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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Thompson does not abandon or concede any issues and/or claims not specifically addressed in the Reply Brief. Mr. Thompson expressly relies on the arguments made in the Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

TOC

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

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*

The State's asserts three arguments, all of which must fail. The State argues that 1) Mr. Thompson's motion was properly summarily denied, 2) that his motion was "untimely," and 3) that his motion was "meritless" (Answer Brief 52). All three arguments will be addressed in turn. Additionally, the State mischaracterizes Mr. Thompson's argument and the nature of the proceedings below. These mischaracterizations will also be addressed.

At the outset, the State mischaracterizes Mr. Thompson's argument as "contend[ing] that the fact that the other two elements were actually considered and rejected in the prior determination that he was not retarded should be ignored because the lower court was not required to make those findings at the time" (Answer Brief 52). The State does not cite to or refer to any motion or pleading presented by Mr. Thompson in support of this assertion. The State is mistaken in characterizing Mr. Thompson's argument in this manner. As set out in Mr. Thompson's Initial Brief, the post-conviction court at Mr. Thompson's *Atkin's* hearing[1] unconstitutionally limited testimony and disregarded testimony about Mr.

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Thompson's intellectual functioning and the consensus within the scientific community about how to assess intellectual disability by discounting or wholly disregarding evidence about Mr. Thompson's school history – where he was diagnosed as intellectually disabled prior to the age of 18[2] – and Thompson's poor adaptive functioning because the lower court was bound to follow the dictates of *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007).

The State also argues that the Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), – finding Florida's method of assessment of intellectual disability claims unconstitutional and in clear violation of *Atkins* – does not require providing Mr. Thompson with an opportunity to present evidence and make argument consistent with scientific principles or require states to conform legal definitions of "retardation to the views of the scientific community" (Answer Brief

[2] Many years ago, when Thompson was in school, the term used was "mental retardation" or mentally retarded. Throughout its Brief, the State uses the term "mentally retarded." However, as explained by the Court in *Hall*, the term "intellectual disability" is used by psychiatrists and other experts." *See* Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et al., The Renaming of *Mental Retardation* : Understanding the Change to the Term *Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, *e.g.*, "DSM–5." *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013)., *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

52-53 (the "actual holding of *Hall* was limited to a determination that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure.")). While the State may want to finely parse the holding in *Hall,* in so doing the State misses the Court's clear meaning and instruction in *Hall*. What the Court actually said on the page cited by the State was:

> This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM-5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive able to that of individuals with a lower IQ score"). The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability.

Hall, 134 S. Ct. at 2001. The State misses the mark on the interpretation of *Hall* and its applicability to intellectually disabled defendants challenging their unconstitutional death sentences.

While the State suggests that this Court is not required as a result of *Hall* to adopt the AAIDD definition of "retardation," the State does not suggest what other definition this Court should look to. Any definition of intellectual disability post–*Hall,* must be informed by consensus within the medical community. States may

make procedures– but they cannot make up their own definitions inconsistent with accepted scientific principles or they run the risk of executing individuals with intellectual disability and run afoul of notions of human dignity protected by the Eighth Amendment.

The State is trying to lead this Court down the same rosy path as it did prior to *Hall* — encouraging this Court to ignore insights of the psychological community. This Court should not allow itself to be misled again. The states are not free to ignore the medical community's clinical definition of intellectual disability, which was the underlying fundamental premise of *Atkins*. While "the legal determination of intellectual disability is distinct from a medical diagnosis," *Hall* requires that the legal determination is to be "informed by the medical community's diagnostic framework." *Hall*, 186 S. Ct. at 2000. "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.

The State is correct that there still remains a "legal determination of intellectually disability which is distinct from a medical diagnosis" (Answer Brief 53 (quoting *Hall*, 134 S. Ct. at 2000)). But in *Hall*, the Court struck down this Court's statutory construction adopted in *Cherry v. State* as violative of the Eighth Amendment. The Court found that this Court's construction of the statute violated

the Eighth Amendment by depriving a "[p]erson facing that most severe sanction [of] a fair opportunity show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001.

While *Hall* acknowledged that science does not "dictate," this Court's decision in *Cherry* was wrong for departing too far from the science upon which *Atkins* was premised. Clearly as to ID, the Eighth Amendment under *Hall* requires the law to be tethered to a degree to the clinical definition fundamentally underlying *Atkins*. Science does not "dictate," but has to inform the legal standards. Mr. Thompson submits that the problem in *Hall* was that *Cherry* ignored the science upon which IQ testing was and is premised. The SEM used by the medical community was and is a scientifically recognized fact.[3] Excluding it from consideration as to whether a capital defendant's intellectual disability precludes a death sentence without some logical basis premised upon reason was unconstitutional. Mr. Thompson submits that it was the departure from science with no basis in reason that conflicted with the fundamental premise underlying *Atkins* that was found unconstitutional in *Hall*.[4] This departure from science includes

[3] A legal test for intellectual disability which ignores the scientific fact recognized in the SEM is like a building code that ignores the existence of gravity.

[4] Perhaps there are situations where *Atkins* tests breaking from medical diagnosis of ID would be reasonable. For instance, early onset is required to diagnose ID medically, but since it has no bearing on the *Atkins* purposes of ensuring a degree of understanding by an individual at the time of their crime, in aiding their attorney in

ignoring and limiting the introduction of testimony and scientific evidence regarding the significance of multiple IQ scores and how to assess intellectual disability evidence. 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. Such a requirement cannot be used, under *Hall v. Florida*, to deny Mr. Thompson or any other capital defendant "a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001.

Retroactivity

The State further argues that given the holding in *Hall*, the lower court correctly denied Mr. Thompson's motion because Mr. Thompson's motion was untimely because *Hall* is not retroactive (Answer Brief 53 -54). However the lower court never found Mr. Thompson's motion to be untimely (PCR-V. 126-128).

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their representation, and at the time their sentence is carried out, it may be seen as a place where the *Atkins* test could omit the third prong from medical diagnosis without committing *Hall* error. Perhaps the concurrent requirement between IQ and maladaptive functioning could be altered in the *Atkins* environment to account for the fact that death row is a difficult place to measure adaptive functioning. But requiring a higher degree of evidence of early onset in the *Atkins* context than the medical community requires when such evidence has nothing to do with a defendant's moral culpability and more to do with the happenstance of someone else's recordkeeping or ability to recall the defendant's mental impairments before the age of eighteen amounts to the same constitutional error that the majority in *Hall* found infected *Cherry v. State*.

Nonetheless, Mr. Thompson has asserted that *Hall* is retroactive. The State has argued otherwise (Answer Brief 54-59).

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 State asserts that "*Hall* is a mere evolutionary refining regarding the admission of evidence and procedural fairness that does not apply retroactively" (Answer Brief 56). However, the scope of the majority opinion was much broader than the State acknowledges:

> No legitimate penological purpose is served by executing a person with intellectual disability. **To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.** "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." . . . As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. *See id*., at 319, 122 S. Ct. 2242 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available

> to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").
>
> A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. **These persons face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.**

Hall, 134 S. Ct. at 1992-93 (parenthetical material in original) (citations omitted) (emphasis added).[5] If that passage in *Hall* is not enough to establish that the State has misread the decision too narrowly, *Hall* goes further:

> **The question this case presents is how intellectual**

[5] In explaining the scope of the Eighth Amendment prohibition against the execution of intellectually disabled and its rationale, it is clear that the majority in *Hall* holds that execution of one who is intellectually disabled violates the Eighth Amendment, in part due to "a special risk of wrongful execution." Of course, requiring the intellectually disabled to present clear and convincing evidence of onset before the age of 18 means that those who are intellectually disabled, and due to their disability already exposed to "a special risk of wrongful execution," must bear an additional risk of being wrongfully executed, particularly where the passage of time has resulted in the loss of the necessary evidence of the onset before the age of 18. *See Hill v. State*, 473 So.2d 1253, 1258-59 (Fla. 1985) ("The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, *see Pate v. Robinson*, 383 U.S. 375, 386-87 (1966); *Dusky v. United States*, 362 U.S. 402, 403 (1960), we cannot conclude that such a procedure would be adequate here."); *Mason v. State*, 498 So.2d 734, 737 (Fla. 1986) ("Should the trial court find, for whatever reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law, the court must so rule and grant a new trial.").

> **disability must be defined in order to implement these principles and the holding of *Atkins*.** To determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*. This in turn leads to a better understanding of how legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule. That understanding informs our determination whether there is a consensus that instructs how to decide the specific issue presented here.

Id. at 1993 (emphasis added). Clearly, much more was at issue in *Hall* than a refining of procedure. Indeed, the majority in *Hall* found that this Court's statutory construction of § 921.137(1) adopted in *Cherry v. State*, and applicable to all Florida cases, was unconstitutional, recognizing a "consensus that our society does not regard this strict cutoff as proper or humane." *Hall*, 134 S. Ct. at 1998. The majority in *Hall* was explicit as to the nature and scope of its ruling: "**In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional**." *Id*. at 2000.

In its penultimate paragraph, the majority wrote:

> 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.** The States are laboratories for experimentation, but **those experiments may not deny the basic dignity the Constitution protects**.

Id. at 2001 (emphasis added) . In light of these statements, the State's position that *Hall* is somehow limited to only a non-retroactive procedural clarification is an astounding misunderstanding of the majority opinion in *Hall*.[6]

The State asserts that *Hall* cannot be given retroactive effect and considered in post-conviction proceedings under the standard articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). However, *Hall* clearly meets the *Witt* standard.[7]

First, under *Witt*, "changes of law which place beyond the authority of the

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[6] The State's argument ignores the entire reasoning of the decision in *Hall*, and in particular, the following statements of Eighth Amendment law: "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection," *id*. at 1998, "[p]ersons facing that most severe sanction **must have a fair opportunity to show that the Constitution prohibits their execution**," *id*. at 2001 (emphasis added).

Imposing a clear and convincing burden of proof on a capital defendant from an impoverished background, requiring him to produce documents and records at an evidentiary hearing in 2010-11 from before the defendant turned eighteen in 1975 does not accord "a fair opportunity" within the meaning of *Hall*. Impoverished children generally, and certainly in the 1960s and 1970s, did not and do not receive much, if any, mental health evaluation beyond a Slosson IQ test or some equivalent exam given by a public school for course placement purposes. *Hall v. Florida* absolutely calls the burden of proof under Florida law (certainly as to the third prong) into question because it does not accord those with "a special risk of wrongful execution" with "a fair opportunity to show that the Constitution prohibits their execution. *See Hill v. State*, 473 So. 2d at 1258-59; *Mason v. State*, 489 So. 2d at 737.

[7] Again, as stated in his Initial Brief, Mr. Thompson's believes and has argued that he should prevail on the basis of his arguments in light of *Hall*, a decision arising from collateral proceedings in a case in which the conviction became final in 1993 just as Mr. Hall gets the benefit of the decision as to whether he can receive a death sentence for a 1978 crime.

state the power to regulate certain conduct or impose certain penalties" are retroactive. *Id*. at 929. Clearly, the State seeks to draw a line between the retroactivity of *Atkins v. Virginia* and *Hall*—a line that the majority in *Hall* did not draw when it wrote: "**But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection**." *Hall*, 134 S. Ct. at 1998 (emphasis added). Accordingly, *Hall* more fully "define[d] the [] scope of the constitutional protection," *id.*, generally and rudimentarily defined first in *Atkins*. 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. This position is reiterated in *Montgomery v. Louisiana*, 2016 WL 280758 (2016) when the court recognized that "rules prohibiting a certain category of punishment for a class of defendants," such as is the case here, should have retroactive effect. Under *Witt v. State*, both *Atkins* and *Hall* must apply retroactively.

Alternatively, under *Witt*, it can be argued that *Hall* is to *Atkins* what *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was to *Lockett v. Ohio*, 438 U.S. 586

(1978).[8] In both *Hall* and *Hitchcock*, the U.S. Supreme Court granted certiorari review in collateral proceedings and found that Florida capital law did not comport with the Eighth Amendment jurisprudence established over a decade earlier in *Atkins* and *Lockett*, respectively. This Court in *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), recognized that *Hitchcock* applied retroactively, as it corrected Florida's misapplication of *Lockett*, and was thus cognizable in collateral proceedings.

Moreover, to not apply *Hall* retroactively and deny Mr. Thompson the ability to rely upon that decision, as an expansion of the right recognized in *Atkins* and curtailment of the State's discretion to statutorily define the right, would violate Mr. Thompson's right to equal protection and due process under the Fourteenth Amendment. Mr. Hall was convicted for a crime occurring in 1978. His conviction was affirmed on appeal and became final in 1981. *See Hall v. State*, 403 So. 2d 1319 (Fla. 1981). While his death sentence was subsequently vacated in collateral proceedings, a new penalty phase ordered and another death sentence imposed, his conviction for a 1978 crime has been final and intact since 1981. It is the sentence for that 1978 crime that was at issue in *Hall*. Mr. Thompson was convicted for a crime that occurred in 1976. In 1989, after two remands, Mr. Thompson was again

[8] While *Hall* is retroactively applicable as placing beyond the authority of the State the power to execute certain individuals, Mr. Thompson includes this alternative retroactivity argument for completeness.

sentenced to death after a jury recommendation of 7-5. Mr. Thompson's sentence was affirmed on direct appeal and became final in 1993. *See Thompson v. State*, 619 So. 2d 261 (Fla. 1993). There can be no valid basis for giving Mr. Hall the benefit of the ruling in *Hall* as to his death eligibility for the 1978 crime for which he was convicted in 1981, while denying Mr. Thompson the ruling in *Hall*, as additional authority in support of his arguments that the Eighth Amendment precludes his execution for his 1976 crime for which he was convicted in 1993. This Court sent Mr. Hall's case back to the circuit court for further consideration in light of the fact that prior determinations were made under an unconstitutional standard. Indeed, allowing Mr. Hall the benefit of *Hall*, while precluding Mr. Thompson from even citing it in his arguments, would be arbitrary and constitute a violation of *Furman v. Georgia*, 408 U.S. 238 (1972). *Hall* should be found retroactive under the principles set out in *Witt*,

Prior Factual Determination and Presentation of Evidence Unconstitutionally Limited by Cherry

The State asserts that the lower court correctly determined that even if *Hall* does call for a re-examination of each case that was previously decided on an unconstitutional standard, *Hall* would still not apply to Mr. Thompson because he was given a hearing and the assessment of the evidence was proper (Answer Brief 60). However, the State's own arguments and factual assertions, and the lower court's analysis, demonstrate the unconstitutional assessment of the evidence in Mr.

Thompson's case. By way of example, the State argues that because Mr. Thompson "failed to present evidence that he had an *adult IQ score of 70* or below," his claim was properly denied (Answer Brief 61) (emphasis added). But, of course, an assessment of intellectual disability requires onset prior to age 18, and an adult IQ score of even 80 does not preclude a finding of intellectual disability. "[A] person with an IQ score above 70 may have such severe adaptive deficits" that his functioning is comparable "to that of individuals with a lower IQ score". *Hall* 134 S.Ct. at 2001, quoting the DSM-V. Further, the lower court found that "Thompson did not prove a single prong," including onset prior to the age of 18 (PCR-V. 127). But Thompson did present testimony from his eighth-grade teacher, William Weaver, that he was *diagnosed as mentally retarded in elementary school* (T1. 38-41). But this evidence was disregarded by the prior court. Although the prior court did not set out her reasons for rejecting the testimony from Mr. Thompson's teacher that he was identified as mentally retarded, a look at Thompson's IQ scores from childhood suggest the prior court was following the dictates of *Cherry*: Thompson scored a 75 on an IQ test on May 11, 1961 when he was six-years-old and a 74 when he was nine-years-old (T1. 39). Coupled with the teacher's testimony, it is hard to fathom how the prior court could have made a valid legal determination that this evidence failed to establish onset prior to age 18.

The same is true as to deficits in adaptive functioning. As noted by the State

in their Answer Brief, Weaver said Thompson had a "clunky walk," "poor motor skills" and a short attention span in school (Answer Brief 22). All told, then, the evidence in the state-court record provided substantial grounds to question [Thompson's] adaptive functioning. An individual, like [Thompson], who was placed in special education classes at an early age, was suspected of having a learning disability, and [had poor motor skills], certainly would seem to be deficient in both '[u]nderstanding and use of language' and '[l]earning'—two of the six 'areas of major life activity' identified [in adaptive testing instruments]." *Brumfield v. Cain*, 135 S. Ct. 2269, 2280 (2015). As such, the prior court's determination that Thompson failed to establish adaptive deficits must be viewed through the now-discredited analysis mandated in *Cherry*.

The State also argues that *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009), provides support because this Court in *Nixon* stated that *Cherry* did not preclude presentation of all three prongs (Answer Brief 61). However, a fair reading of *Nixon* demonstrates that this Court reaffirmed the principles of *Cherry* in *Nixon. Nixon* was as wrongly decided as *Cherry* and *Nixon's* validity is itself called into question.

The State argues that Mr. Thompson has already litigated his intellectual disability claim and is procedurally barred from addressing his intellectual disability "unless [he] can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding" (Answer Brief 60). To

the extent that this argument even merits a reply, Mr. Thompson sets forth the following. Although Mr. Thompson maintains that his prior evidentiary hearing regarding his *Atkins* claim was far from a full and fair hearing and all determinations regarding his intellectual disability were assessed under an unconstitutional standard, Mr. Thompson is not proceeding under a newly discovered evidence claim but the premise that notions of due process, fundamental fairness and the Eighth Amendment require that the dictates of *Hall* must be applied retroactively to Florida capital litigants like Mr. Thompson whose hearings were viewed through the unconstitutional distortion of the *Cherry* prism.

Additionally, the State further asserts that Mr. Thompson is not entitled to relief because the lower court in 2009 made findings as to all three prongs of his intellectual disability claim under the standard, which is now unconstitutional. The State is mistaken. As noted in Mr. Thompson's Initial Brief, the prior court did not meaningfully address the second and third prong of the *Cherry* standard after it was determined that Mr. Thompson did not meet the rigid first element (*See* PCR-IV 836). After four pages of analysis on the first prong, the prior court judge cursorily wrote, "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)). It cannot be said in any

way that those three sentences provide meaningful analysis of Mr. Thompson's evidence regarding his adaptive functioning and onset prior to age 18. Thompson's childhood struggles in elementary school and identification as mentally retarded and in need of education classes is the type of evidence which the scientific community would regard a supporting a finding of intellectual disability.

The State argues that Mr. Thompson's case is distinguishable from *Oats v. State,* 181 So. 3d 457 (Fla. 2015). In particular, the State argues that Mr. Thompson's point that during closing arguments the State called Thompson "a retarded bump on a log," (*See* R. 3084; Initial Brief 2), "actually misquotes what the State say[s]" and implies that the use of the language was taken out of context (Answer Brief 63). While it is true that many pages prior in the State's closing, the State belittles and mocks Mr. Thompson's mitigation, including Thompson's evidence that he is mentally retarded, and argues it should be rejected. However, the State did later unequivocally describe Thompson as a "retarded bump on a log" (Answer Brief 64; R. 3084).

Of course, at the time of Mr. Thompson's retrial, there was no bar to executing intellectually disabled people. So whether the State simply misspoke when he told the jury that Thompson was a retarded bump on a log without equivocation, or whether the State argued in the alternative in closing argument, the fact remains that the prosecutor did in fact make the statement in closing argument as set out in Mr.

Thompson's Brief. This Court scan presume the State means what it says when it tells a capital jury that a capital defendant is "retarded."

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

The State misapprehends Mr. Thompson's argument and thus mistakenly recharacterizes this claim as one of judicial bias and thus the issue is procedurally barred (Answer Brief 66-70). However, as explained in Thompson's Initial Brief, Thompson's descriptions of the judge's conduct "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" (Initial Brief 48).

Mr. Thompson is entitled to a full and fair hearing premised on *Hall.* In order for this Court to assess Thompson's argument, Thompson included in his Initial Brief detailed facts from the record concerning the circumstances surrounding the litigation of his initial *Atkins* claim. The State devoted 51 pages of her Answer Brief

to set out facts supporting the State's view of the history of this case. Mr. Thompson is also entitled to set out facts.

Argument II of Mr. Thompson's Initial Brief squarely addressed the ways in which the lower court tried time and again to deny Mr. Thompson's claim without full and fair consideration, again minimizing his disability. Without understanding the nuances of which witnesses testified and mentioning the tension between counsel and the lower court, this Court cannot fully appreciate that Mr. Thompson did not receive a full and fair hearing, and therefore is entitled to relief pursuant to *Hall*.

The State has asserted time and time again that Mr. Thompson was afforded a full and fair hearing and sweeps away challenges to the truncated hearing by citing state court evidentiary rules. However, in light of the Court's analysis in *Hall*, additional evidence from medical and scientific communities concerning how to assess and determine intellectual disability – such as that intended to be offered by Dr. Greenspan – would be proper and admissible and helpful to a court attempting to make a reasoned and informed judgment on a capital defendant's intellectual functioning.

Mr. Thompson's assertions could not be more in line with *Hall's* conception of the Eighth Amendment inquiry, which requires 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*. In order to assess Thompson's intellectual disability in line with *Hall*, Thompson should be allowed to present and have fairly considered the testimony of an expert who can explain the scientific and medical consensus of interpreting Mr. Thompson's lifetime of IQ testing, his adaptive functioning and his childhood diagnosis of mental retardation. The State's arguments must fail.

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 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.

CERTIFICTE 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 11th of March, 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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