearing, Mr. Thompson would be permitted to present expert testimony on how the constellation of evidence in this case should affect consideration of his IQ score of 71, despite it not being a score of 70 or below. That testimony was improperly excluded in this case. As this Court recognized in *Oats*,

> The United States Supreme Court emphasized these same principles in its most recent decision pertaining to the intellectual disability analysis, in which the Court held that the defendant was entitled to an evidentiary hearing on his intellectual disability claim. *See Brumfield,* 135 S.Ct. at 2279. The Supreme Court first reiterated that an IQ test result of 75 is "entirely consistent with intellectual

> disability," relying on its prior decision in *Hall*. *Id.* at 2277. The Supreme Court then addressed the next two prongs, determining that the record contained "substantial grounds to question [the defendant's] adaptive functioning," based on numerous examples from the defendant's childhood, including his low birth weight, that he was placed in special classes in the fifth grade, and that he had difficulty processing information. *Id.* at 2280.

Oats v. State, No. SC12-749, slip. op., at *10 (Fla. Dec. 17, 2015). Such evidence, some of which was presented in Thompson's case and some of which was unreasonably excluded, must be considered in order to comport with a constitutionally sound determination of intellectual disability as required by the Eighth Amendment.

A remand is called for.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Thompson submits that he is entitled to have the lower court's order reversed. Mr. Thompson should receive a new evidentiary hearing before a fair and impartial judge in which he will be entitled to present all of his evidence and be given the opportunity to rebut the State's evidence. In the alternative, this Court should find that Mr. Thompson is intellectually disabled and constitutionally excluded from execution based on *Hall* and the evidence already presented in this case.

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief has been filed with the Court and served on opposing Counsel, Assistant Attorney General Sandra Jaggard, using the Florida Courts e-filing portal on the 27th of January, 2016. Counsel further certifies that on the same day a copy has been mailed to Mr. Thompson via U.S. Mail, first class postage prepaid.

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