IN THE SUPREME COURT OF FLORIDA

JERMAINE FOSTER,
Appellant,

v.

CASE NO. SC17-2198
DEATH PENALTY CASE

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

Oral argument is not necessary in this case, as this Court's precedent is well-established and all of the arguments raised by Appellant in his response have been previously raised and were rejected by this Court. This is an appeal of Appellant's successive motion for postconviction relief.

STATEMENT OF THE CASE AND FACTS

The facts adduced at Appellant's trial were as follows:

> On the morning of November 28, 1993, Gerard Booker came to the trailer shared by Foster and Leondra Henderson and stated he wanted to recoup his recent gambling losses by committing robberies. Armed with a .38 caliber handgun, a .9 millimeter handgun, and an Uzi-type automatic weapon, Foster and Booker, who were joined by Alf Catholic, approached three unknown men who were selling drugs from their truck. After forcing the victims to remove their clothing and lie on the ground, Foster, Catholic, and Booker stole the victims' cash, jewelry, crack cocaine, and red Ford pickup truck. The group of Foster, Catholic, Booker, and Henderson agreed to find a local drug dealer and rob him. When the group was unable to locate their intended victim, they drove to Osceola County to visit a girlfriend of Catholic and to find other victims to rob.
>
> Once at the Palms Bar, Foster and Catholic drank liquor, and Foster played a video game and danced. After a while, the group went outside, and Booker detailed a plan to rob the entire bar. As the group headed back into the bar, Henderson noticed a black Nissan Pathfinder that was in the parking lot. Henderson determined that Anthony Faiella and Mike Rentas had come to the bar in that vehicle. Henderson pointed out Faiella, Rentas, and Clifton to Booker as possible victims to rob of their money and their vehicle. Foster told Henderson, Booker, and Catholic that if the victims did not have any money, he was going to kill them.
>
> At around 1:30 a.m., Faiella, Rentas, Clifton, and George left the bar in the Pathfinder. The other group followed them in the red truck. When the victims

> stopped and got out of the Pathfinder to inspect the damage, the group in the red truck took out their weapons and demanded money from the occupants of the Pathfinder.
>
> All four of the victims were ordered out of the Pathfinder, and Tammy George was separated from the three male victims. The group again demanded money from the male victims. When these victims did not produce any, they were ordered to remove their clothes, and Foster had the men place their underwear and hands on their heads and lie face down on the ground.
>
> At this point, Foster, from a position beside and to the rear of Anthony Clifton, shot Clifton in the back of the head, killing him. Foster then approached Rentas and fired at his head. The bullet hit him in the hand, and Rentas pretended to be dead. Foster next walked to Faiella and shot him in the head, killing him. After this, Foster approached George as if to kill her, but Booker talked him out of it. The group then left in the Pathfinder and unsuccessfully tried to dispose of it by driving it into a lake. All four of the assailants were apprehended within days.

Foster v. State, 679 So. 2d 747, 750-51 (Fla. 1996).

The jury convicted Appellant of two counts of first-degree murder, one count of attempted first-degree murder, and four counts of kidnapping. *Id.* at 751. After the penalty phase, the jury unanimously recommended that Appellant be sentenced to death for the murders. *Id*. The trial court found four aggravators were proven: 1) Appellant was previously convicted of a capital felony; 2) the capital felony was committed while Appellant was engaged in kidnapping; 3) the capital felony was committed for pecuniary gain; and 4) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Id*. at 751. The trial court also found that one statutory mitigator applied in Appellant's case: Appellant's capacity to

appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *Id.* at 751. The trial court followed the jury's unanimous recommendation, and sentenced Appellant to death. *Id*. at 751.

On appeal, this Court affirmed Appellant's convictions and sentences. *Id*. at 756. The United States Supreme Court denied certiorari review of Appellant's case on March 17, 1997. *Foster v. Florida*, 520 U.S. 1122 (1997).

On June l, 2000, Appellant filed his Motion to Vacate Judgment of Conviction and Sentence pursuant to Rule 3.851, *Florida Rules of Criminal Procedure*. On September 25, 2000, he filed a Supplemental Motion to Vacate Judgment of Conviction and Sentence.

On January 23, 2002, Appellant filed a Motion for Leave to Amend, attaching the affidavit of clinical social worker Janet Vogelsang. This motion was denied on February l, 2002, at the close of the evidentiary hearing, which began on January 30, 2002. On July 15, 2002, the Court entered an Order Denying Motion to Vacate Judgment of Conviction and Sentence and Supplemental Motion to Vacate Judgment of Conviction and Sentence.

On October 14, 2004, this Court reversed the order denying his Motion for Leave to Amend and relinquished jurisdiction for 180 days, with direction to hold an evidentiary hearing on the allegations set forth in that pleading. On January 20-21, 2005, the circuit court conducted the hearing, and denied relief on March l, 2005. This Court affirmed. *Foster v. State,* 929 So. 2d 524 (Fla. 2006).

Foster filed a successive motion for postconviction relief on August 29, 2017, alleging:

> Claim One: The Defendant is intellectually disabled (mentally retarded) under the new case law and hence exempt from the death penalty;
>
> Claim Two: Defendant's death sentences are unconstitutional under the Sixth and Eighth Amendments to the U.S. Constitution and under Article 1, Sections 16 and 22 of the Florida Constitution in light of *Hurst v. Florida* and *Hurst v. State* and must be vacated; and
>
> Claim Three: The State's failure to identify aggravating circumstances in the Indictment vitiates Defendant's judgments of guilt and sentences of death for first-degree murder.

The trial court held formal argument at a case management conference on November 2, 2017. The court denied relief on November 17, 2017, ruling as to claim one, that Appellant's claim was procedurally barred. As to claim two, the court denied relief on retroactivity. As to claim three, the court rejected Appellant's argument that aggravating circumstances must be alleged in the indictment based on well-settled case law. This appeal follows.

SUMMARY OF ARGUMENT

The lower court properly denied Appellant's motion for postconviction relief, which sought to relitigate an *Atkin* claim, because the motion was untimely, successive, and meritless. Under Rule 3.851(d)(2), a successive motion is subject to summary denial unless the defendant can establish one of two exceptions to filing successive motions - newly

discovered evidence, or a fundamental constitutional right that has been held to be retroactive. *See Fla. R. Crim. P*. 3.851(d)(2). In this case, Appellant has previously raised an intellectual disability claim, which this Court rejected. The lower court properly summarily denied this claim.

Under this Court's decisions in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), Appellant is not entitled to any relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), or *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), because his death sentence became final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. Because Appellant's case was final before *Ring*, and *Hurst* is not retroactive under federal law, this Court should affirm the trial court's denial of Appellant's successive postconviction motion. Additionally, even if *Hurst* applied, any *Hurst* error is harmless.

The lower court properly denied Appellant's motion for postconviction relief, alleging the State's failure to identify aggravating circumstances in the Indictment. The claim is procedurally-barred, and even if it were not, this Court has repeatedly held that the aggravating factors are not required to be listed in the Indictment.

ARGUMENT

STANDARD OF REVIEW

When a trial court summarily denies a claim in a postconviction motion, this Court reviews that ruling *de novo*. *Pardo v. State*, 108 So. 3d 558, 561 (Fla. 2012). Because a trial court's decision summarily denying a postconviction motion is "ultimately based on

written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So. 3d 904, 911 (Fla. 2013); *Staples v. State*, 202 So. 3d 28, 32 (Fla. 2016) (explaining that "where the issue presented is a question of law, the standard of review is *de novo*"). The standard of review is *de novo*.

ARGUMENT I

ISSUE I: APPELLANT'S DEATH SENTENCES ARE NOT IN VIOLATION OF THE EIGHTH AMENDMENT BECAUSE HE IS NOT INTELLECTUALLY DISABLED

In his first claim, Appellant argues that he is "exempt" from the death penalty due to an alleged intellectual disability. Appellant supports his claim with the assertion that the decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014) affords him relief. Appellant's claim regarding his alleged intellectual disability is meritless, because the evidence put forth by Appellant failed to show that he is, in fact, intellectually disabled.

A. APPELLANT'S INTELLECTUAL DISABILITY CLAIM UNDER *HALL V. FLORIDA* IS PROCEDURALLY BARRED

Here, Appellant's argument that his alleged intellectual disability exempts him from the death penalty as a matter of law, is procedurally barred as Appellant raised this claim in his previous postconviction motion. *See Foster*, 929 So. 2d at 531 ("Foster also alleges that the postconviction court erred in summarily denying his claim that he is mentally retarded and thus the sentence of death violates [*Atkins*].") The lower court correctly held:

> Based on the foregoing, the Court concurs with the State's argument that all three prongs of the intellectual disability test have been considered and therefore, Mr. Foster is not entitled to an evidentiary hearing or any relief under *Hall* and *Walls*.

(V1, R645).[1]

Pursuant to Rule 3.851 (d), of the Florida Rule of Criminal Procedure, a motion to vacate judgement of conviction and sentence of death must be filed within the one year of the judgment and sentence becoming final. The only way for Appellant's motion to be considered timely, is if any one of the following exceptions is properly alleged in his motion:

(A) the facts on which the claim is predicated were unknown to Appellant or his 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 [above] and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). No such exception applies here.

Additionally, a "motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Fla. R. Crim. P. 3.851(e)(2). A successive Rule 3.851 motion may be summarily denied on

[1] Cites to the current record on appeal are V_, R_ for the volume and page number. Cites to the initial postconviction record on appeal are PCR, V_, R_.

the merits "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Fla. R. Crim. P*. 3.851(f)(5)(B).

Contrary to Appellant's argument, the trial court already analyzed and rejected Appellant's intellectual disability claim under all three prongs of the intellectual disability test as required under *Hall v. Florida*, 134 S. Ct. 1986 (2014). Nothing in the record reflects that the court was tainted by the prior unconstitutional cutoff of 70 and did not provide the proper review under *Hall*. All of the court's original reasoning rejecting this claim remains valid.

1. ALL THREE PRONGS OF THE INTELLECTUAL DISABILITY TEST HAVE ALREADY BEEN CONSIDERED DURING APPELLANT'S PENALTY PHASE AND POSTCONVICTION HEARING

In *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014), the United States Supreme Court noted that "the medical community 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." The Court stated that Florida's statutory definition of intellectual disability, on its face, was consistent with the views of the medical community, but that this Court's narrow interpretation of the statute, foreclosing further evidentiary development when a defendant had an IQ score above 70, was unconstitutional. *Id*. at 1999-2001.

In making his arguments regarding *Hall* and its alleged effect on this case, Appellant insists that *Hall* requires States to conform the legal definition of intellectually disabled to the views of the medical community. However, this assertion is contrary to the express language in *Hall* itself. The United States Supreme Court specifically stated that the work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000.

Instead, it merely stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993. Thus, Appellant's assertion that *Hall* required Florida to adopt the AAIDD-11[2] definition of intellectually disabled and interpret the definition so adopted in accordance with that organization's views is simply false.

The views of medical experts do not ''dictate'' a court's intellectual-disability determination. The Supreme Court clarified that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, 137 S.Ct. 1039, 1048 (2017). These clinical guides are ''designed to assist clinicians in conducting clinical assessment, case formulation, and

[2] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support – 11th Edition*, AAIDD (2010) ("AAIDD-11").

treatment planning.'' DSM–5,[3] at 25. They do not seek to dictate or describe who is morally culpable—indeed, the DSM–5 cautions its readers about ''the imperfect fit between the questions of ultimate concern to the law and the information contained'' within its pages. *Id*.

''Psychiatry is not … an exact science.'' *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). ''[B]ecause there often is no single, accurate psychiatric conclusion,'' we have emphasized the importance of allowing the ''primary factfinder[ ]'' to ''resolve differences in opinion …on the basis of the evidence offered by each party.'' *Id*. Because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation. *Hall v. Florida*, 134 S. Ct. 1986, 2006 (2014).

In support of his claim, Appellant cites to *Moore v. Texas*, 137 S.Ct. 1039 (2017). Moore scored an average of 70.66 on six IQ tests, marginally above a cutoff of 70, which is adjusted by a five-point standard error of measurement. He also had adaptive deficits in conceptual, social, and practical skillsets, any one of which would have confirmed intellectual disability. *Hall* clarified that the definition of intellectual disability should comport with contemporary medical standards, avoid a rigid IQ cutoff score, and take into

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[3] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013) ("DSM-5").

account the overall functioning of the individual. In *Moore*, the Supreme Court applied *Hall* in concluding that the Texas court had deviated from prevailing clinical standards in several ways in determining that the defendant failed to prove significant impairment in adaptive functioning.

The Texas Court of Criminal Appeals (CCA) rejected those precedents established in *Hall* and said that the death sentence should be carried out, based on guidelines it had adopted in another case. That case, known as *Ex parte Briseno*, used standards based on the ninth edition (1992) of a manual by the American Association on Mental Retardation, not more recent revisions. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

The Texas court found that the defendant's adaptive strengths "constituted evidence adequate to overcome considerable objective evidence of Moore's adaptive deficits," whereas "the medical community focuses the adaptive functioning-inquiry on adaptive deficits." *Id*. at 1050. Additionally, the Texas court, contrary to the medical community, concluded that the defendant's academic failure and childhood abuse and suffering detracted from a determination that his intellectual and adaptive deficits were related, as well as required the defendant to prove that his adaptive deficits were not related to a personality disorder. *Id*. at 1051.

Finally, the Texas court further diverged from prevailing clinical standards by applying "nonclinical" factors derived from case law in determining that the defendant

failed to prove deficits in adaptive behavior. *Id*. at 1051-52. These "Briseno" factors consider whether people who knew the individual as a child think he was intellectually disabled and "act in accordance with that determination"; whether the individual carried out formulated plans or conducted himself impulsively; whether the individual can lie effectively; and whether his offense required forethought, planning, and complex execution, among other considerations. Essentially, Moore's mental competency was gauged using a 23-year-old definition of intellectual disability, rather than modern medical standards.

In order for a defendant to establish a claim of intellectual disability under Florida law, the defendant must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. *See* § 921.137(1), Fla. Stat. (2016).

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, 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.

§ 921.137(1), Fla. Stat. (2016). Here, unlike the court in *Moore*, the court applied the correct standard in evaluating Appellant's intellectual disability claim.

Appellant further construes *Brumfield* to advance his claims. In *Brumfield*, the Supreme Court held that, on the record before it, the Louisiana trial court violated 28 U.S.C. § 2254(d)(2) by not affording the inmate a hearing on his intellectual disability claim where the IQ scores he presented were "entirely consistent with intellectual disability" and the record raised questions about his "impairment . . . in adaptive skills." *Brumfield*, 135 S. Ct. at 2277, 2279. Thus, Brumfield announced a procedural requirement that Louisiana afford an inmate an evidentiary hearing on an intellectual disability claim where there is some "reasonable doubt" as to his or her intellectual disability. *Id.* In finding that the state court acted unreasonably, the Supreme Court did not apply a nationwide standard for intellectual disability but rather relied on Louisiana law defining and analyzing intellectual disability. *Id.* at 2278-79. Contrary to *Brumfield*, Appellant received a full hearing on his intellectual disability claim in which he was afforded an opportunity to present evidence as to all three prongs of the test.

Finally, Appellant is incorrect in his suggestion that the order in *Wright v. Florida*, 138 S.Ct. 360 (2017), shows that the Court ignored clinical authority when evaluating claims of intellectual disability. The entire text of the order in *Wright* is:

> On petition for writ of certiorari to the Supreme Court of Florida. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039, 197 S.Ed.2d 416 (2017).

Id. Such language does not establish that a constitutional violation has occurred. *Parker v. Randolph*, 442 U.S. 62, 76 n.8 (1979), *abrogated on other grounds by Cruz v. New York*, 481 U.S. 186 (1987). Instead of relying on the language of the order, Appellant seeks to infer a holding from the pleadings and record in *Wright*. To do so is improper. *United States v. Mitchell*, 271 U.S. 9, 14 (1926). Thus, Appellant's contention that *Wright* establishes that this Court's precedent requires the adoption of any particular definition of intellectual disability should be rejected.

2. ALTHOUGH *HALL* HAS BEEN APPLIED RETROACTIVELY UNDER *WALLS*, APPELLANT IS NOT ENTITLED TO ANY RELIEF UNDER *HALL*, AS HE HAS ALREADY RECEIVED A FULL HEARING ON ALL PRONGS OF INTELLECTUAL DISABILITY

Appellant is not entitled to relief, because the trial court already analyzed Appellant's intellectual disability claim under all three prongs of the intellectual disability test as required under *Hall v. Florida*, 134 S. Ct. 1986 (2014).

Hall held that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. It permitted defendants with IQs between 70 and 75 the opportunity to present evidence regarding the other elements of mental retardation. *Kilgore*, 805 F.3d at 1314; *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). Moreover, this Court had actually held that defendants could do so even before *Hall*. *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009).

This Court made the following remarks as to Appellant's intellectual disability claim:

> Foster also alleges that the postconviction court erred in summarily denying his claim that he is mentally retarded and thus the sentence of death violates *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Subsequent to Foster's postconviction evidentiary hearing that also included testimony concerning his mental abilities, the United States Supreme Court issued its decision in Atkins, which held that the imposition of the death penalty on those who are mentally retarded violates the Eighth Amendment. The Court further recognized that to be considered mentally retarded, a defendant should be able to show: (1) a significantly subaverage intellectual function and that typically between 70 and 75 or lower is the cutoff IQ score; (2) related limitations in two or more of certain applicable adaptive skill areas; and (3) the onset must occur before age eighteen. Atkins, 536 U.S. at 308 n. 3, 122 S.Ct. 2242. Foster contends that the evidentiary hearing established all factors except whether the onset of his alleged mental retardation occurred before age eighteen; thus, he contends that the circuit court erred by denying his claim without an additional hearing that would provide him with an opportunity to establish this last element.
>
> Contrary to such allegations, the lower court did not find that Foster established the necessary prongs to show mental retardation. First, after quoting extensive portions of Dr. Dee's testimony, the postconviction court found that Dr. Dee's testimony did not clearly establish that Foster was mentally retarded.
>
> > Q In your testing of Mr. Foster ... did he have the mental functioning to do the every day chores from what you observed and the testing you did?
> >
> > A He never had. No. And although there is some question in this case whether there was opportunity and whether or not he was a sufficient age at which-at least to me to make that determination, so I remember specifically saying while he was mildly intellectually disabled or borderline, that's about the best I could do in terms of descriptive functioning. I think from behavior,

> he could be considered mildly intellectually disabled, he didn't keep a job or kept any accounts, he always depended on other people for support. But, once again, there are socioeconomic factors have to be considered so I wasn't insisting on that.

On cross examination, however, Dr. Dee further clarified his opinion as to whether Defendant was mentally retarded. He testified that:

> Q In looking at Mr. Foster's adaptive behavioral scales did you do like the Vineland test or any of the-
>
> A No, I didn't think it would be particularly useful because I had the information I needed. I could do one now from the information I have but he never had a job for a substantial period of time. He hadn't finished school. He was not really functioning literal [sic]. He had a lot of cultural deprivation. It's a very difficult call in the situation. Still very young and he's been subject to some very bad influence, involved in criminal behavior and kind of moved around from pillar to post, and *I was kind of reluctant to decide finally whether mental retardation for him so I said mildly intellectually disabled to borderline. Not borderline very high, but I was reluctant to make a decision regarding retardation.*

(Emphasis added.) The postconviction court then reviewed the three prongs of mental retardation as noted in *Atkins* to determine whether Foster had proven any of the factors.

Dr. Dee testified that Defendant's IQ was 75, which at most is borderline to even begin to consider whether a person is mentally retarded. Nevertheless, even if Defendant's IQ score of 75 is considered as evidence of mental retardation, Defendant does not meet the second prong of the test set forth in *Atkins*, i.e., significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Dr. Dee's testimony was refuted by the testimony of Leonore [sic] Henderson and by Mr. Smallwood, Defendant's original trial attorney....

Evidence showed that Defendant was supporting himself and functioning on his own, albeit, by illegal drug sales. He was even able to provide shelter and sustenance for another, Leondre [sic] Henderson. His communication skills, as evidenced by his

> meetings with his trial attorney and by his own testimony before this Court, did not indicate significant limitations as required by *Atkins*, 122 S.Ct. at 2242.
>
> Moreover, the testimony from the original trial does not support the allegation that Defendant evidenced significant limitations in adaptive skills before age 18. In school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded.
>
> It is evident that the issue as to whether Defendant is mentally retarded was presented at and explored during the evidentiary hearing in this matter. In *Atkins*, the Court stated that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 122 S.Ct. at 2250. After considering all the evidence and personally observing Defendant testify, this is just such an instance as contemplated by the United States Supreme Court. This Court finds that Defendant is not mentally intellectually disabled as defined in *Atkins*. The evidence simply does not support this claim.
>
> After reviewing the record and the postconviction court's findings, we reject Foster's claim that his rights under *Atkins* were violated. Foster was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The postconviction court found that the evidence did not support his claim. We find no errors in the postconviction court's findings or conclusions.

Foster, 929 So. 2d at 531-33.

Even if Appellant's IQ score of 75 is considered as evidence of mental retardation, Appellant does not meet the second prong of the test forth in *Atkins*, i.e., significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age 18. The testimony from the original trial did not support the allegation that Appellant evidenced significant limitations in adaptive skills before age 18. Neither did the evidence at the postconviction hearing. The evidence showed that

Appellant was supporting himself and functioning on his own. His communication skills, as evidenced by his meetings with his trial attorney and by his own testimony before the court, did not indicate significant limitations as required by *Atkins*.

ln *Atkins,* the Court stated that not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins,* 122 S.Ct. at 2250. Such is the case with Appellant.

3. PRIOR CONSIDERATION OF APPELLANT'S PRESENTATION OF EVIDENCE CONCERNING HIS INTELLECTUAL DISABILITY, WHICH OCCURRED AT HIS PENALTY PHASE AND AT HIS INITIAL 3.851 HEARING WAS ADEQUATE

In *Hall,* the United States Supreme Court revisited the issue of intellectual disability, and concluded that Section 921.137, Florida Statutes, was unconstitutional under the Eighth Amendment, because of Florida's strict and rigid rule of defining intellectual disability as requiring an IQ test score of 70 or less. *Id*. at 1994. To comply with the Eighth Amendment, the Court stated 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." *Id.* at 2000.

Accordingly, although Appellant argues extensively that the new rules mandate a more "liberal" approach in determining whether an individual is intellectually disabled, all that is required, is for a defendant to be allowed to present additional evidence regarding adaptive deficits when the defendant's IQ test score falls within the test's margin of error.

See Snelgrove v. State, 214 So. 3d 992, 1003 (Fla. 2017) ("when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.") (citations omitted).

The present definition of disability includes "intellectual-functioning deficits, adaptive deficits, and the onset of these deficits while still a minor." Although *Hall* requires courts to consider all three prongs of intellectual disability in tandem, we have recently reiterated that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Quince v. State*, *rev. op*., Case No. SC17-127 at p. 10 (Fla. Apr. 12, 2018) *quoting Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016); *Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017); *Snelgrove v. State*, 217 So. 3d 992, 1002 (Fla. 2017). And while *Hall* requires a holistic hearing, "defendants must still be able to meet the first prong of [the intellectual disability standard]." *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017).

Appellant is still not entitled to relief, because the trial court already analyzed Appellant's intellectual disability claim under all three prongs of the intellectual disability test as required under *Hall v. Florida*, 134 S. Ct. 1986 (2014).

4. THE PRIOR TREATMENT OF APPELLANT'S INTELLECTUAL DISABILITY CLAIM BY THIS COURT IS SUFFICIENT UNDER FEDERAL LAW AS PRESCRIBED BY *ATKINS, HALL, BRUMFIELD, AND MOORE*

The trial court already analyzed and rejected Appellant's intellectual disability claim under all three prongs of the intellectual disability test as required under *Hall v. Florida*.

While *Atkins* restricted the State's power to take the life of *any* intellectually disabled individual, *Hall* allowed Florida courts to continue to abide by section 921.137(1), but eliminated the bright-line cutoff IQ test score. In *Brumfield*, the Supreme Court held that, on the record before it, the Louisiana trial court violated 28 U.S.C. § 2254(d)(2) by not affording the inmate a hearing on his intellectual disability claim where the IQ scores he presented were "entirely consistent with intellectual disability" and the record raised questions about his "impairment . . . in adaptive skills." *Brumfield*, 135 S. Ct. at 2277, 2279. The Court relied on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding. Appellant was afforded such a hearing.

In *Moore*, the Texas court diverged from prevailing clinical standards by using a 23-year-old definition of intellectual disability, rather than modern medical standards. This too is different than what occurred in Appellant's case. It is also important to note that, contrary to what Appellant seems to suggest, *Moore* did not **prohibit** the consideration of an inmate's adaptive strengths. The problem in *Moore* was not that adaptive strengths were considered at all; the problem was that the Texas court **overemphasized** the defendant's adaptive strengths and, contrary to "clinical authority" proceeded to **arbitrarily** offset the

defendant's demonstrated adaptive deficits against "**unconnected strengths**." *Moore*, 137 U.S. at 1051 n.8 (emphasis added).

The facts in the above cases are inapposite to Appellant's facts. His case is more in line with *Rodgers v. State*, 2017 WL 563213 (Fla. Feb. 13, 2017). In *Rodgers* when the trial court considered Rodgers' intellectual disability claim before sentencing Rodgers to death in 2004, it permitted Rodgers to present evidence of all three prongs of the intellectual disability standard and analyzed each of the three prongs, both individually and collectively. The trial court concluded:

> Although Rodgers suffered from "mild mental retardation" based on an IQ score of 69, he did not establish that he had deficits in adaptive behavior because he "has possessed personal independence and has functioned in the community as expected of his age and upbringing," nor did he establish that his alleged disability was present before the age of eighteen years. Thus, the trial court based its conclusion that Rodgers was not intellectually disabled on his failure to meet both the second and third prongs of the standard and the fact that although his intellectual functioning was subaverage, the degree to which it was subaverage was mild.

Rodgers v. State, 2017 WL 563213, at *2 (Fla. Feb. 13, 2017).

Appellant was afforded the opportunity to show why his evidence met all three prongs of the *Atkins* test during his sentencing and during a postconviction evidentiary hearing.

ISSUE II: APPELLANT'S PROFFER IN THE CIRCUIT COURT FAILS TO ESTABLISH THAT HE IS INTELLECTUALLY DISABLED

Appellant argues that the evidence shows he suffers from deficits in adaptive functioning. The State respectfully disagrees. The facts put forth by Appellant do not establish that he suffers from deficits in adaptive functioning or that any deficits in adaptive functioning manifested before the age of eighteen. Furthermore, Appellant's argument that the testimony below went unrefuted, and that the evidence overwhelmingly supports his contention that he is intellectually disabled, is not entirely accurate. Although the State did not put on witnesses to refute Appellant's contention that he suffers from deficits in adaptive functioning and that the deficits manifested before the age of eighteen, the State did not need to put on witnesses to refute Appellant's claims.

The evidence showed that this Court had previously rejected his claims of deficits in adaptive functioning and Appellant failed to put forth any additional facts not already addressed by the court. The fact that Appellant now had the affidavit of a different expert with a more favorable analysis does not grant him relief. Neither do the sworn affidavits provided by Appellant that depict him as slow and unable to care for himself. The State argues that there is nothing to indicate that these facts were not otherwise known to the Appellant at the time of his sentencing and at the time of his evidentiary hearing. The affidavits are of Ericka Powell, a longtime friend; Andrea Spillman, who has known Appellant all his life; Rose Foster, his aunt; and Heaven Foster, a cousin. In that respect it is procedurally barred. Nevertheless, the information provided does not change the result.

In the sworn affidavit of Leondra Henderson that was proffered below, he stated that Appellant would have been unable to live alone and would have been lost without him. The testimony by Mr. Henderson at the evidentiary hearing painted a much different picture. There, Mr. Henderson testified that he had run away from home and Appellant had taken him in. He stated that he respected Appellant and he was the "only one who really took me in and you know just looked out for me". He testified that Appellant was the one taking care of him. His testimony established that Appellant had a roof over his head, a car and was successfully taking care of himself. (PCR, V5, R674).

Competent substantial evidence existed in the record to support the trial's court's denial of Appellant's renewed motion for intellectual disability, and thus, he is not entitled to relief. *See Hampton v. State*, 219 So. 3d 760, 770-772, 781 (Fla. 2017) (Fla. May 4, 2017) (holding that competent substantial evidence supported the trial court's conclusion that the defendant was not intellectually disabled, where defendant failed to show subaverage intellectual functioning, concurrent deficits in adaptive functioning, and onset before the age of eighteen.)

A. Subaverage intellectual functioning and adaptive deficits

Appellant argues that the trial court failed to address all three prongs of the intellectual disability test in deciding Appellant's renewed motion for determination of intellectual disability, as required under *Hall v. Florida*, 134 S. Ct. 1986 (2014). However, Appellant is incorrect.

By his own admission, Appellant states that he is in a unique procedural posture in that he had expert testimony and evidence of mental retardation presented back at the original sentencing proceeding. Dr. Dee and the mitigation specialist, Ms.Vogelsang, testified about adaptive deficits. (*IB* at 1-2). Appellant again raised intellectual disability in the original postconviction proceeding where an evidentiary hearing was held. Dr. Dee testified at the hearing as well and discussed Appellant's IQ score and adaptive deficits. He confirmed that Appellant's IQ was 75. When asked if he could render an opinion as to whether Appellant was intellectually disabled, he responded "by the standards of the American Association of Mental Retardation Standards at that time that would have been considered a score low enough to consider mental retardation, although you can't just consider the IQ. They say and still say 75 or so, or below is the place at which we begin to think about mental retardation and have to assess areas of adaptive functions such as skills of everyday living". (PCR, V5, R705). He stated that Appellant was sort of borderline and he had to look to assess other things such as the adaptive behavioral skills. (PCR, V5, R724).

The trial court made findings against Appellant and this Court affirmed the trial court's denial of relief. (PCR, V1, R691-92). In Appellant's initial 3.851 appeal, this Court specifically held that the evidence presented in the initial postconviction proceedings was insufficient to establish deficits in adaptive functioning. This Court specifically addressed

Dr. Dee's testimony, and identified portions of Dr. Dee's testimony which showed that the evidence was insufficient to establish intellectual disability:

> Q In your testing of Mr. Foster ... did he have the mental functioning to do the every day chores from what you observed and the testing you did?
>
> A He never had. No. And although there is some question in this case whether there was opportunity and whether or not he was a sufficient age at which-at least to me to make that determination, *so I remember specifically saying while he was mildly intellectually disabled or borderline, that's about the best I could do in terms of descriptive functioning.* I think from behavior, he could be considered mildly intellectually disabled, he didn't keep a job or kept any accounts, he always depended on other people for support. But, once again, there are socioeconomic factors have to be considered so I wasn't insisting on that.

Foster, 929 So. 2d at 532 (emphasis within the original). This Court also noted the following remarks by Dr. Dee during cross-examination:

> He had a lot of cultural deprivation. It's a very difficult call in the situation. Still very young and he's been subject to some very bad influence, involved in criminal behavior and kind of moved around from pillar to post, and *I was kind of reluctant to decide finally whether mental intellectually disabled for him so I said mildly intellectually disabled to borderline. Not borderline very high, but I was reluctant to make a decision regarding intellectually disabled.*

Id. (emphasis within the original). The evidence showed that Appellant supported himself, functioned on his own, that he was able to provide shelter for someone else, and that his communication skills did not indicate significant limitations under *Atkins*. *Foster*, 929 So. 2d at 533. The fact that someone "scores low on certain tests or that he exhibits soft neurological findings does not automatically translate into a diagnosis of mental retardation, particularly when he does not exhibit behaviors indicative of significant

cognitive and adaptive limitations or neurological impairment". *Cain v. Chappell,* 870 F.3d 1003, 1023 (9th Cir. 2017).

Furthermore, although Appellant contends that the trial court ruled or "adjudicated" him to be intellectually disabled, this Court also rejected this contention and found that the trial court did not adjudicate Appellant as intellectually disabled. *See Foster*, 929 So. 2d at 532, ("[c]ontrary to such allegations, the lower court did not find that Appellant established the necessary prongs to show mental retardation.") This Court concluded its analysis by noting that the trial court analyzed the facts of Appellant's case under all three prongs of the intellectual disability test, afforded Appellant a full hearing as to his intellectual disability claim, and affirmed the trial court's ruling that Appellant is not intellectually disabled. *Id*. at 533. Accordingly, Appellant failed to show that he suffers from deficits in adaptive functioning.

B. Subaverage intellectual functioning and adaptive deficits before age 18

During the initial postconviction hearing Dr. Dee addressed the addition of school records which he was able to review. Although counsel indicated that Appellant had been placed in Special Education, no records were produced to show that Appellant did in fact take special education courses. Dr. Dee explained the significance of Special Education classes and was clear that it was formulated for kids slow in everything, not specifically a learning disability. Dr. Dee also clarified between being mentally disabled and mentally

retarded, making it clear that it was possible for a person with an IQ of 75 to not be mentally retarded. He gave as an example of someone who may be slowed a bit but that doesn't make them retarded. (PCR, V5, R723).

The school records Appellant proffered fail to provide evidence of intellectual disability. The records indicate he entered into Speech Therapy under Exceptional Education Services between fourth and eighth grade. It required Appellant to remain in his regular class with group therapy by the Speech/Language Program for 1 to 2 hours a week. He was dismissed from speech therapy in January 1986 indicating that "Jermaine's language skills are within normal limits". (PCR, V1, R586-603). Appellant was sent to the Polk County Opportunity Center in 1989 for "vulgar language" towards a teacher and withdrawn from Dennison Junior High School in 1991 for non-attendance. (PCR, V1, R551, 564).

This Court noted that there was no evidence to suggest that that any deficits in adaptive functioning manifested before the age of 18. Specifically, this Court reasoned that "[Foster] was not placed in special education classes nor was there any indication from teachers that [Foster] was possibly mentally intellectually disabled." *Id*. at 533. Appellant did not meet his burden of proof in showing that his alleged deficits in adaptive functioning manifested before the age of eighteen.

ISSUE III: APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING OR ANY RELIEF UNDER *HALL* OR *WALLS*.

Appellant did have the benefit of the trial court reviewing all three prongs of the intellectual disability test without one prong being dispositive of the other. The trial court considered and examined all three prongs of the intellectual disability test, rather than focus solely on Appellant's IQ score, and determined he did not meet the criteria. That is what this Court requires under *Hall*. The trial court who served as the factfinder weighed the credibility of the witnesses and their testimony, and ultimately concluded that Appellant did not establish all three prongs of the test. *See Tibbs v. State,* 397 So. 2d 1120, 1123 (Fla. 1981) (stating that the trial court's role is to evaluate the credibility of the witnesses and their testimony, and that appellate courts should not reweigh the trial court's findings on the credibility of witnesses and their testimony).

What Appellant is ultimately attempting to do is persuade this court that somehow the standard for analysis is different today than it was then. That is not the case. All three prongs have stayed the same. The difference now is that when a defendant whose IQ score falls within the standard error of measurement, the courts are required to go on and consider the other two prongs. That was already done in Appellant's case.

Accordingly, because the trial court already evaluated all three prongs of the intellectual disability test as required under *Hall*, Appellant is not entitled to an evidentiary hearing or any relief under *Hall* or *Walls*. *See Rodriguez v. State*, 219 So. 3d 751, 15 759-60 (Fla. 2017) (distinguishing Rodriguez's case from *Oats v. State*, 181 So. 3d 457 (Fla. 2015), and holding that Rodriguez was not entitled to an evidentiary hearing or any *Hall* relief, because the trial court had already evaluated Rodriguez's intellectual disability claim under all three prongs of the intellectual disability test as required under *Hall*, and

the evidence failed to establish that Rodriguez was intellectually disabled). The trial court properly held that Appellant was not entitled to an evidentiary hearing or any relief under *Hall* and *Walls.*

ARGUMENT II

ISSUE I: APPELLANTS DEATH SENTENCES DO NOT VIOLATE *HURST V. FLORIDA* AND *HURST V. STATE*

In *Hurst v. Florida*, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002). After being remanded for a harmless-error analysis, this Court determined that *Hurst v. Florida* requires that all critical findings must be unanimously found by the jury before the trial court may consider imposing a death sentence.[4]

[4] While recognizing this Court's precedent to the contrary, the State maintains that there was no underlying constitutional error in this case. Appellant became eligible for a death sentence by virtue of his contemporaneous violent felony convictions for murder, attempted murder and kidnapping. The unanimous verdict by Appellant's jury establishing his guilt of these contemporaneous crimes was sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162-63 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). *See also Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017) (Confirming the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts.); *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 15-10881, 2017 WL 4271115, at *20 (11th Cir. Sept. 26, 2017) (In rejecting a *Hurst* claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying

In *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016), this Court required that the jury unanimously find the existence of each aggravating factor, find that the aggravating factors are sufficient, and find that the aggravating factors outweigh the mitigating circumstances. *Id.* at 44. It further held that the jury's recommendation for a sentence of death must be unanimous. *Id.*

In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court held that capital defendants like Appellant whose sentence was final prior to *Ring* are not entitled to *Hurst* relief. The trial court correctly denied Appellant's motion for postconviction relief holding:

> Mr. Foster presents extensive argument, but no further discussion is warranted. This Court is bound by the Florida Supreme Court's ruling on this matter: "We have consistently held that *Hurst* is not retroactive prior to June 24, 2002, the date that *Ring v. Arizona*, ... was released." *Hannon v. State*, 2017 WL 4944899 (Fla. November 1, 2017).

In *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), this Court succinctly indicated, "[a]lthough Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*." *Hitchcock*, 226 So. 3d at 217. The same is true here. Although Appellant attempts to inundate this Court with statistics and reports condemning the death penalty system, he offers no basis for this Court to alter its position.

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aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* § 13A-5-

A. *Hurst* should not be applied retroactively to Appellant's case

1. *Ring* does not violate the Eighth Amendment's prohibition against arbitrary and capricious punishment or the Fourteenth Amendment's guarantee of Equal Protection

In *Asay v. State*, 210 So. 3d 1 (Fla. 2017), this Court held that *Hurst v. Florida* is not retroactive to any case in which the death sentence was final prior to the June 24, 2002, decision in *Ring*. *Asay v. State*, 210 So. 3d at 22; *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). The judgment in *Asay* became final October 7, 1991, and thus, Asay was not eligible for any relief under *Hurst v. Florida*. *Asay*, 210 So. 3d at 8.

The Eleventh Circuit has also addressed the issue of retroactivity and denied *Hurst v. Florida* relief because *Hurst v. Florida* is not retroactive under federal law, stating: "[t]he Supreme Court has held that *Ring* does not apply retroactively to cases on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring* does not apply retroactively under federal law to death-penalty cases already final on direct review.)." *Lambrix v. Sec'y, Fla. Dep't of Corr*., 872 F.3d 1170, 1182 (11th Cir. 2017), *cert. denied*, *Lambrix v. Florida*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017). Further, the Eleventh Circuit held that this Court's ruling in *Lambrix*, that *Hurst v. Florida* did not retroactively apply to Lambrix, whose judgment was final in 1986, "is fully in accord with

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45(e).").

the U.S. Supreme Court's precedent in *Ring* and *Schriro.*" *Lambrix*, 872 F.3d at 1182. The Eleventh Circuit also rejected the statutory retroactivity argument stating:

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision.

Id. at 1183; *see also Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst v. State* based solely on the fact that their judgments were final prior to the decision in *Ring*. This Court has consistently applied its *Asay V* decision by denying retroactive application of *Hurst* to defendants whose death sentences were final prior to *Ring*. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In recent months, this Court has denied several cases based on *Hitchcock*. *See Cole v. State*, 234 So. 3d 644 (Fla. 2018); *Beasley v. State*, 234 So. 3d 553 (Fla. 2018); and *Willacy v. State*, 43 Fla. L. Weekly S24 (Fla. Jan. 23, 2018). *Asay V* and *Hitchcock* foreclose relief in Foster's case.

Additionally, with retroactivity, there is usually a cutoff date to provide for finality in appellate proceedings. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a

'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. at 328 (1987); *see also Smith v. State*, 598 So. 2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending direct review would receive the benefit of relief from *Hurst v. Florida* error. The fact that this Court has drawn the line at the decision date in *Ring* instead of the decision date in *Hurst v. Florida*, benefits more appellants.

Appellant contends that the *Ring* cut off date violates the Equal Protection Clause and the Eighth Amendment. This Court has previously heard and rejected Appellant's due process, equal protection, and arbitrariness arguments. *See Asay*, 224 So. 3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); *Lambrix*, 227 So. 3d 112 (Fla. 2017) (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

The law is well-settled that the Equal Protection Clause prohibits disparity of treatment by a State between classes of individuals whose situations are debatably the same. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008). Thus, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." *Id.*

Here, Appellant's argument is based on the fatally flawed contention that this Court's ruling discriminates between similarly situated individuals. However, Appellant is

not similarly situated with the defendants who are entitled to *Hurst* relief, because those defendants were sentenced to death under an unconstitutional sentencing scheme. However, at the time Appellant's sentence became final, a defendant could, consistent with the Sixth Amendment, be sentenced to death based on a judge's fact-finding alone. Hence, contrary to Appellant's contention, he is not similarly situated with "post-*Ring*" defendants, and thus his Equal Protection claim must fail. *See also Lambrix v. Sec'y, Florida Dep't. of Corr.*, 872 F.3d 1170 (11th Cir. 2017) (rejecting Lambrix's argument that this Court's retroactivity decisions violates the Equal Protection Clause, because Lambrix, whose death sentence was final prior to *Ring*, was not similarly situated with the defendants who are entitled to *Hurst* relief.) Appellant has not demonstrated how he is treated differently from similarly situated defendants. *See Asay*, 210 So. 3d at 28 ("Asay does not demonstrate how he was treated differently from similarly situated defendants.")

Furthermore, Appellant's case is being given an individualized determination, and his right to appeal is not unfairly curtailed by the outcome of *Hitchcock* or any other capital case. Accordingly, although Appellant argues extensively for an individualized assessment of retroactivity in his case, his arguments are clearly contrary to the law and must be denied.

2. *Hurst* should <u>not</u> be applied retroactively to Appellant's case under the Supremacy Clause of the United States Constitution

Appellant's due process argument also fails to create an avenue for relief. A due process violation impairs the truth-finding function and raises doubts as to the accuracy of a guilty verdict. *In re Winship*, 397 U.S. 358, 364 (1970). However, a *Hurst* error does not rise to the level of substantially impairing the truth-finding function of the criminal trial because a *Hurst* violation requires remand for resentencing, not a new trial or vacation of the conviction.

Appellant's claim that *Hurst* somehow made the aggravators de facto "elements" is incorrect. A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. *See Bousley,* 523 U.S. 614, 620-621 (1998). But that is not what *Hurst* has done. The range of conduct punished by death in Florida remains the same. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court stated, "*Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. 536 U.S., at 609, 122 S.Ct. 2428." *Schriro,* 542 U.S. at 354. (emphasis in the original).

Appellant's reference to other cases in regards to this argument is misplaced. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the United States Supreme Court held that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), announced a substantive rule of constitutional law. Substantive rules alter "the range of conduct or the class of persons that the law punishes," *Schriro,* 542 U.S. at 353. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. See *Bousley*, *supra*, at 620. In *Schriro,* the Supreme Court determined that *Ring*, the case upon which *Hurst* is based, was not substantive, and thus, not retroactive. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id*. *Ring* was deemed a procedural rule by this Court as well as the United States Supreme Court because it regulates the manner in which culpability is determined. See *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) (explaining how *Ring* is a "prototypical procedural rule" rather than a substantive change to the law.); *Schriro*, 542 U.S. at 353 (*Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, it had nothing to do with the range of conduct a state may criminalize.). Also, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), has been deemed a procedural rule that does not apply retroactively. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *Curtis v. United States*, 294 F.3d 841, 843-844 (7th Cir.

2002). Rules that allocate decision-making authority in this fashion are prototypical procedural rules. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996) (*Erie* doctrine); *Dobbert v. Florida*, 432 U.S. 282, 293-294, (1977) (*Ex Post Facto* Clause).

Hurst, like *Ring*, allocates decision-making authority to the jury, rather than the judge. If *Ring* was not retroactive under the federal test, then *Hurst*, likewise, cannot be retroactive because *Hurst* merely extends *Ring* to Florida's capital sentencing scheme. See *Turner v. Crosby*, 339 F.3d 1247, 1283 (11th Cir. 2003) (concluding that retroactivity analysis of *Apprendi* applies equally to *Ring*, and that, under the *Teague* doctrine, *Ring* does not apply retroactively to Turner's death sentence); *see also Welch v. United States*, 136 S.Ct. 1257 (2016) (holding that new constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review). *Ring* was an extension of *Apprendi*. Because *Apprendi* was a procedural rule, it axiomatically follows that *Ring*, and now *Hurst*, is also a procedural rule. Appellant's argument that *Hurst* creates a substantive right was also rejected in *Asay*, 224 So. 3d at 703. This Court clearly held that Chapter 2017-1 does not create a substantive right to a life sentence and *Asay* was not entitled to relief. *Id.*

Hurst does not change the elements of any capital crimes or jury instructions, nor does it eliminate any defense. It only changes the procedure that would be followed in

determining how a person convicted of a capital crime would be sentenced. Appellant is not entitled to relief.

B. There is no *Hurst* error, because *Hurst* does not apply retroactively to Appellant.

1. Federal constitutional right

Appellant's death sentence does not violate any constitutional provision, because this Court has consistently held that *Hurst* does not apply retroactively to capital defendants like Appellant, whose sentences were final prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Here, Appellant's sentence became final on March 17, 1997, when the United States Supreme Court denied certiorari review in his case. Thus, Appellant's case was final five years prior to the Supreme Court's decision in *Ring*.

Appellant's sentence was final prior to the *Ring* decision, and this Court enunciated a bright-line rule that defendants whose sentences were final prior to *Ring*, are not entitled to any *Hurst* relief. Finally, although *Hurst v. Florida* is clearly not retroactively applicable to Appellant's case, even if it were, the trial court's ruling should still be affirmed because any error was harmless.

2. Harmless-Error Analysis

Appellant argues that under its per se harmless-error rule, this Court has denied relief in every case where the jury rendered a unanimous death recommendation pre-*Hurst*. He

argues that this rule operates mechanically, rather than individually. Although we don't even reach the harmless error analysis here because *Hurst* is not retroactive to Appellant, any *Hurst* error would be harmless.

In *Hurst v. State*, this Court concluded that *Hurst* error is capable of harmless error review and set out the requirements for a harmless error analysis based upon a *Hurst* claim. "Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68, *citing Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). Under this standard, this Court's harmless error analyses in the wake of *Hurst* has varied due to an individualized, case-by-case approach. *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018).

The first inquiry is to whether the jury recommendation was unanimous. *See, e.g.*, *Kaczmar v. State*, 228 So. 3d 1, 9 (Fla. 2017); *Jones v. State*, 212 So. 3d 321, 343-44 (Fla. 2017); *King v. State*, 211 So. 3d 866, 890 (Fla. 2017); *Davis v. State*, 207 So. 3d 142, 174-175 (Fla. 2016). This Court has consistently held that any *Hurst v. Florida* error is harmless if the jury's recommendation for death was unanimous. *See Tundidor v. State*, 221 So. 3d 587 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017), *cert. denied*, 138 S.Ct. 3 (2017); *Hall v. State*, 212 So. 3d 1001 (Fla. 2017); *Jones v. State*, 212 So. 3d 321 (Fla. 2017), *cert. denied*, 138 S.Ct. 175 (2017); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), *cert. denied*, 138 S.Ct. 3 (2017).

Here, the jury recommendation was unanimous. However, a unanimous recommendation does not foreclose the analysis as Appellant avers. Rather, it begins the evaluation process into the factors which influenced the unanimous recommendation.

3. Reliability

A unanimous recommendation is not sufficient alone; rather, it "begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018), *citing King*, 211 So. 3d at 890. Hence, we look to other factors such as the jury instructions. *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018), *citing Kaczmar*, 228 So. 3d at 9; *King*, 211 So. 3d at 890-91; *Davis*, 207 So. 3d at 174-75.

In *Hall v. State*, 212 So. 3d 1001 (Fla. 2017), this Court reasoned that the instructions given to the jury informed the jury that it needed to determine whether sufficient aggravators existed and whether any aggravation outweighed the mitigation before it could recommend a death sentence. *Id*. This Court further reasoned that "[e]ven though the jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did in fact recommend death unanimously." *Id*. at 1035. The Court

concluded that any *Hurst* error in regard to Hall's sentence, which was based on a unanimous recommendation, was harmless beyond a reasonable doubt, and that Hall was not entitled to a new penalty phase proceeding. *Id*. at 1035-36.

Like the jury in *Hall*, Appellant's jury did not make specific factual findings as to any aggravating circumstances, nor did it make any findings in regard to the weight of the aggravating and mitigating circumstances. The jury was instructed that each aggravating circumstance had to be established beyond a reasonable doubt before it could recommend a death sentence. The jury was not instructed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous. The jury also was not instructed that it was not required to recommend death even if the aggravators outweighed the mitigators. Nevertheless, like *Hall*, Appellant's jury still unanimously recommended a death sentence.

Next, the aggravators and mitigators presented in this case are taken into consideration. In *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors."

The trial court found four aggravators were proven: 1) Appellant was previously convicted of a capital felony; 2) the capital felony was committed while Appellant was engaged in kidnapping; 3) the capital felony was committed for pecuniary gain; and 4) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Id*. at 751. The trial court also found that one statutory mitigator applied in Appellant's case: Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *Id.* at 751. The aggravation here clearly outweighed the mitigation. Finally, the horrific facts of Appellant's case validate the conclusion that the *Hurst* error was harmless beyond a reasonable doubt.

Notwithstanding the lack of specific factual findings, like *Hall*, Appellant's jury did unanimously recommend a death sentence, which lays the foundation to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. Such a recommendation is "precisely what [this Court] determined in *Hurst v. Florida* to be constitutionally necessary to impose a sentence of death." *Id.* at 175.

Thus, like *Reynolds*, *Hall*, *Knight*, *King*, *Kaczmar*, and *Davis*, even if *Hurst* could apply, any *Hurst* error in Appellant's sentence, which was based on a unanimous

recommendation, was harmless beyond a reasonable doubt, and therefore Appellant would still not be entitled to a new penalty phase proceeding.

4. Eight Amendment *Caldwell* Claim and

5. Harmless-Error under *Sullivan*

In *Caldwell*, the Supreme Court ruled that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Appellant maintains that since the jury only recommended imposition of the death penalty, his sentences violated the Eighth Amendment under *Caldwell*. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

This Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). Recently, this Court issued a detailed opinion which expressly addressed these *Hurst*-induced *Caldwell* claims. *Reynolds v. State*, 2018 WL 1633075 (Fla. Apr. 5, 2018).

This Court concluded that *Hurst*-induced *Caldwell* claims against the standard jury instruction do not provide an avenue for *Hurst* relief. To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Specifically, neither *Ring* nor *Hurst* provides bases for *Caldwell*

challenges to the standard jury instruction given in the interim, between 2002 and 2016, because these challenges cannot withstand the Supreme Court's holding in *Romano*. *See, e.g.*, *Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014); *Foster v. State*, 132 So. 3d 40, 75 (Fla. 2013); *Patrick v. State*, 104 So. 3d 1046, 1064 (Fla. 2012); *Barwick v. State*, 88 So. 3d 85, 108-09 (Fla. 2011); *Phillips v. State*, 39 So. 3d 296, 304 (Fla. 2010); *Reese v. State*, 14 So. 3d 913, 920 (Fla. 2009); *Jones v. State*, 998 So. 2d 573, 590 (Fla. 2008); *Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007); *Miller v. State*, 926 So. 2d 1243, 1257 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005); *Globe v. State*, 877 So. 2d 663, 673-74 (Fla. 2004); *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003).

Therefore, a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law. *See Romano*, 512 U.S. at 9; *Caldwell*, 472 U.S. at 342-43. Here, Appellant's jury was properly instructed on its role **based upon the law existing at the time of his trial.** Thus, characterizing the jury as "advisory" and the trial court as the final sentencer, was an accurate description of the role assigned to the jury by Florida law and there is no *Caldwell* violation.

Moreover, Appellant's sentence was pre-*Ring*. In addressing retroactivity, this Court stated "as a practical matter, a *Hurst*-induced *Caldwell* claim cannot be more retroactive than *Hurst* because the rights announced in *Hurst* serve as the basis for this type of

Caldwell claim—the two are inextricably intertwined for the purposes of this challenge. If rights are not retroactive prior to *Ring*, then any pre-*Ring* claim based on those rights plainly cannot stand." *Reynolds v. State*, 2018 WL 1633075, at *10. (Fla. Apr. 5, 2018).

ARGUMENT III

ISSUE I: APPELLANT'S CLAIM IN REGARD TO THE INCLUSION OF AGGRAVATING FACTORS IN HIS INDICTMENT IS PROCEDURALLY BARRED AND HE IS NOT ENTITLED TO RELIEF

Appellant further argues that his death sentence is unconstitutional, because the State was required to list the aggravating factors in the indictment. Appellant's argument is procedurally barred, and, even if his claim is not procedurally barred, Appellant would still not be entitled to relief. This Court has consistently held that the State is not required to list the aggravating factors in the indictment, and thus Appellant's claim must be denied. The trial court properly held:

> Defendant acknowledges this claim is also based on *Hurst v. Florida* and *Hurst v. State*, which does not apply retroactively, as set forth in the ruling on Claim Two. Furthermore, the Florida Supreme Court has consistently rejected the argument that aggravating circumstances must be alleged in the Indictment. *See,e.g., Pham v. State*,70 So. 3d 485, 497 (Fla. 201 l); *Zommer v. State*, 31 So. 3d 733, 7 53 (Fla. 2010).

(V1, R646-47).

Additionally, Appellant's claims regarding the alleged deficiency in the indictment is a claim that could have been raised in his direct appeal case. *See State v. Larzelere*, 979 So. 2d 195, 207-08 (Fla. 2008) (stating that an allegation regarding a deficient indictment is

properly raised on direct appeal). Claims that could have been, or were raised on direct appeal, are procedurally barred from being raised in a postconviction motion. *Gorby v. State*, 819 So. 2d 664, 674 n. 8 (Fla. 2002). Hence, because the claim could have been raised on direct appeal, Appellant's claim is procedurally barred from consideration in this postconviction proceeding, and thus he is not entitled to any relief.

Even if Appellant's claim is not procedurally barred, he would still not be entitled to any relief. This Court has repeatedly held that there is no requirement for the aggravating factors be listed in the indictment. *See e.g., Pham v. State,* 70 So. 3d 485, 496 (Fla. 2011) (quoting *Ferrell v. State*, 918 So. 2d 163, 180 (Fla. 2005) ("we have rejected claims that *Ring* requires the aggravating circumstances to be alleged in the indictment.")); *Zommer v. State*, 31 So. 3d 733, 753 (Fla. 2010) ("we have previously rejected constitutional challenges to an indictment for failure to list the aggravating circumstances that the State intends to prove."); *Grim v. State*, 971 So. 2d 85, 103 (Fla. 2007) (quoting *Vining v. State*, 637 So. 2d 921, 927 (Fla. 1994) ("[a]s we have said before, '[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in [the statute]. Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove.'")); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006) (rejecting defendant's argument that the failure to list the aggravating factors in the

indictment renders a death sentence unconstitutional under *Ring*). *Hall. v. State*, Case No. 17-1355, *slip op*. at 12-13 (Fla. Apr. 12, 2018).

Thus, even if Appellant's claim is not procedurally barred, he would not be entitled to any relief because this Court has consistently held that there is no requirement to list the aggravating factors in the indictment.

CONCLUSION

Appellant's claim regarding his alleged intellectual disability is meritless, because the evidence put forth by Appellant failed to show that he is, in fact, intellectually disabled. Additionally, Appellant's death sentence does not violate any constitutional provision, because this Court has consistently held that *Hurst* does not apply to defendants like Appellant, whose sentence was final prior to the *Ring* decision. Lastly, Appellant is not entitled to have his death sentence vacated due to the failure to list the aggravating factors in the indictment. The claim is procedurally-barred, and even if it were not, this Court has repeatedly held that the aggravating factors are not required to be listed in the indictment.

Based on the foregoing authority and arguments herein, the State respectfully requests that this Honorable Court affirm the order of the circuit court and deny all relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 19, 2018, a true and correct copy of the foregoing was filed via e-Portal to: Christopher J. Anderson, Esq., chrisaabl@gmail.com, 2217 Florida Blvd., Neptune Beach, Florida 32266; Billy H. Nolas, billy_nolas@fd.org,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this reply is 14-point Times New Roman, in compliance with *Fla. R. App. P*. 9.210 (a) (2).

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