IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-957

ROGER LEE CHERRY,

Petitioner,

v.

JULIE L. JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

PAMELA JO BONDI
ATTORNEY GENERAL

JAMES D. RIECKS
ASSISTANT ATTORNEY GENERAL
Florida Bar #0142077
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
Tel- (386) 238-4990
Fax- (386) 226-0457
James.Riecks@myfloridalegal.com
CapApp@MyFloridaLegal.com

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COME NOW the Respondents, by and through undersigned counsel, and respond as follows to Cherry's Petition for Writ of Habeas Corpus ("Petition"). For the reasons set out below, the petition should be denied in all respects.

FACTS

In its direct appeal decision affirming Cherry's convictions and sentence of death, this Court described the facts as follows:

> Roger Lee Cherry appeals his convictions of two counts of first-degree murder, one count of burglary with an assault, and one count of grand theft. He also appeals his sentences, which include imposition of the death penalty for each of the murder counts. We have mandatory jurisdiction. Art. V, § 3(b)(1), *Fla. Const.* We affirm Cherry's four convictions, affirm the death sentence as to one victim and vacate as to the other, vacate the noncapital sentences, and remand for resentencing.
>
> Cherry burglarized a small two-bedroom house in DeLand belonging to an elderly couple, Leonard Wayne and

Esther Wayne, during the late evening of June 27 or the early morning of June 28, 1986. When their son arrived for a visit about noon on the 28th, he noticed that their car was gone and a door to the house ajar. Upon entering the bedroom, he discovered his parents lying two feet apart on the bedroom floor, dead. Autopsies revealed that Mrs. Wayne died of multiple blows to the head and that Mr. Wayne died of cardiac arrest.

At the trial, the state's chief witness, Lorraine Neloms, testified that Cherry left the apartment which they shared between 11 and 11:30 p.m. on June 27, 1986, explaining that "he needed some money." He returned about an hour later with two or three rifles and a wallet which contained a bank card and a license identifying a man named Wayne. She asked where he had been and he responded that he went inside a house by the armory. The prosecutor then asked:

> Q. Did he tell you what happened inside the house?
>
> A: Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car.

Ms. Neloms further testified that Cherry bled from a cut on his right thumb, which he stated was the result of having cut a line.

Cherry left the apartment twice more that evening. The first time he went to a bank and on his return stated that a card was stuck in the machine. The second time, about fifteen minutes later, he left "to ditch the car he stole."

The following night, Cherry had Ms. Neloms drive by the car he had "ditched." She identified it as a light blue Ford Fairmount. They saw several police officers around the car and did not stop. After returning home, Ms. Neloms then learned of the murders. As she and Cherry watched the eleven o'clock news, television footage showed the car and house by the armory. She described Cherry as acting "[r]eal strange." Ms.

Neloms later went to the police and Cherry was arrested.

A Sun Bank supervisor then testified that the automatic teller machine three blocks from the Wayne residence captured a Master Card and a Sun Bank card belonging to the Waynes on June 28, 1986. Bank audit slips revealed that five or six transactions were unsuccessfully attempted between 1:55 and 2 a.m.

Police testimony indicated that the telephone wire outside the house had been cut at the junction box and that blood had been discovered on a piece of discarded paper near the box, on the walkway leading to the back porch, and on at least one of three jalousie panes found in a wooded thicket to the rear of the house. Those panes had been removed from the porch window. Cherry's blood was consistent with the blood found on the paper and the jalousie. Cherry's left palm print was found on the door frame at the entrance to the Waynes' bedroom and his left thumbprint appeared on one of the jalousie panes. However, a hair fragment was collected from the bedroom wardrobe and determined to be dissimilar to Cherry's known hair sample. Cherry was arrested on July 2 at his home, approximately three blocks from the Waynes' house. Police noted at that time that Cherry had a cut on his thumb, which he remarked was the result of having cut the head off a fish.

Finally, evidence was presented that the Waynes' Fairmount had been discovered abandoned in a wooded area within a mile of their house. Inside its locked trunk, police found a metal tray bearing Cherry's left thumbprint. Cherry's blood was consistent with blood identified on a towel recovered from the front seat of the car.

A jury convicted Cherry of the four crimes charged in the indictment. During the penalty phase, the state offered no additional evidence. The defense evidence was limited to a September 10, 1987, psychiatric evaluation by George W. Barnard, M.D. [FN1] The jury recommended the imposition of the death penalty by a 7-5 vote for the murder of Leonard Wayne and by a 9-3 vote for the murder of Esther Wayne.

> [FN1] Dr. Barnard reported that Cherry's father beat him severely and that his mother had alcohol problems. In the year before his arrest, Cherry smoked marijuana daily and smoked approximately $700 worth of "crack," the last time being on June 28, 1986.

The trial judge sentenced Cherry to death on both capital counts in accordance with the jury's recommendation, finding that the aggravating circumstances [FN2] far outweighed any mitigating circumstances. On the burglary count, he sentenced Cherry to a life term of imprisonment, and on the grand theft count, to a five-year term, with each to run concurrent with the other.

> [FN2] The court found that Cherry had been previously convicted of another felony involving the use and threat of violence, that is robbery; that the murders were committed while he was engaged in the commission of a burglary; that the murders were committed for pecuniary gain; and that the murders were "especially wicked, evil, atrocious or cruel."

Cherry v. State, 544 So. 2d 184, 184-86 (Fla. 1989).

PRIOR HABEAS PETITIONS AND POSTCONVICTION INTELLECUTAL DISABILITY PROCEEDINGS

Cherry previously filed a state court petition for writ of habeas corpus, which this Court described as follows:

> Cherry now raises several claims and subclaims in his petition for writ of habeas corpus. [FN2] The habeas petition, in large measure, attacks appellate counsel's actions in prosecuting the direct appeal in the late 1980s. It was in the direct appeal that this Court affirmed the convictions, affirmed the death penalty for Ester Wayne's murder, vacated the death penalty for Leonard Wayne's murder on proportionality grounds, and directed a life sentence be imposed in lieu thereof.

> [FN2] Cherry contends that (1) there was error in the trial court's consideration of Cherry's mitigation in that (a) the trial court failed to consider the psychiatric report, and (b) even if the trial court considered the psychiatric report, appellate counsel was ineffective for not arguing that (i) the sentencing order failed to discuss the mitigating circumstances, and (ii) the aggravating and mitigating circumstances should have been reweighed after this Court struck an aggravating circumstance on direct appeal; (2) appellate counsel should have argued that the trial court erred in excluding from evidence certain documents and that the prosecutor improperly bolstered a State's witness; (3) appellate counsel should have raised fundamental error relating to various prosecutorial comments and arguments; and (4) appellate counsel failed to argue juror misconduct.

Cherry v. Moore, 829 So. 2d 873, 875 (Fla. 2002). This Court ultimately denied Cherry's Petition for Habeas Corpus. *Id.* at 882 ("Having rejected all of Cherry's claims, we deny his petition for writ of habeas corpus.")

Cherry subsequently filed a successive *Florida Rule of Criminal Procedure* 3.851 motion, which he later amended to include a motion pursuant to *Florida Rule of Criminal Procedure* 3.203 which alleged Cherry was exempt from execution because he is mentally retarded. This Court described the procedural posture which led to the litigation of these claims as follows:

> On August 7, 1997, Cherry filed a second postconviction motion, raising five claims. [FN1] The circuit court held a *Huff* [FN2] hearing, after which it summarily denied all five of Cherry's claims. *State v. Cherry,* No. 1986-04473 (Fla. 7th Cir. Ct. order

dated Oct. 16, 2001) [*hereinafter* Postconviction Order I]. Following Cherry's motion for rehearing, the circuit court reversed part of its decision and granted Cherry's motion for an evidentiary hearing to address the claim of newly discovered evidence.

> [FN1] The claims raised by Cherry were: (1) he was denied access to important files and records by State agencies and offices; (2) newly discovered evidence would have altered the outcome of his trial; (3) inadmissible, inaccurate scientific evidence was improperly admitted at his trial; (4) execution by electrocution is cruel or unusual punishment or both; and (5) appellate lawyers should not be prohibited from interviewing trial jurors.
>
> [FN2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

. . .

After the hearing, the circuit court denied relief on this claim. *State v. Cherry,* No. 1986-04473 (Fla. 7th Cir. Ct. order dated Aug. 12, 2002) [*hereinafter* Postconviction Order II]. Cherry appealed the denial of his postconviction motion, raising two issues. [FN3]

> [FN3] Cherry raised the following issues on appeal: (1) newly discovered evidence existed, which if introduced at his trial, would have altered the outcome of the trial; and (2) certain scientific evidence was improperly admitted at his trial.

While review of the circuit court's decision was pending before this Court, Cherry filed a third motion for postconviction relief, based on the decisions in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The State filed a motion to relinquish jurisdiction on the basis of this third motion. On November 18, 2004, we relinquished jurisdiction to the circuit court for a determination of mental retardation pursuant to rule

> 3.203. The circuit court held a hearing on July 25, 2005, at which the defense presented evidence.
>
> Following this hearing, the circuit court found that Cherry did not meet the statutory definition for mental retardation. *Cherry v. State*, No. 86-4473 (Fla. 7th Cir. Ct. order filed Oct. 14, 2005) [*hereinafter* Supplemental Order].
>
> On November 2, 2005, we granted leave to Cherry and the State to supplement their initial briefs to this Court on the basis of the circuit court's determination that Cherry is not mentally retarded. Following oral argument on January 5, 2007, we now affirm the circuit court's denial of each of Cherry's claims.

Cherry v. State, 959 So. 2d 702, 704-705 (Fla. 2007). This Court affirmed the denial of Cherry's intellectual disability claim based upon the following finding that Cherry failed to demonstrate that he has significant subaverage general intellectual functioning:

> .. Cherry challenges the circuit court's determination that he is not mentally retarded in accordance with the definition set forth in section 921.137(1), *Florida Statutes* (2002)...
>
> Thus, Cherry must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, Cherry must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.
>
> The circuit court appointed two expert psychologists to test, examine, and evaluate Cherry for the court's mental retardation determination: Dr. Peter Bursten on behalf of the defense; and Dr. Greg Prichard on behalf

of the State. Both Dr. Bursten and Dr. Prichard submitted reports on their findings.

At the July 25, 2005, hearing, the defense first called Dr. Bursten to testify. Dr. Bursten stated that he interviewed Cherry, reviewed a large amount of background information, administered the Wechsler Adult Intelligence Scale, third edition (WAIS-III), and interviewed three people who knew Cherry before the offense. On the WAIS-III test Dr. Bursten administered, Cherry scored a full scale IQ of 72. On cross-examination, Dr. Bursten agreed that the two standard deviations language in the rule would place the mental retardation cutoff score at 70.

The defense then also called Dr. Prichard. Dr. Prichard also administered several tests, although he relied on the WAIS-III test administered by Dr. Bursten for Cherry's IQ score. Both Drs. Bursten and Prichard testified that the standard error of measurement (SEM) should be taken into account in every IQ analysis. Dr. Bursten stated:

> The concept of mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation. The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in.
>
> And the Diagnostic and Statistical manual which is what we - meaning the mental health professionals - rely on when arriving at diagnostic hypotheses. That manual guides us to look at IQ scores as being a range rather than absolute. And the manual talks about a score from 65, a band, so to speak, from 65 to 75 - and of course, lower than 65 - comprising mental retardation.

Several exhibits were also submitted by the defense. Among these exhibits were several presentence investigation reports throughout the defendant's life which included various IQ scores. [FN6] The defense rested, and the State produced no witnesses at the evidentiary hearing. Following the hearing, the circuit court denied Cherry's motion for a

determination of mental retardation. Supplemental Order at 15.

> [FN6] The following IQ scores were reported in the exhibits, in addition to the test administered in 2005: 71 on Kent test administered in 1968; 85 on Beta test administered in 1972; 79 on Kent test administered in 1976; 86 on Beta test administered in 1979; 68 on Beta test administered in 1987; 72 on WAIS-R test administered in 1992; and 78 on WAIS-R test administered in 1996.
>
> . . .
>
> Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.
>
> Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination. We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

Id. at 711-714. The United States Supreme Court again denied review. *Cherry v. Florida*, 552 U.S. 993 (2007).

Evidence Presented to the Trial Court Regarding Adaptive Deficits and Onset Before 18

Although this Court did not reach the merits of the second and third prong of Cherry's intellectual disability claim, Cherry did exercise his opportunity to present evidence to establish these prongs when he first presented his *Atkins* claim

to the postconviction trial court. The following summarizes the testimony of two mental health experts who testified at Cherry's first *Atkins* hearing regarding Cherry's adaptive functioning and onset before 18:

> Dr. Bersten reviewed extensive background material in evaluating Cherry that included the Department of Corrections (DOC) medical records. Dr. Bersten questioned Cherry concerning his adaptive functioning over the course of his life, paying particular attention to the years when Cherry was not incarcerated. (SR Vol.7 874-75).[1] Dr. Bersten administered the Scales of Independent Behavior, Revised (SIB-R). He conducted several telephone interviews with three informants and administered an adaptive functioning measure to one of those informants. (SR Vol.7 875).
>
> Dr. Bersten spoke with Cherry's fifth grade teacher as well as a social worker, (Ms. Henry) who worked with Cherry and his family during his childhood. Both of these people indicated Cherry was impaired and "essentially retarded." (SR, V7, R879-80).
>
> Dr. Bersten spoke with Cherry about his life prior to his incarceration. Dr. Bersten also spoke with Cherry's wife who lived with Cherry when he was in his 20's. The information they gave Dr. Bersten indicated Cherry's adaptive functioning was low. (SR, V7, R880).
>
> In diagnosing Cherry's adaptive behavior, Dr. Bersten relied primarily on Cherry's life during his pre-incarceration period. He also relied on Cherry's self-report and DOC records. (SR, V7, R888).
>
> Dr. Bursten administered the Vineland test, a standardized instrument, to Cherry's wife, Heddy Cherry. (SR, V7, R898). In administering this test, Dr. Bersten concentrated on Mr. Cherry's behavior from

[1] Citations to the 2005 trial court proceedings, Supreme Court record on appeal Case No. SC02-2023, are Supplemental Record "SR" followed by "V" for volume number, followed by R_ for page number.

age 24 to 26. (SR, V7, R898). Ms. Cherry rated the defendant with a behavior composite of below 20, "as low as you can get," a reflection of very impaired functioning. (SR, V7, R898-99). Ms. Cherry may have had perceptions that the defendant was more impaired than he was. (SR, V7, R900).

Although Dr. Bersten reviewed the DOC records regarding Cherry, he did not find any information that Cherry had a pen pal or a posting on a web site that Cherry was seeking pen pals. (SR, V7, R902). Cherry's actions are restricted in prison, but he is able to prepare food for himself. (SR, V7, R904). Cherry does have antisocial personality disorder. (SR, V7, R907-08). Cherry has worked in the kitchen in the prison. He also worked in a forestry operation operating large machinery, prior to his incarceration. (SR, V7, R915-16).

Cherry reported that he worked as a concrete finisher and built fence panels using a nail gun. (SR, V7, R919). He was trying to improve his reading skills and has had few disciplinary reports. (SR Vol.7 920). He has used the grievance procedure and the inmate's canteen. (SR, V7, R920-21). He is capable of using the medical call out procedure when he needs medical attention as is able to obtain medication refills. (SR, V7, R921). Although he may have requested the newspaper, Dr. Bersten is not sure whether or not Cherry could read or understand it. (SR, V7, R922).

Various bits of information revealed that Cherry was "slow, limited." People who are mentally retarded can have antisocial behaviors. (SR, V7, R931). Cherry's antisocial behavior and depression are factors that have also led to his poor adaptive functioning. (SR, V7, R932).

When he was young, Cherry did not fit in. He did not do well in school, was involved with drugs and criminal behavior. He never lived independently, and for most of his life, has been incarcerated and "just followed the rules." He has not taken any of the opportunities offered by DOC to grow, develop, or show some type of leadership. (SR, V7, R933). The Department of Corrections classifies Cherry as falling

within the range of borderline intellectual functioning. (SR, V7, R941).

There were no special education classes available to Cherry until after fifth grade. There were no indications in his records that he was socially promoted from grade to grade. (SR, V7, R941). He has followed the rules within the Department of Corrections and adapted well. Dr. Bursten believed Cherry is limited in his adaptive functioning and academic skills because he is mentally retarded not because he is antisocial. (SR, V7, R941-42).

Dr Greg Prichard, a licensed psychologist, conducts forensic evaluations for both the State and Defense. (SR, V7, R944, 945). Dr. Prichard was appointed by the court to conduct an evaluation of Cherry to determine if he was mentally retarded. (SR, V7, R947).

Dr. Prichard reviewed a vast amount of documents related to Cherry,[2] and evaluated him on May 25, 2005. (SR, V7, R947). Dr. Prichard interviewed Cherry and administered the Wide Range Achievement Test-Third Edition (WRAT), and spoke to a correctional officer in order to administer the Scales of Independent Behavior-Revised Edition (SIB-R).

Dr. Prichard discovered that a previous examiner had noted that Cherry "seems to be a very inadequate, borderline defective, having difficulty manipulating the moderately complex factors of his environment." (SR, V7, R963). This statement was made when Cherry was 17 years old, in the context of reporting a "Kent" IQ score. (SR, V7, R963). When Cherry was 20 years old, an examiner wrote, "he seems to be easily led by the dictates of his peers and allows his peers to make a pawn of him." Affidavits prepared by respondents who knew Cherry when he was younger reported that he was slow and mentally retarded. (SR, V7, R965).

Cherry reported that he was placed in special education classes and remained there until he dropped

[2] Dr. Prichard reviewed DOC records, affidavits, trial transcript proceedings, Supreme Court decisions, and Dr. Bersten's raw test data and report. He also reviewed Dr. Barnard's testing data. (SR, V7, R949).

out of school in 11th grade. (SR, V7, R965-66). A former guidance counselor (George Williams) recalled that Cherry was in an exceptional child program that administered to the mentally or emotionally maladjusted students. Cherry's achievement was extremely low and he was in need of constant supervision. (SR, V7, R967).

Dr. Prichard administered the SIB-R to Officer Paxon, a correctional officer familiar with Cherry's behavior and daily routine. (SR, V7, R957, 959). In Dr. Prichard's experience, correctional officers are good at communicating information. (SR, V7, R958). However, Officer Paxon had to estimate numerous times what Cherry could and could not do. (SR, V7, R987).

Officer Paxon's responses on the SIB-R indicated Cherry's adaptive skill level was a 51. The information Dr. Prichard received from Paxon was not only consistent with the anecdotal and historical information he had on Cherry, but "the most compelling piece of information ... that adaptive behavior testing that I received from the corrections officer." (SR, V7, R974-75). However, inmates in general, can increase their level of adaptive functioning. (SR, V7, R975-76). Dr. Prichard's ultimate conclusion regarding Cherry is "It is likely that he is mentally retarded." (SR, V7, R976). Further, "It is not definitive, but it is likely." (SR, V7, R977).

Cherry's pre-sentencing report indicated he was "of dull normal intelligence." (SR, V7, R979). Cherry's SIB-R that was administered to Officer Paxton, indicated Cherry's functioning was the equivalent of a 10-year-old. (SR, V7, R979, 980). This equated to 21 points below the IQ of 72. In Dr. Prichard's experience, the adaptive behavior score (SIB-R) and the IQ score are usually consistent. If there are huge disparities, then the results should be questioned. (SR, V7, R980, 981). The adaptive behavior Vinland score of 20 that Dr. Bersten obtained was an invalid score. (SR, V7, R981).

Cherry's work history indicated he worked as a concrete finisher and operated dangerous and complex equipment in the forestry industry. (SR, V7, R982). Cherry is capable of using the grievance procedure in

prison and has the ability to order items from the prison canteen. (SR, V7, R983, 984). He does not have many disciplinary actions against him. (SR, V7, R984). There is nothing in the DOC's records that indicates Cherry is not capable of feeding himself, dressing or grooming himself, or able to use the bathroom facilities unassisted. (SR, V7, R986).

Cherry worked at an apple plant in New York, working around heavy machinery. While it was not clear how he arrived in New York, Dr. Prichard agreed that Cherry is capable of moving around independently. (SR, V7, R990).

There was some indication that Cherry is teaching himself to read. He has a number of books in his cell at prison that are not consistent with a mentally retarded person. (SR, V7, R997, 998). Dr. Prichard could not say that Cherry was or was not mentally retarded based on the sophisticated facts of the crime in this case. (SR, V7, R1000).

The 2010 Successive *Atkins* Proceedings.

In 2010, Cherry filed his **fourth** post-conviction relief motion, which raised, for the second time, a claim that he is excluded from execution because he is intellectually disabled.[3] The evidentiary hearing regarding this motion generated a 600 page transcript consisting of the testimony of eight (8) mental health experts. The premise of that motion, and the subject of the testimony, was whether a more recent intelligence assessment instrument which had become available after the *Atkins* litigation was concluded allowed Cherry to relitigate his *Atkins*

[3] The first *Atkins* litigation was based on Cherry's score on the WAIS-III assessment instrument. The subsequent litigation was based on Cherry's score on the WAIS-IV assessment instrument, which was not in existence at the time of the first litigation.

claim. The postconviction court denied relief making the following findings:

> In this case, however, the Court finds that the test [the WAIS-IV] administered by Dr. Krop is not an accurate reflection of the Defendant's IQ when considered in light of the totality of results of prior testing over the years. **The Court also has significant concern with the objectivity of the test administrator, Dr. Krop, and the effort of the Defendant who was certainly aware of the purpose of the testing.**
>
> **The Court finds that the prior test results of Mr. Cherry, which were previously reviewed extensively, are as valid now as they were before administration of the WAIS-IV.**
>
> As to the issue of "newly discovered evidence," whether or not the WAIS-IV score is newly discovered evidence or not is very problematic. This point was not extensively argued by counsel, but it is obvious that the WAIS-IV test result did not exist until well after the Defendant had appealed this very issue to Florida's Supreme Court and his claim had been rejected. Logically, as research proceeds and these types of tests are refined future tests may well produce different results. In this case, however, it is undisputed that the WAIS-IV test was available to the public for administration in August 2008, almost two years prior to the claim made by the Defendant in this case. **This is well outside the time frame provided in Rule 3.851(d)(2), and the Court finds that the Defendant's claim is barred by virtue of his failure to timely raise the issue.**
>
> As a result of the foregoing, the Court denies the Defendant's motion.

(emphasis added). (V8, R1173-74).[4]

[4] Citations to the 2011 trial court proceedings, Supreme Court Case No. SC12-772 on appeal, are V_ for volume number followed by R_ for page number.

An extensive discussion of the testimony from the evidentiary hearing cannot be accomplished within the page limits established by this Court's Rules. However, while Cherry presented extensive testimony from experts regarding the development of the WAIS-IV as compared to the prior version of that intelligence assessment instrument (the WAIS-III), his counsel presented no testimony whatsoever to suggest that Cherry's score on the WAIS-III, which was previously rejected as a basis for finding him mentally retarded, was in any way inaccurate. Experts agreed the WAIS-III was the "gold standard" at the time it was administered to Cherry.

There was likewise no disagreement among the experts that, in order to diagnose an individual with mental retardation, three components must exist: significantly subaverage intellectual functioning, concurrent deficits in adaptive functioning, and onset before the age of 18. However, Cherry chose to focus exclusively on the intellectual functioning component and chose not to present any evidence concerning adaptive functioning and onset before 18.[5]

This Court affirmed the postconviction trial court's denial of relief in an opinion that states, in pertinent part:

[5] Neither the State nor the trial court took any action to prevent Cherry from presenting evidence concerning adaptive functioning or onset before 18.

> Roger Lee Cherry, a prisoner under sentence of death, appeal from the circuit court's order denying his successive motion for postconviction relief. *See Fla. R. Crim. P.* 3.851. . . . Cherry filed his fourth postconviction motion arguing that his test score on the WAIS–IV constituted newly discovered evidence of mental retardation. The circuit court held an evidentiary hearing and subsequently denied the claim. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1*), Florida Constitution*.
>
> Cherry raises two issues on appeal. First, he argues that his test score on the WAIS–IV constitutes newly discovered evidence that his mental retardation serves as a constitutional bar to a sentence of death. Secondly, Cherry argues that he was denied a full and fair hearing on the issue because the court refused to consider certain evidence. **Because Cherry failed to provide any evidence that demonstrates that his prior test scores were invalid and because Cherry failed to establish all three elements required to prove mental retardation, we hereby affirm the circuit court's order denying him postconviction relief.**

Cherry v. State, 114 So. 3d 932 (Fla.) (table) (emphasis added); *cert denied*, *Cherry v. Florida*, 134 S.Ct. 140 (2013).

Cherry's Amended Petition for Writ of Habeas Corpus, which was filed with the Federal District Court for the Middle District of Florida on July 8, 2013, is currently pending.

RESPONSE TO INDIVIDUAL CLAIM

> ***HALL V. FLORIDA*, 134 S.Ct. 1986 (2014) DOES NOT REQUIRE THIS COURT TO VACATE ITS DECISION IN *CHERRY V. STATE*, 959 So. 2d 702 (Fla. 2007) BECAUSE *HALL* DOES NOT APPLY RETROACTIVELY AND, EVEN IF IT DID, PETITIONER WOULD REMAIN UNABLE TO DEMONSTRATE THAT HE IS INTELLECUTALLY DISABLED.**

Cherry's Petition ultimately seeks to again relitigate his claim of intellectual disability based on the decision rendered in *Hall v. Florida*, 134 S.Ct. 1986 (2014). At the outset, Cherry is not entitled to relief because his Petition is untimely, barred by the law-of-the-case doctrine, procedurally barred, and generally an inappropriate vehicle under which to present this claim. Further, *Hall* is not a retroactive change in the law and is inapplicable to Cherry's case. Even if *Hall* was a retroactive change in the law, its holdings would have no affect on Cherry's intellectual disability claim because the trial court did in fact consider the standard error of measurement when evaluating Cherry's I.Q. scores and because Cherry was never precluded from presenting evidence of his adaptive deficits or onset before the age of eighteen. In fact, Cherry fully presented evidence relevant to these prongs at his first *Atkins* evidentiary hearing.

I. Habeas is Untimely and Not the Proper Vehicle Under Which to Present this Claim

Fla. R. Crim. P. 3.851(d)(3) provides:

> *All* petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, **including petitions for writ of habeas corpus**, shall be *filed simultaneously* with the *initial* brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule

(emphasis added). The plain language of Rule 3.851 requires the dismissal of Defendant's habeas petition. The rule makes no provision for any habeas corpus petitions filed long after the appeal on a defendant's initial motion for postconviction relief. *See Mann v. Moore*, 794 So. 2d 595 (Fla. 2001) ("all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion").[6] In addition, Cherry previously filed a habeas petition in this Court and there is no provision in Florida law for the filing of a successive habeas petition. Since the applicable rule provides for only one filing date, the rules do not permit the opportunity for successive petitions. As such, this successive petition is untimely and unauthorized. It must be dismissed.

Furthermore, the issue presented in the Petition is only cognizable in a motion for postconviction relief, provided the strict requirements of the rule relating to successive motions are met. Since Cherry is seeking factual findings which would require an evidentiary hearing, a postconviction motion, filed in the trial court, is the appropriate vehicle to request such a hearing. This Court cannot conduct an evidentiary hearing.

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[6] The substance of former Rule 9.140(b)(6) is now contained in Rule 9.142(a)(5), and essentially "mirrors" (*Mann*) the filing requirements for habeas petitions as set out in Rule 3.851(d)(3).

However, Cherry is not entitled to relief even under Rule 3.851. Cherry cannot meet the requirements for filing a successive motion; thus, he is precluded from bringing a successive motion for postconviction relief in the trial court. Rule 3.851(a) applies to "all *motions and petitions* for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal." (emphasis added). Rule 3.851(d) requires that, subject to certain exceptions, a motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within one year after the judgment and sentence become final. Rule 3.851(d)(2)delineates the exceptions to this time limit:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> > (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
> >
> > (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
> >
> > (C) postconviction counsel, through neglect, failed to file the motion.

Cherry is unable to invoke these exceptions. He certainly has no basis on which to invoke the first exception, since he is

alleging that he suffers from an intellectual disability, supported by a low IQ, low adaptive functioning, and onset before age eighteen. Further, Cherry cannot demonstrate that *Hall* applies retroactively.[7]

In addition to setting time limits for filing motions to vacate judgments of conviction and sentence, Rule 3.851 also distinguishes between initial and successive motions, setting forth more restrictive page limits and establishing more rigorous pleading requirements for successive motions. *See* Rule 3.851(e)(2). Limiting the scope of this Court's original jurisdiction has become necessary due to the practical difficulties experienced by this Court when it has decided to expand such jurisdiction in the past. *See Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999) (recognizing the expansion of original jurisdiction to alleviate burden on trial courts has been "neither time-saving nor efficient").

The right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992). The time limitations on out-of-time and successive petitions for writ of habeas corpus

[7] Discussed further in section IV, *infra*.

contained in Rule 3.851 are constitutionally reasonable.[8] And as this Court has said in countless opinions, habeas corpus is *not* a substitute for an appropriate motion for postconviction relief in the trial court, and is not a "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court. Last year, this Court reiterated that rule of law in the non-capital sector. *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (relying in part on capital cases in rejecting claim of non-capital defendants that limitation on access to successive habeas petitions is an unconstitutional suspension of the writ.)

In Cherry's case, his conviction and death sentence became final on August 16, 1989, with issuance of this Court's mandate.

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[8] See *Felker v. Turpin*, 518 U.S. 651 (1996)(finding that time limitations imposed for filing federal habeas petitions do not act as a suspension of the writ). It bears noting that capital defendants in federal court face similar time limits for filing habeas petitions and their right to file successive habeas petitions is likewise limited. Further, the restrictions on out-of-time motions contained in Rule 3.851(d)(2)(B) are very similar to the restrictions on successive federal habeas petitions contained in 28 USC Section 2244 (b)(2), which provides, in part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Cherry's successive/third motion for postconviction relief raising an intellectual disability claim was denied with a corrected order on October 13, 2005. Cherry filed his initial brief with this Court regarding the denial of said intellectual disability claim on March 30, 2006. This Court affirmed the trial court's ruling on April 12, 2007, and the Mandate issued on June 26, 2007. Defendant previously filed a petition for writ of habeas corpus with this Court which this Court denied on October 3, 2002. Cherry's original state habeas petition did not raise the intellectual disability claim raised herein. Because the rules of criminal procedure do not permit defendants to file successive or out-of-time habeas petitions, the instant Petition must be dismissed.

II. Law-of-the-Case Doctrine

In *Owen v. State*, 862 So. 2d 687, 694 (Fla. 2003), this Court explained the doctrine of the law of the case as follows:

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue*, 452 So.2d 550, 552 (Fla. 1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice,

> notwithstanding that such rulings have become the law of the case.

Owen, 696 So. 2d at 720. (citation omitted). Claims raised in a habeas petition which defendant has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition. *See Mann v. Moore,* 794 So. 2d 595, 600-01 (Fla. 2001); *see also Parker v. Dugger,* 550 So. 2d 459, 460 (Fla. 1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion....").

According to § 921.137(1), *Fla. Stat.* (2013), "the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning **existing concurrently** with deficits in adaptive behavior and manifested during the period from conception to age 18" (emphasis added). This statute led to the evaluation of the following three prongs which a capital defendant must establish to support a finding that the defendant suffers from an intellectual disability: 1) significantly subaverage general intelligence functioning; 2) deficits in adaptive functioning; and 3) onset before age eighteen. Defendant first pursued his claim of intellectual disability as a bar to execution in his Motion for Postconviction Relief filed pursuant to Rule 3.851,

which the trial court heard on July 25, 2005, and denied in a detailed order on October 13, 2005.[9] On April 12, 2007, this Court affirmed the trial court's ruling that the Defendant is not intellectually disabled holding:

> [W]e conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.
>
> Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination.

Cherry v. State, 959 So. 2d 702, 714 (Fla.), *cert denied*, *Cherry v. Florida*, 552 U.S. 993 (2007).

While this Court did not address the second and third prong of Cherry's intellectual disability determination, its finding that Cherry failed to meet the first prong of his intellectual

[9] On or about April 17, 2002, Cherry filed a successive postconviction motion. On July 31, 2002, Cherry requested leave to amend his post conviction motion based on the decisions reached in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Ring v. Arizona*, 536 U.S. 584 (2002) which were released after the filing of his postconviction motion. Cherry's request was granted August 6, 2002, and his amended motion was filed in October 2002. After a *Huff* hearing on December 20, 2002, the trial court directed the State to file a motion requesting this Court relinquish jurisdiction to allow the trial court to address issues raised in Cherry's amended motion. This Court relinquished jurisdiction to the trial court on November 19, 2004, to determine Cherry's timely filed claim of mental retardation.

disability claim should be considered the law of this case irrespective of the *Hall* decision because *Hall* does not apply retroactively and, even if *Hall* did apply retroactively, the postconviction trial court's evaluation of Cherry's claim was ahead of its time and happened to comply with the requirements of *Hall*. The postconviction trial court's order specifically indicates that it took the standard error of measurement into account when considering Cherry's IQ scores:

> This Court declines to perform a blanket change of the clearly stated IQ criteria, **however, the +/-5 standard of error is a universally accepted given fact and, as such, should logically be considered**, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.

(SR, V4, R533). (emphasis added). Ultimately, the trial court found that "based on the evidence, there appears a substantial probability that Roger Cherry's IQ is over 70," and that "Cherry has not proven that he meets the criteria for mental retardation by clear and convincing evidence" noting that Cherry "has consistently scored in excess of 70 over the years, with the majority of his IQ scores falling above 70 **even with the application of the +/- confidence interval**." (SR, V4, R540). (citation omitted)(emphasis added). Under these unique circumstances, granting the relief Cherry requests in his Petition would only lead to a third litigation of the same issue

that would ultimately reach the same conclusion, which would seem to be a clear violation of the valid public policy favoring the promotion of finality and efficiency in our judicial process.

Furthermore, any argument Cherry hopes to present concerning prongs two and three of his intellectual disability claim, which were completely unaffected by the *Hall* decision, are also procedurally barred under the law-of-the-case doctrine in light of this Court's affirmance of a subsequent trial court ruling. After hearing the evidence regarding Cherry's adaptive functioning during the evidentiary hearing held regarding Cherry's first *Atkins* claim, the postconviction trial court's found:

> . . . [I]t is not clear that the Defendant's concurrent adaptive deficiencies are due to an IQ below 71. Neither is it clear that deficits in adaptive behavior, given the Defendant's history, are significant enough to indicate mental retardation. To this Court, they appear evident, but not substantial. Additionally, the crimes Roger Cherry committed in the instant case are more sophisticated than those expected of a mentally retarded person. He managed to cut the telephone wires at the junction box outside the victim's home and removed three panes from the porch window prior to entry. Said acts demonstrate a certain degree of planning, as opposed to impulsivity. When questioned by police after the commission of the crimes about a cut on his finger, Roger Cherry responded that it was obtained when he was cutting the head off a fish. The Defendant also abandoned the car he had stolen from the victims. These actions demonstrate Roger Cherry's acknowledgement and appreciation of the wrongfulness of his actions at the time of the crimes.

(SR, V4, R541)(citations omitted).

Cherry also had a second opportunity to present evidence of adaptive deficits and onset before 18 when he was granted an evidentiary hearing regarding his successive motion for postconviction relief based on a newly discovered IQ test score of 64. The trial court held an evidentiary hearing pursuant to this motion on March 22, 2012, and in its order denying Cherry's motion, the trial court aptly noted, "regard[ing] any deficits in the Defendant's adaptive behavior as well as manifestation prior to 18, **this Court cannot offer any conclusions due to a lack of evidence**. The order entered previously by Judge Piggotte addressed both those issues and made extensive findings." (V8, R1173). (emphasis added). Assuming *arguendo* that Cherry's WAIS-IV score of 64 was conclusive proof that Cherry suffered from significantly subaverage general intellectual functioning at the time he took the WAIS-IV test,[10] Fla. Stat. §924.059 mandated the

[10] Respondents do not concede this point. In fact, Respondents contend this score is unreliable because of Dr. Krop's breach in protocol and Dr. Prichard's pattern analysis (V4, R449-462), and because the test's assessment of malingering is flawed when used on death row inmates, particularly inmates who have been appealing death sentences for many years and have taken multiple IQ tests. The TOMM (Test for Memory Malingering) is the protocol used to detect malingering; however, the TOMM was normed against civil plaintiffs seeking money damages for brain injuries. (V3, R418; V8, R1171-72). These classes of individuals are too dissimilar to instill reliability in the TOMM when used to measure the IQ of a death row inmate, particularly where: a) civil plaintiffs are not housed in the same facility like death

denial of Cherry's claim for exemption from the death penalty because Cherry utterly failed to present any evidence whatsoever that his alleged subaverage intellectual functioning caused deficits in his adaptive functioning or had onset before Cherry turned eighteen. Upon review, this Court affirmed the trial court's findings on appeal, holding:

> Because Cherry failed to provide any evidence that demonstrates that his prior test scores were invalid **and because Cherry failed to establish all three elements required to prove mental retardation**, we hereby affirm the circuit court's order denying him postconviction relief

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row inmates and are far less likely to meet and discuss IQ tests; b) civil plaintiffs are less likely to have taken multiple IQ exams, as is often the case with death row inmates; and c) civil plaintiffs are not necessarily convicted felons who are *per se* impeachable and, as a group, more likely to be intellectually dishonest, particularly when the results can mean the difference between life and death.

Further, the manner in which the TOMM is administered makes it relatively easy to identify. The TOMM has its own separate set of test materials, including its own separate answer sheet. (V3, R378). It has changed little during its development - it contained 50 questions in WAIS III and 50 of the same kind of questions in WAIS IV. (V1, R79-80). Further, the fifty TOMM questions involve simple memory questions while other parts of the actual IQ test present increasingly difficult questions or challenge the test taker by limiting the time allowed to complete a set of tasks to determine how quickly the test taker was able to complete the tasks. *Id.*, (V4, R451-60).

Based on the configuration of the TOMM, coaching a death row inmate to underperform on a WAIS IQ test is as simple as advising, "Do your best on the easy part that the administrator gives you separately, but underperform on the rest." While no grounds are known to exist to support a claim that Cherry was coached, if a single inmate has ever been coached, there is no way of knowing how far that information has spread without a study as to communications within the jails and death row.

Cherry v. State, 114 So. 3d 932 (Fla.) (table); *cert. denied*, C*herry v. Florida*, 134 S.Ct. 140 (2013)(emphasis added).

The Eleventh Circuit has also addressed the law-of-the-case doctrine. In *United States v. Tamayo*, 80 F.3d 1514, 1520 (11th Cir. 1996), the Eleventh Circuit stated, "[a]n appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also as to issues decided necessarily by implication on the prior appeal." Consequently, "an appellate decision on an issue must be followed in all subsequent trial court proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." (quoting *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985)). Thus, there are three exceptions to the law-of-the-case doctrine: (1) the evidence in a subsequent trial is substantially different; (2) there is a change in controlling law; or (3) the prior decision was clearly erroneous and would result in manifest injustice. *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996). The trial court's multiple denials of Defendant's motions for bar of execution based on intellectual disability, and this Court's multiple affirmances of same, became the law of the case. Because none of the exceptions apply

to the law of the case, it would proper, and is necessary, for this Court to dismiss Defendant's petition for writ of habeas corpus.

III. Procedural Bar

Defendant's *Atkins* claim has been already been raised on appeal; once on appeal from the denial of his motion filed pursuant to *Fla. R. Crim. P* 3.203 and again on appeal from his successive postconviction motion filed pursuant to *Fla. R. Crim. P.* 3.851. Cherry cannot litigate the merits of an issue through a habeas petition to relitigate the merits of claims that should have been or have been raised below. *See Preston v. State,* 970 So. 2d 789, 805 (Fla. 2007); *Knight v. State,* 923 So. 2d 387, 395 (Fla. 2005); *Rodriguez v. State,* 919 So. 2d 1252, 1280 (Fla. 2005) (stating that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). [H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). *See also Doyle v. Singletary*, 655 So. 2d 1120 (Fla. 1995) (determining that although Doyle's trial counsel preserved the issue at trial by objecting and proposing new jury instructions, his appellate counsel failed to pursue the issue on direct appeal, thus making

it procedurally barred in habeas proceedings). Since Defendant has twice raised this issue on the appeal of two separate motions filed below, it is now procedurally barred and relief must be denied.

IV. *Hall v. Florida*, 134 S.Ct. 1986 (2014) does not Apply Retroactively.

Defendant's reliance upon *Hall* in support of his Petition is based upon his belief that the decision in *Hall* constitutes a retroactive change in the law. This belief is misguided. In *Hall*, the United States Supreme Court determined that Florida's interpretation of its statute defining intellectual disability was unconstitutional and might result in a violation of *Atkins v. Virginia*, 536 U.S. 304 (2002) where the standard error of measurement ("SEM") is not taken into consideration for IQ scores - most commonly from the Wechsler Adult Intelligence Scale (WAIS). As a result, a defendant with a full scale score between 70 and 75 must be permitted the opportunity to present, and have considered, evidence concerning the second two factors in the intellectual disability analysis, namely, concurrent deficiency in adaptive behavior and manifestation of the condition before age eighteen. *See Hurst v. State*, 147 So. 3d 435, 441 (Fla. 2014); *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); §921.137, Fla. Stat. (2012); *In re Henry*, 757 F.3d 1151, 1158, 1161 (11th Cir. 2014); *see also Mays v. Stephens*, 757 F.3d

211, 217-19 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 951 (2015) (rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). *Hall* did not create a new constitutional right. *Atkins* created the constitutional right. *Hall* is merely an application of *Atkins* to the particular facts of Hall's case. The Supreme Court held that Florida should not have precluded Hall from presenting other evidence of his intellectual disability based solely on a full scale score of 71. Defendant has never been precluded from presenting evidence of his alleged intellectual disability.

Hall does not apply retroactively in Florida or in Federal court. As an initial matter, the United States Supreme Court made no mention in the *Hall* opinion itself that the decision was intended to apply retroactively. Moreover, a new decision with constitutional implications is not automatically retroactive; it must meet certain criteria under Florida or federal law.

In Florida, once a criminal conviction has been upheld on appeal, the application of a new rule to that conviction is very limited. As noted by this Court in *Wuornos v. State*, 644 So. 2d 1000, 1007 n.4 (Fla. 1994), "new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." In short, cases are presumed to be prospective only. *Id.* A new rule of law will not apply retroactively unless it meets the criteria in

Witt v. State, 387 So. 2d 922 (Fla. 1980). *Hernandez v. State*, 124 So. 3d 757, 763-64 (Fla. 2012) (holding *Padilla v. Kentucky*, 559 U.S. 356 (2010), does not apply retroactively in Florida). In *Witt*, the Florida Supreme Court held that a new rule of law does not apply retroactively to final convictions unless the change "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. While *Hall* meets the first two prongs of the analysis, it fails to meet the third prong of *Witt*, and thus, does not apply retroactively.

The third prong of *Witt* is a two-part analysis. "A decision is of fundamental significance when it either: (1) places beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) when the rule is of sufficient magnitude to necessitate retroactive application." *Hernandez*, 124 So. 3d at 764. *Hall* did not create a new class of individuals upon whom the states could not impose the death penalty. Rather, it recognized that defendants with a 70 to 75 WAIS full scale score are not *per se* immune from execution. Instead, those defendants must be afforded the opportunity to establish the other two prongs of intellectual disability. Hence, Hall did not place beyond the State the power to impose the death penalty upon a class of persons.

Additionally, *Hall* is not of "sufficient magnitude" to necessitate retroactive application. In making that assessment, the courts consider three factors: "(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." *Hernandez*, 124 So. 3d at 764 (Fla. 2012). As a general matter, courts have "rarely found a change in decisional law to require retroactive application." *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001) (noting that between 1980 and 2001, the Court had decided over sixty retroactivity cases at that time, and "this Court rarely finds a change in decisional law to require retroactive application").[11]

[11] This Court has held:

> Normally, a new rule which is not a fundamental change in the law, but merely an evolutionary refinement is generally applied prospectively to most cases, retrospectively to certain nonfinal cases ("pipeline" cases), but never to final cases. In order for an advantageous decisional change to be fully retroactive to final cases on collateral review, it must be of constitutional nature, a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval[ ]." *Witt v. State*, 387 So. 2d 922, 925, 929, 931 (Fla. 1980); *see State v. Callaway*, 658 So. 2d 983 (Fla. 1995). A mere "evolutionary refinement" will not abridge the finality of judgments because to do so would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30.

This Court has recognized that numerous decisions from the United States Supreme Court that provided new developments in constitutional law were not retroactive. *See Johnson v. State*, 904 So. 2d 400 (Fla. 2005), *cited in Chandler v. State*, 75 So. 3d 267 (Fla. 2011) (finding that under the *Witt* factors, *Ring v. Arizona*, 536 U.S. 584 (2002) does not apply retroactively to Florida death row inmates whose convictions and sentences were final at the time of the decision); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005) (holding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply retroactively); *Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011) (holding *Porter v. McCollum*, 558 U.S. 30 (2009) is not retroactive); *Dennis v. State*, 109 So. 3d 680, 703 (Fla. 2012) (citing *Chandler v. Crosby*, 916 So. 2d 728, 729-31 (Fla. 2005) and finding *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply retroactively).

The application of non-retroactivity to new constitutional decisions that have interpreted even the most sacred of constitutional protections, such as the right to confrontation and fundamental due process, is in keeping with the interest in finality of judgments. This Court has observed:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial

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Mitchell v. Moore, 786 So. 2d 521, 529 (Fla. 2001).

> resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.

Witt, 387 So. 2d at 925. Clearly, making new rules broadly applicable retroactively to all final cases would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Id*. at 929-30. The *Hall* decision fails under the first two prongs of the "sufficient magnitude" factors: (a) the purpose to be served by the new rule; and (b) the extent of reliance on the old rule.

First, new rules of law that constitute "evolutionary refinements" with the purpose of "affording new or different standards for procedural fairness and for other like matters," do not require retroactive application. This stands in contrast with "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding;" rules whose purposes require retroactive application. *Witt*, 387 at 929. Here, *Hall* is an example of an evolutionary refinement in procedural law. *Hall* did not invalidate Florida's statute or procedural rules that define intellectual disability. Further, *Hall* did not redefine

intellectual disability to expand or contract the spectrum of defendants who may fall into the category of the intellectually disabled. The definition of intellectual disability under this Court's jurisprudence remains unchanged. The law still requires that a defendant establish: (1) deficiency in intellectual functioning two standard deviations below the mean (i.e., 70 or below, taking into account the SEM); (2) deficiency in adaptive functioning; and (3) onset of the first two prongs before age eighteen. *Hall* simply found Florida's procedural mechanism for defendants to prove intellectual disability was unconstitutionally applied to a facially constitutional statute in Hall's case. *Hall* created a prospective precedent to guide lower courts in complying with *Atkins*. A defendant with a 70 to 75 full scale IQ score on a WAIS test is not deemed automatically intellectual disabled. Rather the defendant must be afforded the opportunity to prove the second and third prongs of the intellectual disability statute. *See e.g. Rodgers v. State*, 948 So. 2d 655, 667 (Fla. 2006). *Hall* is not the type of "jurisprudential upheaval" that compels retroactive application. *See Johnson*, 904 So. 2d at 412.

Second, there has been extensive reliance on the old rule regarding the strict cut-off score of 70 or below prior to *Hall*. *See Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007). Subsequent to that opinion, numerous cases have relied on that decision.

See, Diaz v. State, 132 So 3d 93, 120 (Fla. 2013); *Snelgrove v. State*, 107 So. 3d 242 (Fla. 2012); *Dufour v. State*, 69 So.3d 235, 246-47 (Fla. 2011); *Franqui v. State*, 59 So.3d 82, 92-94 (Fla. 2011); *Kilgore v. State*, 55 So.3d 487, 509-10 (Fla. 2010); *Nixon v. State*, 2 So.3d 137, 142 (Fla. 2009); *Phillips v. State*, 984 So.2d 503, 510 (Fla. 2008); *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007); *Cherry v. State*, 114 So. 3d 932 (Fla. 2013) (unpublished disposition); *Quince v. State*, 116 So. 3d 1262 (Fla. 2012) (unpublished disposition), *cert. denied*, *Quince v. Florida*, 134 S.Ct. 2695 (2014); *Thompson v. State*, 41 So. 3d 219 (Fla. 2010) (unpublished disposition); *Walls v. State*, 3 So. 3d 1248 (Fla. 2008) (unpublished disposition). Prior to *Hall*, the bright-line cutoff score of 70 for establishing the first prong of intellectual disability was enforced consistently.

Third, the retroactive application of *Hall* would be burdensome to the administration of justice and incentivize successive litigation even for those defendants who have been afforded the opportunity to present all three prongs of intellectual disability. Such litigation will unnecessarily tie up judicial resources and create a significant financial burden. Retroactive application of *Hall* would mean new evidentiary hearings even for those defendants whose claims have been rejected previously by this Court. This Court should find that *Hall* is not retroactive.

A finding of non-retroactivity is supported by *In re Henry*, 757 F.3d 1151, 1158-61 (11th Cir. 2014) where the Eleventh Circuit opined that Henry was not entitled to a successive federal habeas corpus review in part because "[i]t is undeniable that the rule pronounced by the Supreme Court in *Hall* was not made retroactive to cases on collateral review. *Hall* made no mention of retroactivity. Nor has any subsequent Supreme Court case addressed the issue, much less made *Hall* retroactive." In its decision, the Eleventh Circuit noted:

> . . . no combination of Supreme Court holdings compels the conclusion that *Hall* is retroactive to cases on collateral review. *See In re Dean*, 375 F.3d 1287, 1290 (11th Cir.2004) (opinion by the panel) ("Multiple cases can, together, make a rule retroactive, but only if the holdings in those cases necessarily dictate retroactivity of the new rule." (emphasis added)). *Atkins* had *Penry*, but there are no Supreme Court cases here that necessarily dictate that the *Hall* rule is retroactive. The Supreme Court has never held that a rule requiring procedural protections for prisoners with IQ scores within the test's standard of error would be retroactive. Nor does the *Penry* principle—that any rule placing a class of individuals beyond the state's power to execute is retroactive-apply here because *Hall* merely provides new procedures for ensuring that States do not execute members of an already protected group. *Cf. In re Morgan*, 713 F.3d at 1368 (concluding that the Supreme Court had not made the rule in *Miller v. Alabama*, --- U.S. ----, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), retroactive for purposes of § 2244(b) because the rule did not impose a categorical bar to a type of punishment, but instead "changed the procedure by which a sentencer may impose a sentence of life without parole on a minor"). The Supreme Court made clear in *Hall* that the class affected by the new rule—those with an intellectual disability—is identical to the class protected by *Atkins*. *See Hall*, 134 S.Ct. at 1990 ("This Court has

> held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242.... [Florida's] rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."). *Hall* did not expand this class; instead, the Supreme Court limited the states' power to define the class because the state definition did not protect the intellectually disabled as understood in *Atkins*. *Hall*, 134 S.Ct. at 1986 (looking to *Atkins*, 536 U.S. at 309 n. 5, 122 S.Ct. 2242, in reaching the "Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower' ... may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning"). Moreover, even if we could say, as the dissent suggests, that *Hall* expanded the class of individuals described in *Atkins*, it did not categorically place them beyond the power of the state to execute. Instead, *Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief. Therefore, *Penry* in no way dictated that the rule announced in Hall is retroactive to cases on collateral review. The long and the short of it is that the rule announced by the Supreme Court in Hall has not been made retroactive. In the absence of any such ruling from the United States Supreme Court, we are without power to grant leave to file a second or successive petition.

In re Henry, 757 F.3d 1151, 1158-61 (11th Cir. 2014) (footnotes omitted). Defendant has not shown, nor is he able to show that *Hall* has retroactive application. Consequently, relief must be denied.

V. The Postconviction Trial Court's Ruling is not Contrary to the Holding in *Hall v. Florida,* 134 S.Ct. 1986 (2014).

Even if *Hall* applied retroactively, its holding does not conflict with the manner in which Cherry's *Atkins* claim has been adjudicated. The postconviction trial court did not prohibit Cherry from presenting evidence of adaptive functioning and age of onset. Rather, Cherry was given two opportunities to present such evidence, did in fact present such evidence once, and the trial court considered this evidence when ruling that Cherry is not intellectually disabled as defined by §921.137 Florida Statutes. Furthermore, the postconviction trial court went beyond what was required of it at the time and considered the SEM when evaluating the first prong of Cherry's *Atkins* claim. *Hall* does not establish a right to a second hearing and, nonetheless, Cherry received exactly what *Hall* requires. Defendant's claim that *Hall* confers to him the right to relitigate his *Atkins* claim is meritless and his Petition should be denied. *In re Hill*, 777 F.3d 1214, 1224 (11th Cir. 2015); *Mays*, 757 F.3d at 218-19.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the Respondents submit that the claim contained in Cherry's Petition should be dismissed or, alternatively, denied on the merits.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ JDRL

JAMES D. RIECKS
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax No. (386) 226-0457
James.Riecks@myfloridalegal.com
CapApp@MyFloridaLegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by E-Mail to Linda McDermott, Esquire, lindammcdermott@msn.com, McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118-61, Estero, FL 33928 on this 16th day of June, 2015.

/s/ JDRL

Of Counsel