Supreme Court of Florida

Tallahassee, Florida

OMAR BLANCO,	*	**CASE NO.: SC17-330**
	*	
Appellant,	*	L.T. No.: 061982CF000453A88810
	*	
vs.	*	
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
_____/		

APPELLANT'S INITIAL BRIEF

Respectfully submitted,

/s/ Ira W. Still, III

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INTRODUCTION

Appellant Omar Blanco is an intellectually disabled prisoner on Florida's death row. Florida Courts would not have recognized him as intellectually disabled before the United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), because his IQ scores fell in the range of 71-75, which were above Florida's pre-*Hall* cutoff. Mr. Blanco filed a successive Rule 3.851 motion within one year of *Hall* and proffered unrebutted expert evidence that he is, in fact, intellectually disabled within the meaning of *Hall*.

After initially granting an evidentiary hearing, the trial court reversed itself and summarily denied Mr. Blanco's claim of intellectual disability on procedural grounds. Because Mr. Blanco's allegations of intellectual disability "are not conclusively refuted by the record," this Court "must accept [them] as true." *Ventura v. State*, 2 So.3d 194, 197-98 (Fla. 2009). As such, the question here is whether Florida Courts will provide any forum for a death row inmate who is intellectually disabled within the meaning of *Hall* to develop the factual record and receive a merits determination on his claim that he is categorically ineligible to be executed. Mr. Blanco requests that this Court reverse the trial court's procedural bar ruling and remand the case for an evidentiary hearing.

STATEMENT OF THE CASE

On February 2, 1982, Appellant Omar Blanco was indicted for first-degree murder and armed burglary in the Broward County Circuit Court. *Blanco v.* State, 452 So.2d 520, 523 (Fla. 1984). Mr. Blanco was convicted on both counts and the jury voted 8 to 4 to impose a death sentence. *Id.* The trial court sentenced Mr. Blanco to death for murder, and to a seventy-five year term of imprisonment for armed burglary. *Id.* This Court affirmed. *Id.* at 526.

Mr. Blanco next filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The Circuit Court denied relief, and this Court affirmed. *Blanco v. State*, 507 So.2d 1377, 1380 (Fla. 1987).

On September 16, 1987, Mr. Blanco filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The District Court granted Mr. Blanco's petition in part, ordering that Mr. Blanco was entitled to a new penalty phase proceeding. *Blanco v. Dugger*, 691 F.Supp. 308, 311 (S.D. Fla. 1988). The Eleventh Circuit affirmed. *Blanco v. Singletary*, 943 F.2d 1477, 1479 (11th Cir. 1991).[1]

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[1] On August 1, 1989, Mr. Blanco filed a second Rule 3.850 motion in state court that was mooted by the federal court's grant of penalty-phase relief. Shortly before Mr. Blanco's re-sentencing hearing began, he filed a third Rule 3.850 motion based on new evidence that another man, Enrique Gonzales, was the actual killer. The Circuit Court denied relief and this Court affirmed. *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997).

On April 18, 1994, Mr. Blanco's resentencing proceedings began. The jury voted 10 to 2 to impose a death sentence and the Circuit Court again imposed death. *Blanco v. State*, 706 So.2d 7, 23298 (Fla. 1997).[2] This Court affirmed. *Id.* at 11.

Mr. Blanco next filed a fourth Rule 3.851 motion (his first after the resentencing). *See Blanco v. State*, 963 So.2d 173 (Fla. 2007). The Circuit Court denied the motion without a hearing and this Court again affirmed. *Id.* at 176, 180. On August 31, 2007, Mr. Blanco filed a new federal habeas corpus petition challenging his new sentencing judgment. The District Court denied Mr. Blanco's petition. *Blanco v. Buss*, No. 07-CV-61249, 2011 WL 9933763 (S.D. Fla. 2011). The Eleventh Circuit affirmed. *Blanco v. Sec'y*, 688 F.3d 1211 (11th Cir. 2012).

On May 27, 2014, the United States Supreme Court issued its decision in *Hall v. Florida*, 134 S. Ct. 1986, which held Florida's intellectual disability definition unconstitutional due to its bright-line IQ score cutoff without consideration of the "standard error of measurement" (SEM).

On May 26, 2015, within one year of the issuance of *Hall*, Mr. Blanco filed a successive Rule 3.851 motion alleging that, under *Hall*, he was intellectually

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[2] The Circuit Court found that Mr. Blanco established the statutory mitigating circumstance of impaired capacity and eleven additional non-statutory mitigating circumstances including "dull intelligence" and "organic brain damage." *Blanco*, 706 So.2d at 9 n.7.

disabled and therefore ineligible for execution. *See* R16-40[3] (5/26/15 Successive Rule 3.851 Motion). Specifically, Mr. Blanco alleged that he satisfies the intellectual disability criteria; that his IQ scores fall within the SEM range, rendering him unable to have raised a claim of intellectual disability prior to *Hall*; and that *Hall* should be applied retroactively. *Id.*

Along with his motion, Mr. Blanco submitted an appendix of materials, which included multiple mental health reports and other supporting materials documenting his longstanding intellectual disability. *See* R41 (5/26/15 Notice of Filing Attachments to Successive Rule 3.851 Motion).[4] Among the documents was a 2015 report from Dr. Antonio Puente diagnosing Mr. Blanco with intellectual disability under the appropriate legal and clinical definitions based upon his record review, clinical interview, and updated testing. *See* SR164-80 (Puente Report).

After the State filed its response, the Circuit Court issued an order on September 21, 2015, finding that *Hall* applies retroactively to cases on collateral review and that Mr. Blanco had alleged sufficient facts to warrant an evidentiary hearing on his intellectual disability claim. R112 (9/21/15 Order at 5).

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[3] The record on appeal is cited as R__.

[4] The attachments themselves do not appear to have been included in the record on appeal. Appellant is separately filing a supplement to the record along with this brief that is comprised of the attachments, which is cited as SR__.

Shortly after the Circuit Court issued its order, the State filed a motion for rehearing, arguing that the Circuit Court misapprehended the timing and retroactivity requirements of Rule 3.851 and that Mr. Blanco should be faulted for failing to raise his intellectual disability claim in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002). R119-20 (10/1/15 Rehearing Motion at 4-5). After Mr. Blanco responded to the State's motion, the Circuit Court denied the State's rehearing motion on November 16, 2015. R174-75 (11/16/15 Order).

On August 11, 2016, the State filed a second rehearing motion based exclusively on this Court's unpublished two-page order in *Rodriguez v. State*, No. SC15-1278. R424-37 (8/11/16 Second Rehearing Motion). In *Rodriguez*, this Court upheld a trial court's summary dismissal on timeliness grounds of an intellectual disability claim filed in the wake of *Hall* because "there was no reason Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*."[5] *Rodriguez*, No. SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016).

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[5] In the interim, on January 12, 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Mr. Blanco filed a timely amendment to his Rule 3.851 motion to add a *Hurst* claim, R319-35 (4/18/16 *Hurst* Amendment), which the Circuit Court denied. Mr. Blanco timely appealed to this Court. Following a show-cause order regarding the *Hurst* claim and Mr. Blanco's response, this Court directed that Mr. Blanco only brief the non-*Hurst* related issues in this case. Mr. Blanco accordingly does not include argument related to his *Hurst* claim. He does not, however, waive or abandon it. Mr. Blanco requests further briefing on the *Hurst* claim and submits that relief is appropriate as set forth in his show-cause-order response.

On January 24, 2017, following further briefing and argument regarding the State's second reconsideration motion, the Circuit Court issued a two-page order granting the State's motion and summarily denying Mr. Blanco's Rule 3.851 motion. *See* R530-31 (1/24/17 Order). This timely appeal followed.

SUMMARY OF ARGUMENT

Omar Blanco is intellectually disabled and is, thus, categorically ineligible to be executed. *Atkins v. Virginia*, 536 U.S. 304. Mr. Blanco proffered evidence that satisfies all three prongs of a finding of intellectual disability: he suffers from significantly subaverage intellectual functioning, he suffers deficits in adaptive functioning, and the onset of his deficits occurred during the developmental period. Accordingly, he is categorically ineligible to be executed.

Before the United States Supreme Court decided *Hall*, Mr. Blanco could not have proven his intellectual disability, because Florida's pre-*Hall* standard was unconstitutionally restrictive, requiring that the person "has an IQ of 70 or below." *Zack v. State*, 911 So.2d 1190, 1201 (Fla. 2005) (citing *Cherry v. State*, 781 So.2d 1040, 1041 (Fla. 2000)); *see also* Fla. Stat. 921.137(1) (2001) ("performance that is two or more standard deviations from the mean"). Mr. Blanco's IQ scores fall into the 71-75 range, scores that qualify him as intellectually disabled after *Hall* but did not before *Hall*. Had Mr. Blanco raised an intellectual disability claim under the pre-*Hall* standard, it would have been denied on the merits.

This Court's decision in *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776 (Fla. 2016), does not control. Mr. Blanco could not have raised his intellectual disability claim after *Atkins*, as he could not make out a *prima facie* case under Florida law. Finally, under *Atkins* and *Hall*, Mr. Blanco is categorically ineligible for execution under the Eighth and Fourteenth Amendments. No state-law waiver provision can trump this constitutional prohibition.

ARGUMENT:

OMAR BLANCO IS A PERSON WITH AN INTELLECTUAL DISABILITY AND SHOULD BE PERMITTED TO PROVE IT AT AN EVIDENTIARY HEARING; THE CIRCUIT COURT'S SUMMARY DENIAL BASED ON A PROCEDURAL BAR WAS ERRONEOUS.

A. Mr. Blanco Is Intellectually Disabled.

In 2001, the Florida Legislature passed a statute barring the death penalty for mentally retarded individuals.[6] *See* Fla. Stat. § 921.137(1) (2001). The following year, in *Atkins v. Virginia*, 536 U.S. 304, the United States Supreme Court ruled that the Eighth Amendment likewise categorically bars the execution of mentally retarded individuals. As the Court put it, "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in the areas of reasoning,

[6] "Mental retardation" was the then-current term. Today, the accepted term is "intellectual disability." The two terms have identical meanings.

judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306.

While *Atkins* categorically barred the execution of intellectually disabled individuals, it left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). In response to *Atkins*, this Court set forth the procedures for bringing a claim of intellectual disability in Florida Rule of Criminal Procedure 3.203, which provides, in pertinent part:

> As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B–4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Fla. R. Crim. P. 3.203(b) (2004); *accord* Fla. Stat. § 921.137(1). The definition is broadly similar to the prevailing clinical definition, which "defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and

adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall*, 134 S. Ct. at 1994.

In a report that Mr. Blanco presented below, Dr. Antonio Puente concluded that his "clinical interview, testing, and a review of the available records reveal that Mr. Blanco suffers from intellectual disability under the relevant clinical and legal definitions." SR166 (Puente Report at 3). Mr. Blanco pled sufficient facts to satisfy all three prongs of the intellectual disability definition, and is thus entitled to an evidentiary hearing, as the trial court initially ordered. Notwithstanding the trial court's ultimate decision to deny an evidentiary hearing, this Court must, on this record, accept that Mr. Blanco is intellectually disabled. *See Ventura v. State*, 2 So.3d 194, 197-98 (Fla. 2009) (holding that this Court "must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record" where trial court summarily denies a Rule 3.851 motion).[7]

1. Mr. Blanco Suffers from Significantly Subaverage General Intellectual Functioning.

"[S]ignificantly subaverage general intellectual functioning" is "performance that is two or more standard deviations from the mean score on a standardized

[7] Because "a trial court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the legal sufficiency of the claims asserted or the adequacy of the existing record to resolve the claims, its ruling is tantamount to a pure question of law, subject to de novo review." *Rose v. State*, 985 So.2d 500, 505 (Fla. 2008).

intelligence test." Fla. R. Crim. P. 3.203(b). Because standardized IQ tests have a mean of 100 and a standard deviation of approximately 15 points, "a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, *i.e.*, a score of approximately 70 points." *Hall*, 134 S. Ct. at 1994.

Further, the "professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." *Id.* at 1995. As such, IQ scores must be considered in tandem with their SEM, generally considered to be plus or minus 5 points. *Id.*; *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) ("Accounting for this margin of error, Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability.").

Mr. Blanco's lifetime history of IQ test scores places him in the intellectually disabled range. Mr. Blanco was first administered a full-scale IQ test in 1964 or 1965 (age 14 or 15), as a child in Cuba. A mental health report authored by Dr. Gerardo Nogueira Rivero indicates that Mr. Blanco was administered a Wechsler Adult Intelligence Scale (WAIS) at that time. *See* SR14 (Nogueira Rivero Report at 3). Although it contained no numerical score, the report noted a diagnosis of "retraso mental ligero," or "light mental retardation." *Id.*

Mr. Blanco was again administered a WAIS in 1986 by Dr. Gladys Lorenzo, on which he received a full-scale score of 80. *See* SR17 (Lorenzo Report at 3). In 1988, Mr. Blanco was administered a WAIS-Revised edition (WAIS-R) by Dr. Dorita Marina, on which he scored a 75. *See* SR46 (Marina Report at 5). In 1993, Mr. Blanco was administered another WAIS-R by Dr. Lee Bukstel, who did not indicate a numerical score, but reported Mr. Blanco's full-scale score as being "at the high end of the borderline range. With standard error of measurement being considered, this person's intellectual functioning could rate as high as being just within the low average range." SR36 (Bukstel Report at 8). Dr. Bukstel further noted that "[o]n another intellectual screening measure involving analogous reasoning and visuo-ideational functioning, this person's performance rate into the mild mental deficiency range." *Id.* Most recently, Dr. Antonio Puente administered a WAIS-III (Mexican version), on which Mr. Blanco once again received a full-scale score of 75. *See* SR166 (Puente Report at 3).

Mr. Blanco thus has at least two full-scale IQ scores within the intellectually disabled range, along with an unreported score that resulted in him being diagnosed with "light mental retardation" as a teenager. In his recent report, Dr. Puente concluded Mr. Blanco is intellectually disabled under current clinical and legal standards. *Id.* Mr. Blanco has thus put forth sufficient evidence to support his

entitlement to an evidentiary hearing on the significantly subaverage general intellectual functioning prong.

2. Mr. Blanco Suffers from Deficits In Adaptive Behavior.

Adaptive behavior refers to "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fla. R. Crim. P. 3.203(b). Although Mr. Blanco was denied a hearing, and was thus unable to fully develop the record of his adaptive deficits, he proffered a substantial amount of documentary evidence in the Circuit Court to demonstrate his deficits:

Mr. Blanco was born in a rural area of the Matanzas Province of Cuba; he suffered from a lack of oxygen at birth. SR15, 17 (Lorenzo report at 1, 3). Mr. Blanco "suffered from epileptic-type seizures as a youth. During these seizures, Mr. Blanco would fall to the floor kicking and screaming, his tongue would roll back and he would lose oxygen until his face turned blue." SR20 (Lorenzo Report at 6). These episodes "would occur spontaneously during stressful situations, during which he would also speak unintelligibly and beat his head against the wall." *Id.* He would also "lose control of his bladder while sleeping." *Id.* This problem persisted until he reached puberty. SR22 (Melendez Report at 1).

Mr. Blanco suffered a series of severe head traumas as a child. At age seven, he "suffered a cranial trauma with loss of consciousness for around twelve hours

after falling off of a horse." SR30 (Bukstel Report at 2). At age thirteen, he "suffered another cranial trauma from a tree [fall] where he had loss of consciousness for various hours." *Id.* He had yet another loss of consciousness of unspecified cause later in his teenage years. SR31 (Bukstel Report at 3).

As a teenager, his mother described him as "act[ing] peculiarly on occasions in that he appeared to be 'absent from the world.'" SR30 (Bukstel Report at 2). In Cuba, "it was recommended that he work in simple and concrete labor jobs due to his cerebral organicity and intellectual deficit." SR40 (Bukstel Report at 12).

Mr. Blanco left Cuba in 1980 at age 30 and came to the United States, where he was arrested in short order. He has been in prison for 36 years—virtually the entire time he has spent in the United States—and has thus not had to care for himself or navigate independently in this country for any meaningful period.

When Dr. Lorenzo tested Mr. Blanco in 1986, when he was 35 years old (and already incarcerated), she reported that her clinical testing "indicated extremely poor contact with reality, immaturity and infantile characteristics." SR17 (Lorenzo Report at 3). Dr. Lorenzo concluded that Mr. Blanco was "an immature and insecure person who has an inability to control impulses, poor planning ability, and poor contact with reality under stress." SR19 (Lorenzo Report at 5). She noted that Mr. Blanco "appeared to be incompetent to stand trial." SR20 (Lorenzo Report at 6).

During a 1992 clinical interview, Mr. Blanco reported to Dr. Marina that he "has difficulty understanding things that he reads and he can remember from hearing better than from seeing and that he has trouble remembering either way." R48 (Marina Report at 9). Dr. Marina reported that "[t]he quality of processing information for Omar Blanco is unsophisticated and immature. It is common among children and adolescents, but not adults. This can be precursor to ineffective patterns of adjustment." R51 (Marina Report at 10). She further concluded that Mr. Blanco "presents a significant deficit in perceptual accuracy as exists when reality testing is impaired." *Id.* He "may display higher than usual frequency of behavior disregarding social demands or expectations because he tends to over-personalize in translating stimuli. Another contributing source may be significant problems in perceptual accuracy and/or mediational distortion that creates potential for the unconventional behavior." *Id.*

During a 1993 mental status examination as part of a clinical examination, Dr. Maulion reported that Mr. Blanco could not perform calculations, proverb interpretation, or similarities. SR28 (Maulion Report at 3). Dr. Maulion described Mr. Blanco's abstract reasoning ability as "quite impaired." *Id.*

During another 1993 clinical examination, Dr. Bukstel noted that Mr. Blanco's "[c]omplex abstract reasoning/problem solving is significantly impaired," as was his "[i]mmediate auditory memory/attention span." SR36, 37 (Bukstel

Report at 8, 9). On a measure of "verbal list learning/memory, his performance was significantly impaired overall." *Id.* at 37. Overall, Dr. Bukstel noted that Mr. Blanco's "poorest performances are evident in the areas of complex abstract reasoning/problem solving, complex perceptual motor problem solving, rhythm patter perception/discrimination, simple and complex sequencing/conceptual flexibility, auditory attention/concentration and mental control, broad-based rhythm arithmetic, receptive vocabulary, analogous reasoning and visuo conceptual shifting, and verbal list learning/memory." SR40 (Bukstel Report at 12). Dr. Bukstel concluded that Mr. Blanco "appears to have an organic brain syndrome characterized by both neurocognitive and neurobehavioral deficits." SR41 (Bukstel Report at 13).

Following his more recent evaluation of Mr. Blanco, Dr. Puente noted that, despite having lived in the United States for more than three decades, Mr. Blanco speaks virtually no English. SR164 (Puente Report at 1). Dr. Puente concluded that Mr. Blanco suffers from significant adaptive deficits in the areas of functional academics, social and interpersonal skills, personal care, and self-direction. SR166 (Puente Report at 3). Dr. Puente further concluded that Mr. Blanco "was unable to cope in any unfamiliar situation and was unable to successfully direct himself as an independent adult." *Id.* Mr. Blanco has put forth substantial evidence to support his entitlement to an evidentiary hearing on the adaptive deficits prong.

3. The Age of Onset of Mr. Blanco's Intellectual Disability was Prior to Age 18.

Mr. Blanco's intellectual disability manifested prior to age 18. As noted above, he was first diagnosed with "light mental retardation" as a teenager in Cuba. SR14 (Nogueira Rivero Report at 3). Moreover, Mr. Blanco "suffered several severe head traumas prior to age eighteen." SR166 (Puente Report at 3). Mr. Blanco has thus put forth sufficient evidence to support his entitlement to an evidentiary hearing on the final prong of the intellectual disability definition as well.

B. Mr. Blanco's Rule 3.851 Motion Was Timely Filed.

Pursuant to Florida Rule of Criminal Procedure 3.851(d)(1), motions for postconviction relief must ordinarily be filed within one year of the judgment and sentence becoming final. However, under Florida Rule of Criminal Procedure 3.851(d)(2)(B), a postconviction motion is timely even if not filed within one year where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). Mr. Blanco's motion meets that exception.

Mr. Blanco could not have made out a *prima facie* case that he is intellectually disabled under Florida law before *Hall*. Florida did not recognize intellectual disability as a prohibition to execution until it created a statutory prohibition in 2001. *See* Fla. Stat. 921.137(1) (2001). That statute—like the case law that preceded and followed it—included an IQ cutoff of 70 to qualify as intellectually disabled. *Id.*

("two or more standard deviations from the mean"); *Cherry*, 781 So.2d 1040 (cutoff of 70, so full scale 72 does not qualify); *Zack*, 911 So.2d at 1201 (cutoff of 70); *Cherry*, 959 So.2d at 712-13 (same). Notwithstanding the United States Supreme Court's 2002 decision in *Atkins v. Virginia*, 536 U.S. 304, Mr. Blanco could not meet Florida's intellectual disability standard had he sought relief after *Atkins* because his qualifying IQ scores all fall within the SEM range (71-75). Otherwise put, the claim was not "available" to him before *Hall* because, without considering the standard error of measurement, his claim had no possibility of merit. *See In re Cathey*, 857 F.3d 221, 232 (5th Cir. 2017).

On May 27, 2014, the United States Supreme Court held in *Hall* that Florida's rule requiring a strict IQ cutoff of 70 or less "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 134 S. Ct. at 1990. As such, Mr. Blanco's Rule 3.851 motion is based on, and was filed within one year of, *Hall*'s issuance. Because this Court has since determined that *Hall* applies retroactively, *see Walls v. State*, 213 So.3d 340 (Fla. 2016), Mr. Blanco's motion is timely. *Chandler v. Crosby*, 916 So.2d 728, 733 (Fla. 2005) (Wells, J., concurring) (successive rule 3.851 motion properly filed if filed "within a year of a decision which holds that the new rule is to be applied retroactively"); *cf. Clark v. State*, 35 So.3d 880, 892 (Fla. 2010). This Court should remand Mr. Blanco's case for an evidentiary hearing.

The Circuit Court nonetheless summarily denied Mr. Blanco's motion based on its reading of *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776. The Circuit Court's application of *Rodriguez* to Mr. Blanco was erroneous. Mr. Blanco's Rule 3.851 motion is distinguishable from Rodriguez's because Mr. Blanco's qualifying IQ scores fell exclusively within the range (71-75) made available to Florida capital defendants by the *Hall* decision whereas Mr. Rodriguez's did not. *Rodriguez* does not control. Even assuming, *arguendo*, that *Rodriguez* controls, it was wrongly decided, is inconsistent with Florida law, and is contrary to the position the State advocated prior to *Hall*'s issuance. Finally, this Court should rule that Mr. Blanco is entitled to raise his claim of intellectual disability because the Eighth Amendment does not permit the waiver of an intellectually disabled defendant's right not to be executed.

1. *Hall* Applies Retroactively.

In *Walls v. State*, 213 So.3d 340, this Court concluded that *Hall* should be applied retroactively. A change in law will only apply retroactively if 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." *Walls*, 213 So.3d at 346 (defining "[d]evelopments of fundamental significance" to include "changes of law that . . . place beyond the authority of the state the power to regulate certain conduct or impose certain penalties").

Hall clearly emanates from the United States Supreme Court and is constitutional in nature. *Id*. This Court found the third prong met because "the *Hall* decision removes from the [S]tate's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below." *Walls*, 213 So.3d at 346. Under *Hall*, the State is prohibited from imposing "the sentence of death for individuals with a broader range of IQ scores than before." *Id.* Mr. Blanco is one of those individuals. Because *Hall* applies retroactively, Mr. Blanco's Rule 3.851 motion was timely filed pursuant to Rule 3.851(d)(2)(B).

2. The Circuit Court Incorrectly Determined That This Court's Unpublished Order In *Rodriguez* Renders Mr. Blanco's Motion Untimely.

Under Rule 3.851(d)(2)(B), and in light of *Walls*, Mr. Blanco's Rule 3.851 motion is timely. The Circuit Court nonetheless deemed it untimely pursuant to this Court's unpublished *Rodriguez* order. The Circuit Court's reading of *Rodriguez* was erroneous.

In *Rodriguez*, the defendant was denied a hearing on his post-*Hall* claim of intellectual disability because "there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002)," yet he failed to do so. *Rodriguez*, No. SC15-1278, 2016 WL 4194776. But, as Mr. Blanco noted in the Circuit Court, the defendant in *Rodriguez* had multiple below-70 IQ scores dating back to the late-1970s. R468-69 (*Rodriguez*

v. State, No. SC15-1278, Initial Brief of Appellant at 6-7 (noting that Rodriguez obtained two separate full-scale IQ scores of 62 and 58 in 1977)). Unlike Mr. Blanco, whose qualifying IQ scores are all in the newly opened *Hall* range (between 71-75), there was in fact no impediment to Rodriguez filing a claim of intellectual disability immediately after *Atkins*. As such, Rodriguez does not fall within the class of defendants covered by *Hall*. *Rodriguez* thus simply stands for the proposition that those for whom *Hall* offers no new benefit may not use *Hall* as a trigger to raise an intellectual disability claim.

3. To the Extent *Rodriguez* can properly be read to Preclude Relief on Post-*Hall* Postconviction Intellectual Disability Claims Merely Because No Claim was Raised Post-*Atkins*, It Was Wrongly Decided.

If *Rodriguez* is read as Mr. Blanco submits it should be—simply to bar litigation of intellectual disability claims for defendants with sub-70 scores who failed to raise their claims post-*Atkins*—it would be consistent with *Hall*, *Walls*, and Rule 3.851. But if this Court believes that the *Rodriguez* order stands for the proposition that capital defendants with IQ scores in the 71-75 range were required to raise their claims post-*Atkins*, it should rule that *Rodriguez* was wrongly decided.

The Circuit Court's reading of *Rodriguez* is dependent on the notion that the IQ cutoff of 70 was not established until the second *Cherry* decision in 2007, *see Cherry v. State*, 959 So.2d 702, such that nothing precluded defendants from raising claims of intellectual disability between 2002 (when *Atkins* was decided) and 2007

(when *Cherry* was decided). The State made this explicit argument below in its first motion for rehearing (prior to *Rodriguez*'s issuance). *See* R120 (10/1/15 Rehearing Motion at 5). The State then argued in its second rehearing motion that *Rodriguez* confirmed this interpretation. *See* R424-34 (8/11/16 Rehearing Motion).

But this Court had imposed a strict cutoff of 70 long before the 2007 *Cherry* decision. Indeed, in the 2007 *Cherry* decision, the Court noted that "[t]he legislature set the IQ cutoff score at two standard deviations from the mean, *and this Court has enforced this cutoff*." *Cherry*, 959 So.2d at 713 (emphasis added). *Cherry* proceeded to quote from the Court's 2005 decision in *Zack v. State*, 911 So.2d at 1201, which, in turn, relied upon the Court's 2000 decision in *Cherry*, 781 So.2d at 1041:

> The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. *See* § 916.106(12), Fla. Stat. (2003) [parenthetical omitted]; *Cherry v. State*, 781 So.2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack, 911 So.2d at 1201. In other words, this Court has enforced an IQ cutoff of 70 even before *Atkins* was decided.

In fact, the State took precisely this position while litigating the 2007 *Cherry* case, specifically arguing in its brief to this Court that the cutoff of 70 dates back to

the 2000 *Cherry* decision. *See* R150 (10/16/15 Response to Motion for Rehearing at 4 (quoting Supplemental Brief of Appellee, the State of Florida)). The State should be collaterally estopped from taking the exact opposite position now, merely because its litigation incentives have changed in the wake of *Hall*.

Moreover, in the 2007 *Cherry* decision, this Court unanimously determined that the plain text of § 921.137 and Rule 3.203 themselves precluded raising a claim of intellectual disability with an above-70 score. As *Cherry* explained:

> the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statue and the corresponding rule are clear. We defer to the plain meaning of statutes . . . .

Cherry, 959 So.2d at 713 (quoting *Daniels v. Florida Dept. of Health*, 898 So.2d 61, 64-5 (Fla. 2005)). If the statute and rule were "clear" in 2007, when *Cherry* was decided, they were equally clear when they were originally enacted in 2001 and 2004. It would violate basic notions of due process and fundamental fairness to penalize Mr. Blanco for failing to raise a claim that this Court unanimously believed to be clearly precluded based on the plain meaning of the statute.[8]

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[8] To the extent the Court is concerned with the problem of opening the floodgates absent a limiting principle for the application of *Hall* to old cases, *see Walls*, 213 So.3d at 348 (Pariente, J., concurring), Mr. Blanco's reading of *Rodriguez* offers a more straightforward, logically consistent limiting principle than barring defendants who failed to raise intellectual disability claims that were doomed to fail under pre-*Hall* law. Namely, only those defendants with qualifying IQ scores that fall exclusively within the *Hall* range may reap the benefit of *Hall*. There simply will

4. The Eighth Amendment Prohibition On Executing Intellectually Disabled Defendants Is Not Waivable.

As the United States Supreme Court made clear in *Hall*, "the Eighth Amendment prohibits certain punishments as a categorical matter." *Hall*, 134 S. Ct. at 1992. As relevant here, "persons with intellectual disability may not be *executed*." *Id.* (citing *Atkins*, 536 U.S. at 321) (emphasis added). This is because "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Id.* (citation omitted).

The United States Supreme Court has never suggested that the Eighth Amendment prohibition on "executing" an intellectually disabled person is subject to any sort of waiver or default. Just as it would be clearly improper to execute a person convicted of committing murder as a juvenile who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper v. Simmons*, 543 U.S. 551 (2005), so too it would be clearly improper to execute an intellectually disabled individual who failed to raise his claim at the appropriate time. Notwithstanding any waiver provision of Florida law, the Eighth Amendment requires that persons

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not be that many individuals with colorable claims of intellectual disability who fall into that category.

"facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001; *see also Walls*, 213 So.3d at 348 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). The Court should remand for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, Mr. Blanco requests that this Court reverse the trial court and remand this case for an evidentiary hearing on Mr. Blanco's intellectual disability so that he could prove his basis for invoking his constitutional rights under the Eighth, Sixth and Fourteenth Amendments.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant was E-Filed with the Clerk of the Florida Supreme Court and simultaneously E-Served to the below-listed counsel, this 28th day of March, 2018:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements set forth in rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, in that this brief is printed in Times New Roman, 14-point font, and is double spaced.

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