IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-957

ROGER LEE CHERRY,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY

Respondent sets forth 4 distinct procedural arguments as to why Cherry's petition should not be considered: 1) the petition is untimely and improper; 2) the law of the case doctrine precludes reconsideration of the issue; 3) a procedural bar exists; and 4) Hall v. Florida, 134 S.Ct. 1986 (2014), is not retroactive. And, Respondent argues that this Court's previous determination in Cherry's case is not inconsistent with Hall.

However, first, Cherry submits that Respondent's argument illogically fails to recognize that in reversing Hall, the U.S. Supreme Court overruled this Court's opinion in Cherry's case. Therefore, to ignore the impact of Hall only compounds the error and further violates the Eighth Amendment.

I. TIMELINESS & HABEAS CORPUS

Respondent argues that Cherry's habeas petition is untimely and not the proper vehicle under which to present this claim". Response at 18. Respondent relies on Fla. R. Crim. P. 3851(d)(3) which does not provide for the filing of successive petitions for writ of habeas corpus. Response at 19.

However, Art. I, § 13 of the Florida Constitution provides:

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in the case of rebellion or invasion, suspension is essential to the public safety.

Art. I, § 13, Fla. Const. This Court authorized the filing of petitions for writs of habeas corpus in Fla. R. App. P. 9.100:

> (a) Applicability. This rule applies to those proceedings that invoke the jurisdiction of the courts described in

> rules 9.030(a)(3), (b)(2), b(3), (c)(2) and (c)(3) for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, **and habeas corpus**, and all writs necessary to the complete exercise of the courts' jurisdiction; and for review of non-final administrative action.
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> (b) Commencement; Parties. The original jurisdiction of the court shall be invoked by filing a petition accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction. If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state. If the petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.

(emphasis added). Authorization for petitions for writs of habeas corpus filed in this Court is clear from cross referencing Rule 9.030(a)(3), which provides:

> The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. The supreme court of any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit court.

These rules have been in effect for many years. On the basis of these rules, many successive habeas petitions have been filed with this Court. At no time were these petitions found to be "unauthorized," nor did the Respondent argue that the successive petitions were "unauthorized." See Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Martin v. Dugger, 515 So.2d 185 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Darden v. Dugger, 521 So.2d 1103 (Fla. 1988); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989); Martin v. Singletary, 599 So.2d 121 (Fla. 1992); Kennedy

v. Singletary, 602 So.2d 1285 (Fla. 1992); Mills v. Singletary, 606 So.2d 623 (Fla. 1992); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993); Mills v. Singletary, 622 So.2d 943 (Fla. 1993); Atkins v. Singletary, 622 So.2d 951 (Fla. 1993); Marek v. Singletary, 626 So.2d 160 (Fla. 1993); Roberts v. Singletary, 626 So.2d 168 (Fla. 1993); Lambrix v. Singletary, 641 So.2d 847 (Fla. 1994); Porter v. State, 653 So.2d 374 (Fla. 1995); Doyle v. Singletary, 655 So. 2d 1120 (Fla. 1995); White v. Singletary, 663 So.2d 1324 (Fla. 1995); Jones v. Butterworth, 691 So.2d 481 (Fla. 1997); McCray v. State, 699 So.2d 1366 (Fla. 1997); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999); Glock v. Moore, 776 So.2d 243 (Fla. 2001); Mills v. Moore, 786 So.2d 532 (Fla. 2001); Johnston v. Moore, 789 So.2d 262 (Fla. 2001); Downs v. Moore, 801 So.2d 906 (Fla. 2001); King v. State, 808 So.2d 1237 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002); Diaz v. Crosby, 869 So.2d 538 (Fla. 2003); Haliburton v. Crosby, 865 So.2d 480 (Fla. 2003); Trepal v. Crosby, 846 So.2d 405 (Fla. 2003); Valle v. Crosby, 859 So.2d 516 (Fla. 2003).[1]

Clearly, this Court has repeatedly and regularly entertained successive petitions for writs of habeas corpus filed on behalf of death sentenced individuals. In fact, this Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Wilson v. Wainwright,

[1]This list is by no means exhaustive.

474 So.2d 1163, 1165 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine its confidence in the fairness and correctness of capital trial and sentencing proceedings. Pursuant to its mandatory jurisdiction over capital cases, this Court has the inherent power to do justice in any case in which a sentence of death has been imposed.

Successive habeas petitions have been found by this Court to be authorized. Respondent's argument that successive petitions are no longer authorized is premised upon Rule 3.851(d)(3). See Response at 19.

Respondent overlooks Rule 2.130, Fla. R. Jud. Admin. In fact, this Court in Mann v. Moore, 794 So.2d 595 (Fla. 2001), observed that "Florida Rule of Judicial Administration provides that the Rules of Appellate Procedure control all proceedings in this Court when there is a conflict in any rules of procedure." Mann, 794 So.2d at 598.[2] Thus, if Rule 9.030(a)(3), conflicts with Rule 3.851(d)(3), the former controls.

Furthermore, habeas corpus and Rule 3.850/3.851 are not interchangeable remedies for the vindication of deprivations of constitutional rights. Rather, the vehicle by which a defendant raises the deprivation of a constitutional right depends on where the alleged constitutional violation occurred – during the

[2]The habeas petition filed in Mann v. Moore was successive. Before Mann received penalty phase relief, he had petitioned this Court for habeas relief and was denied. The petition at issue in Mann v. Moore was filed after he again received a death sentence.

proceedings in the trial court or in the appellate court.

For example, when a defendant seeks to vindicate a right that affects the appellate process, habeas corpus remains the appropriate vehicle, as the trial courts have no power or authority over appellate courts. See Baker v. State, 878 So.2d 1236, 1242 (Fla. 2004)(noting that habeas corpus is the appropriate remedy in those circumstances "where the petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence, or **where the original sentencing court would not have jurisdiction to grant the collateral postconviction relief requested even if the requirements of the rule had been timely met**")(emphasis added)(footnote omitted).

In Baker, this Court addressed the issue of non-capital defendants who were raising challenges to their convictions and sentences directly to this Court via petitions for writs of habeas corpus. The ultimate holding in Baker, however, on its face does not apply in the context of capital defendants. Baker, Id. at 1239 n.3 ("nothing in this opinion should in any way be interpreted as placing any limitations on this Court's **mandatory jurisdiction** to review the propriety of a first-degree murder conviction and resulting sentence of death")(emphasis added). Thus, Respondent's reliance on Baker is misplaced. See Response at 22. Indeed, the recognition in Baker that petitions for writs of habeas corpus are the proper means of raising constitutional claims that the trial court may not entertain in Rule 3.850 proceedings weighs in favor of the propriety of bringing Cherry's

claim in a petition for writ of habeas corpus.

Within the area of capital collateral litigation, this Court has historically exercised its authority to entertain issues brought not only by death-sentenced inmates but also by the State of Florida in a variety of collateral procedural postures. Indeed, this Court has noted that it has "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." State v. Fourth District Court of Appeal, 697 So.2d 70, 71 (Fla. 1997). See also State v. Matute-Chirinos, 713 So.2d 1006 (Fla. 1998); Trepal v. State, 754 So.2d 702 (Fla. 2000).

This Court has also addressed the propriety of whether a Rule 3.850 was the proper vehicle in which to raised an issue relating to the constitutionality of this Court's direct harmless error analysis. Not only did this Court find that Rule 3.850 was not the proper vehicle in which to raise the challenge, this Court put all capital defendants on notice that such claims were improperly raised in a Rule 3.850 motion and should be raised via habeas corpus because a "postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues related to the trial court proceedings, not appellate decisions." Foster v. State, 810 So.2d 910, 916 (Fla. 2002). See also Shere v. State, 742 So.2d 215, 218 n.7 (Fla. 1999)(finding that defendant's claim challenging this Court's harmless error analysis on direct appeal cannot be raised in a motion for postconviction relief).

Here, the U.S. Supreme Court has overturned this Court's

ruling in Cherry's case:

> It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. See *Cherry v. State*, 959 So.2d 702, 712-13 (Fla. 2007)(*per curiam*). That strict IQ test score cutoff is the issue in this case.
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> ***
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> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

Hall, 134 S.Ct. at 1994-5. Therefore, because it is this Court's opinion that was reversed, Cherry has appropriately requested that this Court reconsider its decision in light of Hall.

Further, contrary to Respondent's assertion, Cherry is not requesting a factual determination from this Court. See Response at 19.[3] Rather, he is relying on facts that were developed at his prior hearings, including the unrefuted medical evidence that he suffers from intellectual disability (ID).

II. LAW OF THE CASE DOCTRINE

Respondent argues that the law of the case doctrine precludes this Court's review of Cherry's claim. Response at 23-

[3]Remarkably, Respondent asserts that Cherry must raise his claim in a Rule 3.851 motion, but then immediately argues that "Cherry cannot meet the requirements for filing a successive motion". Response at 20. Respondent does not acknowledge that if he cannot raise his claim in a petition for writ of habeas corpus or Rule 3.851 motion, he has essentially been cut-off from litigating the issue decided in Hall which specifically reversed this Court's decision in his case. Such a result would violate Cherry's constitutional rights.

4. However, according to Respondent, regardless of any intervening facts, opinions or circumstances, once a court has made a decision, that decision cannot be reversed. Response at 24. According to Respondent, no litigant could ever obtain a reversal for any reason, even in a case where a court made an erroneous decision which was later reversed by a reviewing court, which is what occurred in Cherry's case.

However, even in the case cited by Respondent, Owen v. State, 862, So.2d 687, 694 (2003), this Court held:

> 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."

There is no dispute that the U.S. Supreme Court's decision in Hall reversed this Court's decision in Cherry v. State, 959 So.2d 702 (2007). Surely, such an exceptional circumstance requires that this Court revisit it's decision. Indeed, there is no greater manifest injustice than to execute an intellectually disabled individual based on a strict cut-off score that a consensus of our society regards as improper or inhumane. Hall, 134 S.Ct. at 1998.

In urging this Court to accept the circuit court's order as the "law of the case", Respondent argues that Hall is limited to the issue of standard error of measurement (SEM) and the circuit court considered SEM. Response at 26. Respondent also asserts that the other prongs of the definition were "unaffected" by Hall. Response at 26-7. Respondent's position is not supported

by fact or law.

First, a review of the circuit court's order makes clear that the court required that in order to establish ID, Cherry must demonstrate that his IQ met the magic number of 70 (SPC-R3. 540)(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.").[4] Such a finding is directly contrary to Hall which holds: "Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." Hall, 134 S.Ct. at 1995.

And, Respondent ignores Cherry's argument, in which he identified the errors of the circuit court in relation to the other prongs. See Petition at 29-33. In rejecting Cherry's claim, the circuit court relied upon inappropriate and irrelevant considerations rather than what "experts in the field would consider" when diagnosing ID. Hall, 134 S.Ct at 1995.[5]

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[4]Additionally, the circuit court relied on test instruments that are not accepted in the scientific community for determining mental retardation. See Petition at 20, n.18; 29-30.

[5]Indeed, this week, in Brumfield v. Cain, - U.S. -, 2015 WL 2473376 (June 18, 2015), the U.S. Supreme Court reviewed a habeas petitioner's Atkins claim in the 28 U.S.C. § 2254 context. The Court noted that the state court's reliance on a diagnosis of antisocial personality disorder (ASPD), which was used to

Contrary to Respondent's argument, Cherry presented a plethora of evidence that he met all of the prongs for ID.

III. PROCEDURAL BAR

Respondent also argues that Cherry is not entitled to relitigate a claim or litigate a claim that could have been raised below. Response at 31. However, Respondent ignores the fact that Hall overruled Cherry v. State, 959 So.2d 702 (Fla. 2007). Thus, Cherry's claim is not barred since he has never been provided a review of his case in accordance with the principles set forth in Hall. Hall requires that Cherry be provided "a fair opportunity to show that the Constitution prohibits [his] execution." 134 S.Ct. at 2001. Due to this Court's ruling in 2007, he has never had that opportunity.

IV. RETROACTIVITY

In arguing that Hall is not retroactive, Respondent states:

> *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. ...
>
> *Hall* does not apply retroactively in Florida or in Federal Court.

Response at 33.

Under Witt v. State, 387 So.2d 922 (Fla. 1980), "changes of

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contradict the allegation that Brumfield suffered from adaptive deficits, was inappropriate. Citing to the DSM-IV, the Court stated: "The relevance of this diagnosis is, however, unclear, as an antisocial personality disorder is not inconsistent with any ... areas of adaptive impairment or with intellectual disability more generally" Slip op. at 14. Similarly, the circuit court rejected Cherry's Atkins claim, in part, on the basis that he could not establish adaptive deficits due to his diagnosis of ASPD.

law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" are retroactive Id. at 929. And presumably, the State does not contest that rule when asserting: "Atkins created the constitutional right." (Response at 33). Clearly, the State seeks to draw a line between the retroactivity of Atkins v. Virginia, 536 U.S. 304 (2002), 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. Under Witt v. State, both Atkins and Hall must apply retroactively.

Furthermore, both this Court and the U.S. Supreme Court have applied Hall retroactively. In Haliburton v. State, Case No. SC12-893, this Court entered an Order following Hall stating: "Upon reconsideration of this matter as ordered by the United States Supreme Court in Haliburton v. Florida, 135 S. Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203.".

Further, in Brumfield v. Cain, - U.S. -, 2015 WL 2473376 (June 18, 2015), the U.S. Supreme Court held it was unreasonable and contrary to well-established federal law to refuse to conduct an evidentiary hearing on an Atkins claim where the capital

defendant had attained an adjusted IQ score of 75. The U.S. Supreme Court specifically relied on Hall in its opinion. Thus, both this Court and the U.S. Supreme Court have already applied Hall 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).[6] 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.

Moreover, to not apply Hall retroactively and deny Cherry 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 Cherry's right to equal protection and due process. 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). Cherry was convicted for a crime occurring in June, 1986. The trial occurred in 1987. His conviction and one of his sentences of death were affirmed in

[6]While Hall is retroactively applicable as placing beyond the authority of the State the power to execute certain individuals, Cherry includes this argument for completeness.

1989. Cherry v. State, 544 So.2d 184 (Fla. 1989). Thus, Cherry's conviction and sentence has remained final since 1989. There can be no valid basis for giving 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 Cherry the ruling in Hall, as additional authority in support of his arguments that the Eighth Amendment precludes his execution for his 1986 crime for which he was convicted in 1987. Allowing Hall the benefit of Hall, while precluding Cherry would be arbitrary and constitute a violation of Furman v. Georgia, 408 U.S. 238 (1972).

Further, Respondent argues that Hall had little impact on Florida's procedural rules or statutory definition of ID and is simply "a prospective precedent to guide lower courts in complying with *Atkins*." Response at 38. Respondent's argument fails to understand that Hall made clear what the Eighth Amendment required in the context of determining ID: "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." Hall, 134 S.Ct. at 1998. In fact, according to Hall: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." Id. at 1999. Simply put, the states are not free to ignore the medical community's clinical definition of ID, 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." Id. 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.

Respondent also argues that applying Hall to Cherry's case will be burdensome, financially and as to judicial resources, since so many courts relied on Cherry. Response at 39. First, there are only a handful of cases in which the cut-off adopted in Cherry was applied to other defendants' cases. More importantly, the Respondent requests that this Court overlook whether a capital defendant who is intellectually disabled, according to two experts whose opinions were not countered, may be executed in order to promote finality? Cherry urges this Court to answer that question recognizing "its duty to teach human decency as the mark of a civilized world." Hall, 134 U.S. at 2001.

V. HALL OVERRULED CHERRY

Finally, Respondent argues that Hall is not inconsistent with Cherry. Response at 42. Respondent's argument that Cherry "received exactly what Hall requires" is absurd. Hall made clear that this Court's decision in Cherry's case 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. Cherry submits

that the problem in Hall was that this Court's opinion 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. Excluding it from consideration as to whether a capital defendant's ID precludes a death sentence without some logical basis premised upon reason was unconstitutional. Cherry 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.

Moreover, it was not simply this Court's rejection of Cherry's experts' clinical opinion relating to IQ score, but also the circuit court's comments related to the other prongs of the definition, adaptive deficits and onset, and rejection of uncontroverted expert testimony that Cherry is intellectually disabled that is inconsistent with Hall.[7]

CONCLUSION AND RELIEF REQUESTED

> 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.

Hall 134 S.Ct. at 2001. Based on Hall, Cherry respectfully urges that the Court vacate its 2007 opinion and vacate his unconstitutional sentence of death.

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[7]Contrary to Respondent's assertion, Cherry did present evidence of his adaptive skills. See Response at 16. Cherry's evidence and expert's opinions were "informed by the medical community's diagnostic framework." Hall, 134 S.Ct. at 2000.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Habeas Corpus has been furnished by electronic service to James Riecks, Assistant Attorney General, on June 26, 2015.

/s/. Linda McDermott
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This petition is typed in Courier 12 point not proportionately spaced.

/s/. Linda McDermott
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