No. SC17-2198

IN THE

Supreme Court of Florida

JERMAINE FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This case is on appeal from the Circuit Court's summary denial of Appellant Jermaine Foster's successive Rule 3.851 motion for post-conviction relief under *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

The record on appeal from the recent *Hall-Hurst* 3.851 motion is cited as "SPCR." The record from Mr. Foster's initial post-conviction proceeding is cited as "PCR." The record from the original trial is cited as "R."

REQUEST FOR ORAL ARGUMENT

Mr. Foster respectfully requests oral argument pursuant to Fla. R. App. P. 9.320, and also files a separate motion for oral argument with this brief.

STATEMENT OF THE CASE AND FACTS

In July 1994, before the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Foster was convicted of two counts of first-degree murder and sentenced to death.

Prior to the trial, Dr. Henry Dee evaluated Mr. Foster as part of a mitigation assessment. PC-R. 68. Dr. Dee's February 1994 testing determined Mr. Foster's I.Q. score to be 75. R. 319. Dr. Dee testified at the penalty phase that Mr. Foster's low I.Q. score was in conjunction with "adaptive dysfunction" because Mr. Foster failed to meet the criteria for functional literacy and never had formal employment. R. 321.

Mr. Foster's other witness during the penalty phase was licensed clinical social worker Janet Vogelsang. Ms. Vogelsang reviewed a number of records, including Mr. Foster's school and medical records, and interviewed members of his family. Ms. Vogelsang's testimony provided a summary of Mr. Foster's life history, including physical abuse, neglect, intergenerational intellectual impairment, and psychological and emotional battering. *See* R. 116-17.

However, as Mr. Foster's penalty phase was before *Atkins*, intellectual disability was not the focus of the defense presentation. At no point during Dr. Dee's or Ms. Vogelsang's testimony were they asked to describe the three-prong analysis used in cases of intellectual disability (at that time known as "mental retardation") or discuss whether Mr. Foster's circumstances supported those prongs.

Following the advisory jury's unanimous recommendation of two death sentences, the trial court found four aggravating factors: (1) previously convicted of another capital felony; (2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was committed in a cold, calculated, and premeditated manner. *Foster v. State*, 929 So. 2d 524, 527 n.1 (Fla. 2006). The trial court found one "statutory" mitigating factor: Mr. Foster's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. *Id.*

The trial court also *found mental retardation as one of Mr. Foster's non-statutory mitigating circumstances*. Overall, the trial court found the following "non-statutory" mitigators: Mr. Foster (1) endured an abusive childhood; (2) "suffers some organic brain damage, is mildly mentally retarded, and has a low I.Q."; and (3) "suffers from a substance abuse problem and . . . was to some extent under the influence of drugs and alcohol" at the time of the crime. R. 752-753. Despite the finding of mental retardation, the trial court followed the jury's recommendation and sentenced Mr. Foster to death. R. 753. This Court affirmed. *Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996).

Counsel retained Dr. Dee to assist in Mr. Foster's 3.851 post-conviction proceedings. The purpose of Dr. Dee's testimony in those proceedings, which occurred in 2000—again, before *Atkins*—was to support a voluntary intoxication claim. Dr. Dee testified during an evidentiary hearing that, given Mr. Foster's reduced intellectual functioning, drugs and alcohol would have a more deleterious effect on him than on the average person. Dr. Dee observed: "I think from behavior, [Mr. Foster] could be considered mildly retarded, he didn't keep a job or kept any accounts, he always depended on other people for support." PCR. 78. To support this view, Dr. Dee explained that even as an adult, Mr. Foster lived with others and that his memory function was very poor. PCR. 78-79. Dr. Dee also noted that Mr. Foster was the type of person who, for "a person he looked up to and relied on . . .

he [would] do whatever you asked him to do." PCR. 82. Dr. Dee described Mr. Foster as "a follower, he was never a leader." PCR. 82.

On cross-examination, Dr. Dee stated that Mr. Foster "never had a job for a substantial period of time. He hasn't finished school. He was not really functioning literal. He had a lot of cultural deprivation." PCR. 97. (Today, these deficiencies would be described as adaptive deficits). Dr. Dee determined Mr. Foster's intellectual functioning to be "mildly retarded to borderline." PCR. 97. Dr. Dee further qualified his response, stating that if Mr. Foster was in the borderline range, it was "not borderline very high." PCR. 97. When asked if a "mentally retarded" (i.e., intellectually disabled) person can do things, Dr. Dee testified, "[t]here is no hard and fast rule . . . . Some people can do it who are retarded and some people who are retarded can't do it, it depends on the particular individual and their particular skill." PCR. 99.

After the evidentiary hearing but before the Circuit Court ruled on the 3.851 motion, the United States Supreme Court decided *Atkins*. Mr. Foster asked the court for an additional hearing to establish that he was intellectually disabled and thus ineligible for a death sentence under *Atkins*. The Circuit Court *summarily denied* Mr. Foster's *Atkins* claim without holding an additional hearing.

This Court affirmed the summary denial of *Atkins* relief. *Foster*, 929 So. 2d at 531-32. This ruling was made when Florida employed a hard I.Q. cut-off score of

70 for intellectual disability cases. This Court cited Dr. Dee's pre-*Atkins* testimony in finding that Mr. Foster did not qualify as intellectually disabled. *Id.* at 532. The Court also cited the Circuit Court's statement that Mr. Foster had supported himself with illegal drug sales and had cared for his younger co-defendant, Leondre Henderson. *Id.* at 533. Further, this Court stated that Mr. Foster had testified on his own behalf at the evidentiary hearing, so he had some communication capacity. *Id.* Finally, this Court wrote that Mr. Foster was not in special education. *Id.* (It is now acknowledged by the parties that this observation by the Court was simply wrong. The State of Florida does not dispute today that Mr. Foster was in special education.)

On August 29, 2017, now represented by the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida and state- appointed co-counsel, Mr. Foster filed a successive motion for post-conviction relief asserting that he is ineligible for the death penalty because of his intellectual disability under the decisions in *Hall* and *Walls v. State*, 213 So. 3d 340 (Fla. 2016). Mr. Foster explained that none of the reasons provided by this Court for affirming the summary denial of intellectual disability relief in 2006, pre-*Hall*, remain valid bases to deny relief post-*Hall*. Mr. Foster also asserted a separate claim that his death sentences violated the Sixth, Eighth, and Fourteenth Amendments under the *Hurst* decisions. After the State filed its answer, Mr. Foster filed a reply including a proffer of the expert report of Dr. Jethro Toomer addressing Mr. Foster's intellectual disability, *see* SPCR. 530-

33, and sworn statements by lay witnesses on the *Hall* issue, *see infra* Part II.A; SPCR. 514-29.[1]

The Circuit Court held formal argument at a case management conference conducted on November 2, 2017. CHU counsel for Mr. Foster summarized the proffer in detail. As the State did not dispute that Mr. Foster's I.Q. score was within the *Hall* range, counsel focused on adaptive deficits and the manifestation of intellectual disability before age 18.[2] Counsel described Mr. Foster's ongoing difficulty at school, including the times he had to repeat a grade, that he needed his younger relatives to do his homework, and that he consistently scored in the lowest percentiles on standardized tests. SPCR. 697. Mr. Foster was also socially promoted numerous times because he was too old to stay in certain grades. *Id.* at 701. By age 16, Mr. Foster had not even made it to high school. *Id.* at 698. Counsel also described the results of Mr. Foster's standardized tests administered in elementary and middle school that spelled out the adaptive deficits he had as a child, including that Mr. Foster could not "solve purchasing problems for amounts of less than a dollar[;] . . . read an index, a table of contents, or a dictionary; could not write three sentences on the same topic; [or] even by the time he's in junior high school, to properly tell

[1] In *Walls*, this Court recognized Dr. Toomer is an expert in intellectual disability assessment.

[2] A complete description of the proffered evidence and its relevance to the three-prong test for intellectual disability is provided in Part II.A-B, *infra*.

months, days, and numbers from 1 to 20 . . . ." *Id.* at 699-700. Counsel explained, "[t]his is all reflected in the school records. These are all clear, conceptual adaptive deficits as [confirmed by] the proffer we have provided to the Court, as the original testimony from Dr. Dee way back at the original sentencing, all the way through to Dr. Toomer's affidavit today in the case." *Id.* at 699.

Counsel also described the lay-witness statements of Mr. Foster's peers and relatives, who "described [Mr. Foster] as 'slow' his entire life." *Id.* at 702. Other children in the neighborhood would convince him to lick batteries, jump off roofs, sniff ammonia, and run in front of cars. *Id.* at 703. Counsel pointed out that this is "the kind of mistreatment that one would expect with a person who is slow and is being bullied." *Id.* Mr. Foster's hygiene was "deplorable." *Id.* He needed reminders to brush his teeth, wear appropriate clothing for the weather, and even to wear shoes. *Id.* As he became older, Mr. Foster never lived by himself and needed assistance to fill out forms and checkbooks or pay bills. *Id.* He could not cook for himself. *Id.* He also had difficulty communicating with others and would get frustrated when he could not understand. *Id.* at 704.

The State did not contest the substance of Mr. Foster's evidentiary proffer, relying almost entirely on a procedural bar argument. The State's only response to Mr. Foster's factual proffer was that "Mr. Foster was able to care for his relatives, and . . . was able to obtain a driver's license." SPCR. 717. The State appropriately

conceded that Mr. Foster's I.Q. score is 75 and that "if you apply the . . . standard error of measurement, that would drop it down to 70. So that puts him, arguably, as establishing the first prong, which is the subaverage intellectual functioning." SPCR. 711. The State explained that, "the State's position is that, arguably, the first prong has been met." SPCR. 712.

The State based its procedural bar argument on the assertion that intellectual disability was "already analyzed" by the Circuit Court and this Court in prior proceedings occurring nearly ten years before *Hall*. The State also argued for a "default" ruling because the evidence in Mr. Foster's post-*Hall* proffer was available during pre-*Atkins* proceedings. SPCR. 714.

The Circuit Court denied relief on November 17, 2017, ruling that Mr. Foster was procedurally barred from raising a *Hall* claim because he had already raised an intellectual disability claim during his pre-*Atkins* penalty phase and pre-*Atkins* Rule 3.851 hearing. As to *Hurst*, the Circuit Court denied relief on retroactivity and harmless error grounds. SPCR. 646. Finally, the Circuit Court denied Mr. Foster's claim that his indictment was defective because it did not contain the aggravating factors, necessary "elements" of his sentence under *Hurst*, on retroactivity grounds. SPCR. 646-47.

SUMMARY OF ARGUMENT

Mr. Foster is intellectually disabled. He has not been afforded the opportunity for a hearing or appropriate review of his intellectual disability claim at any time since the United States Supreme Court precluded the imposition of the death penalty on the intellectually disabled in *Atkins v. Virginia*. At his pre-*Atkins* penalty phase, Mr. Foster presented evidence of intellectual disability as mitigation, including his I.Q. score of 75 and indications of adaptive deficits.[3] The trial court *expressly found* mental retardation as one of Mr. Foster's non-statutory mitigating circumstances, but at the time such a finding was not a bar to the death penalty. Then, at Mr. Foster's pre-*Atkins* 3.851 evidentiary hearing, Mr. Foster again presented evidence of his intellectual disability, this time for the purpose of supporting a voluntary intoxication claim. After his evidentiary hearing but before his 3.851 claims were reviewed by this Court on appeal, the United States Supreme Court decided *Atkins*. However, the Circuit Court summarily denied a hearing, and this Court affirmed.

Mr. Foster's intellectual disability claim is now properly before this Court under *Hall v. Florida*, which is retroactively applicable in this case under *Walls v. State*, 213 So. 3d 340 (Fla. 2016). In the Circuit Court, the State conceded Mr. Foster's full-scale I.Q. is 75, within the *Hall* range. Mr. Foster also submitted an

[3] As this penalty-phase presentation predated *Atkins*, the evidence was not presented in conformity with the three-prong test provided in *Atkins*.

undisputed proffer establishing his adaptive deficits and the onset of his intellectual disability before age 18. Despite the fact that Mr. Foster never had the opportunity to present evidence of his intellectual disability at any hearing after either *Atkins* or *Hall*, the Circuit Court summarily denied Mr. Foster's *Hall* claim. The Circuit Court found the claim procedurally barred given the pre-*Atkins* consideration of intellectual disability evidence in this case. This ruling was erroneous.

The assessment of Mr. Foster's intellectual disability based on his pre-*Atkins* presentation is insufficient to meet the requirements of *Hall*, 134 S. Ct. at 2000-01 (explaining that an assessment of intellectual disability is "a conjunctive and interrelated assessment" that is "informed by the views of medical experts"), *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (explaining that "current manuals" provide the best description of intellectual disability and how it must be assessed, including the interpretation of I.Q. scores and the determination of adaptive deficits), *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015) (finding it unreasonable to deny an *Atkins* hearing to a defendant with a 75 I.Q. based on his pre-*Atkins* presentation of intellectual disability evidence because the court "should have taken into account that the evidence before it was sought and introduced at a time when [the defendant's] intellectual disability was not at issue"), or *Walls*, 213 So. 3d at 346 (requiring "holistic review" of intellectual disability). Furthermore, the Circuit Court's procedural bar ruling contravenes this Court's holding in *Walls* that those

who previously raised an *Atkins* claim and were denied holistic review of their intellectual disability claims because of the strict I.Q. cutoff at 70 may now raise a claim under *Hall*.

Based on decisions of this Court and the United States Supreme Court, the finding of a procedural bar is reversible error. As the facts Mr. Foster presented in support of his claim have not been disputed, Mr. Foster should be afforded relief based upon the current record, as this Court did in *Hall* itself, *see Hall v. State*, 201 So. 3d 628, 629 (Fla. 2016), or at a minimum, the case should be remanded for an evidentiary hearing, as this Court did in *Walls*, 213 So. 3d at 347.

In addition, Mr. Foster was sentenced to death under Florida's prior unconstitutional sentencing scheme, in violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). His death sentences should be vacated on that separate basis as well.

Finally, Mr. Foster was sentenced to death based on a grand jury indictment that failed to include essential elements, namely, the aggravating factors the State intended to pursue, in violation of several decisions including *State v. Gray*, 435 So. 2d 816, 818 (1983), *Hurst v. Florida*, 136 S. Ct. at 616, and *Hurst v. State*, 202 So. 3d at 40. His death sentences should be vacated.

ARGUMENT I

I. Mr. Foster's death sentences violate the Eighth Amendment because he is intellectually disabled

There is no question that death sentences cannot be imposed on the intellectually disabled. Mr. Foster timely raised an intellectual disability claim immediately after the United States Supreme Court decided *Atkins v. Virginia*, but a hearing was denied. Now represented by CHU counsel, Mr. Foster has now raised a proper intellectual disability claim, this time under *Hall*. The State did not dispute that Mr. Foster's I.Q. is 75, within the *Hall*/*Walls* range. Mr. Foster's factual proffer establishing his adaptive deficits and the manifestation of his intellectual disability before the age of 18 was also not materially disputed by the State. Rather, the State argued that Mr. Foster was procedurally barred from raising a *Hall* claim. The Circuit Court summarily denied Mr. Foster's *Hall* claim under an erroneous application of a procedural bar. Mr. Foster's intellectual disability claim is *not* procedurally barred, and his undisputed proffer establishes his intellectual disability. He should be afforded relief under *Hall* at this juncture. Alternatively, he should be afforded an evidentiary hearing, as this Court did in *Walls*. *Walls*, 213 So. 3d at 347.

A. Mr. Foster's intellectual disability claim under *Hall v. Florida* is not procedurally barred

The Circuit Court erred in finding Mr. Foster's *Hall* claim procedurally barred. This Court reviews procedural bar findings de novo.

This Court's post-*Hall* jurisprudence has established three principles when it comes to reasserted intellectual disability claims under *Hall*. First, *Hall* is retroactive. Second, a defendant cannot be denied relief absent a post-*Hall* hearing when he raised an intellectual disability claim after *Atkins*, as this "preserves" the claim for review post-*Hall* without a procedural bar.[4] And third, where a defendant previously presented I.Q. scores between 70 and 75, any prior consideration of the intellectual disability claim is legally inadequate, even if the defendant was allowed to present evidence on the other prongs, because Florida's courts were tainted by the prior unconstitutional cutoff of 70 and did not provide the holistic review required by *Hall*. We discuss each in turn.

1. *Hall* affirmed the well-established principle that the death penalty cannot be imposed on the intellectually disabled and precluded use of a bright line cutoff to determine intellectual disability because the cutoff failed to take into account the guidance of the medical community

It has been well-established since *Atkins* that states cannot impose death sentences on the intellectually disabled. *Atkins*, 536 U.S. at 321. The *Atkins* Court left it to the states to determine the procedures by which a person establishes that he or she is intellectually disabled under the accepted medical definition of the condition. *Atkins*, 536 U.S. at 317. To establish intellectual disability, Florida

[4] *Cf. infra*, n.7 and Argument I, Part III describing the problems with this "presentation" idea in cases where the defendant's I.Q. is 70-75.

defendants must show (1) significantly subaverage intellectual functioning; (2) deficits in adaptive behavior; and (3) manifestation before the age of eighteen. *Franqui v. State*, 211 So. 3d 1026, 1028 (Fla. 2017).

Before *Hall*, this Court required a defendant to show that he had an I.Q. score of 70 or below before a Florida court would even consider the other prongs. *See Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007), *abrogated by Hall*, 134 S. Ct. at 1990. In *Hall*, the United States Supreme Court held that Florida's strict cutoff was unconstitutional. *Hall*, 134 S. Ct. at 1990. In so holding, the Court "consider[ed] the psychiatric and professional studies that elaborate on the purpose and meaning of I.Q. scores to determine how the scores relate to the holding of *Atkins*." *Hall*, 134 S. Ct. at 1993. The Court explained that I.Q. scores cannot be reduced to a single number and instead represent a range. *Id.* at 1999. By requiring a strict cutoff, Florida courts had "bar[red] consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 2001. Doing so "disregard[ed] established medical practice" by interpreting "an I.Q. score as final and conclusive evidence of a defendant's intellectual capacity . . . while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995. The *Hall* Court "agree[d] with the medical experts that when a defendant's I.Q. 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." *Id.* at 2001.

The United States Supreme Court then addressed intellectual disability claims in a case remarkably similar to Mr. Foster's, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). Mr. Brumfield was tried before *Atkins*. A penalty phase expert testified that he had scored 75 on an I.Q. test. *Id.* at 2275. Just like Mr. Foster, Mr. Brumfield's state post-conviction petition was pending when the United States Supreme Court decided *Atkins*. *Id.* at 2274. Both the state trial court and the Louisiana Supreme Court summarily denied his *Atkins* claim. *Id.* The federal district court granted a hearing on Mr. Brumfield's *Atkins* claim, but the Fifth Circuit vacated that ruling. *Id.* at 2275-76.

In *Brumfield*, the Supreme Court reversed the Fifth Circuit, explaining that the holding of *Hall* was "that it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an I.Q. above 70." *Id.* at 2278 (quoting *Hall*, 134 S. Ct. at 1990). The Supreme Court also emphasized that Mr. Brumfield "had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim", *id.* at 2281, because—just as in Mr. Foster's case—"[a]t his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability." *Id.* at 2281.

Most recently, in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Supreme Court reversed Texas's failure to follow the medical community in making its intellectual disability determinations. The *Moore* Court provided more guidance on how lower courts must assess adaptive deficits. For example, *Moore* indicated that courts should not overemphasize perceived strengths, as was done previously by this Court in Mr. Foster's case. *Id.* Instead, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 1050. This is in line with the understanding of the AAIDD-11,[5] the DSM-5,[6] and *Brumfield*. *See* AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (inquiry should focus on '[d]eficits in adaptive functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); *Brumfield*, 576 U.S. at 2281, ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting American Association on Mental Retardation, *Mental Retardation*

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

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

Definition, Classification, and Systems of Support 8 (10th ed. 2002))). Finally, the Supreme Court criticized the lower court's conclusion that "Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related." *Id.* at 1051. Instead, "those traumatic experiences . . . count in the medical community as '*risk factors*' *for* intellectual disability." *Id.* at 1051 (citing AAIDD-11, at 59-60). Thus, "[c]linicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Id.*

Moore has already affected Florida's handling of intellectual disability claims. Recently, the United States Supreme Court granted a petition for writ of certiorari, vacated this Court's opinion, and remanded for further proceedings in an intellectual disability case, instructing this Court to re-evaluate the case in light of *Moore*. *Wright v. Florida*, No. 17-5575, 138 S. Ct. 360, at *1 (Oct. 16, 2017). In that case, this Court found that the defendant had not established adaptive deficits based on factors similar to those asserted by the State here. *See Wright v. State*, 213 So. 3d 881, 897 (Fla. 2017). Contrary to the DSM-5's guidance that an intellectually disabled person may have deficits in one area of adaptive functioning but not others, this Court denied relief in *Wright* because the defense expert "could only conclude that Wright currently has some deficits in the subcategory of conceptual skills, but

not in the other categories of practical skills or social skills." *Id.* at 900. The United States Supreme Court's remand of the *Wright* case in light of *Moore* shows that it is taking seriously its mandate that state courts rely heavily on the guidelines of medical professionals and experts in assessing intellectual disability claims, and further supports relief under *Hall* in Mr. Foster's case.

2. *Hall* is retroactive to those, like Mr. Foster, who timely raised an intellectual disability claim after *Atkins*

Hall is retroactive on collateral review in Florida. The United States Supreme Court first suggested as much in *Haliburton v. Florida*, 135 S. Ct. 178 (2014). In that case, this Court had denied a successive petition for post-conviction relief based on *Atkins*. While the petition for certiorari was pending, the United States Supreme Court decided *Hall v. Florida*. The Supreme Court vacated this Court's ruling and remanded *Haliburton* for this Court to reconsider the case in light of *Hall*. *See id.* at 178. In turn, this Court remanded the case back to the circuit court for a hearing. *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015).

This Court definitively determined *Hall*'s retroactivity in *Walls v. State*, 213 So. 3d at 346. The Court held: "We find that *Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of I.Q. scores than before." *Id.* at 346. *Walls* was decided on October 16, 2016, meaning that any intellectual disability claims under *Hall* must have been

filed by October 17, 2017. *See Hamilton v. State*, No. SC17-42, 2018 WL 773977, at *2 (Fla. Feb. 8, 2018) ("The relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively."); *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999) (explaining that the filing deadline for claims based on new rights is based on the date of this Court's mandate announcing retroactivity of that right).

Mr. Foster filed his motion for post-conviction relief under *Hall* on August 29, 2017. Thus, it was timely filed.

Mr. Foster also properly "preserved" his claim by asserting his intellectual disability shortly after *Atkins*. As Justice Pariente stated in her *Walls* concurrence, "those defendants who did not timely raise a claim under *Atkins* [] . . . should not be entitled to relief under *Hall*." *Walls*, 213 So. 3d at 348 (Pariente, J. concurring) (citing *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776, at *1 (Fla. Aug. 9, 2016)). This Court denied relief in *Rodriguez* because "there was no reason Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins*." *Rodriguez*, 2016 WL 4194776, at *1. However, those who *have* previously raised *Atkins* claims, like Mr. Foster, are not procedurally barred and are entitled to *Hall* review and a hearing.[7]

[7] Counsel notes, as described in Part 3, *infra*, that this "preservation" idea is misplaced in the cases of defendants with I.Q. scores between 70 and 75. Those defendants *could not* actually present *Atkins* claims before *Hall* because reasonable

3. Prior consideration of Mr. Foster's presentation of evidence supporting his intellectual disability, which occurred at his penalty phase and to a lesser extent at his initial 3.851 hearing, both of which predated *Atkins*, was inadequate to provide the holistic review required by *Hall*

This Court has consistently held that defendants may reassert their intellectual disability claims to rectify any unconstitutional analysis that existed prior to *Hall*. While some defendants have not been afforded new consideration of their intellectual disability claims following *Hall* depending on their case-specific circumstances, Mr. Foster is the only defendant in Florida who has been denied the opportunity to present evidence of his intellectual disability both after *Atkins* and after *Hall*—despite the fact that he timely raised an *Atkins* claim after *Atkins* and a *Hall* claim after *Hall*.

The Circuit Court wrongly relied on *Rodgers v. State*, No. SC15-1640, 2017 WL 563213 (Fla. Feb. 13, 2017), to impose a bar here. *Rodgers* is inapposite. In that case, the defendant's trial was in 2004, two years after *Atkins*. *Id.* at *2. The defendant raised intellectual disability under *Atkins* at his trial. *Id.* The trial court in that case had the benefit of the United States Supreme Court's guidance in *Atkins* outlining the three prongs of the test for intellectual disability, and the court considered whether the defendant was ineligible for a death sentence. *Id.*

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defense counsel would have recognized that there was no remedy in light of the strict 70-I.Q. cutoff.

Significantly, Mr. Rodgers had an I.Q. score of 69, so even though his case was before *Hall*, his sub-70 score allowed him to present evidence on all three prongs. *Id.* That is unlike Mr. Foster's case, where the I.Q. score is 75 and thus within the 70 to 75 range that could not allow for relief under Florida's pre-*Hall* law.

The trial court in *Rodgers* denied relief based on Mr. Rodgers' inability to establish the other prongs, and this Court affirmed. *Id.* After *Hall*, Mr. Rodgers sought a new hearing governed by the "new standard announced in *Hall*." *Id.* The trial court denied a new hearing, and this Court affirmed, because Rodgers fully presented evidence on all three prongs despite the strict 70-cutoff and had not established the presence of adaptive deficits and onset before age 18. *Id.* This Court made clear that the denial of a new hearing was based on the unique "circumstances presented in [Rodgers'] case." *Id.* This too is different than what occurred in the case of Mr. Foster, who presented his intellectual disability evidence *before Atkins* and thus did not even have a hearing addressing the three prongs. Even if post-*Atkins* consideration of this evidence was viewed through the lens of *Atkins*' three-prong test, as explained further below, the pre-*Atkins* presentation here did not conform to *Atkins* standards and any presentation of evidence on the other prongs was tainted by the belief that Mr. Foster could not meet the first prong of the test since his I.Q. score was over 70, above the strict cutoff.

This Court has indicated in other cases that among defendants who had the opportunity to present evidence of their intellectual disability on all three prongs before *Hall*, there is a difference between those who had a score under 70, and thus who received full consideration of their *Atkins* claim, and those who scored between 70 and 75, thus making courts reluctant to fully consider any evidence beyond their I.Q. score. For example, in *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017), the defendant had scores *below* 70, which he presented at a post-*Atkins*, pre-*Hall* evidentiary hearing. This Court found, "[w]hile the change in *Hall* could have affected how the defense prepared, . . . Rodriguez had I.Q. scores below 70 such that a finding of intellectual disability was possible prior to *Hall*, and Rodriguez's defense had every opportunity to present its best case at his prior *Atkins* evidentiary hearing." *Id.* at 759. *Rodriguez*, like *Rodgers*, is inapplicable to Mr. Foster's case. Mr. Foster was not afforded the opportunity to show why his evidence met all three prongs of the *Atkins* test, and the courts were tainted by the 70-cutoff rather than using the holistic approach required by *Hall*.

Mr. Foster's case is akin to the many cases where this Court has either granted relief or remanded for an evidentiary hearing after a defendant reasserted his intellectual disability claim post-*Hall*. This Court's main concern was that even if a defendant's intellectual disability claim had previously been analyzed, such analysis might lack the holistic review required by the United States Supreme Court in *Hall*.

In *Walls*, the defendant filed multiple post-*Atkins* successive petitions asserting intellectual disability. *Id.* at 344-45. The circuit court *granted an evidentiary hearing* on intellectual disability following his first successive post-conviction motion. *Id.* at 344. At that hearing, the defendant presented evidence on all three prongs of the intellectual disability test. *Id.* The circuit court denied relief, and this Court affirmed. *Id.* After *Hall*, *Walls* filed another successive post-conviction petition reasserting his intellectual disability claim. The circuit court summarily denied that petition, in part because "Walls had already received the relief *Hall* allows because Walls had had the benefit of an earlier hearing at which he presented evidence regarding all three prongs of the test for intellectual disability." *Id.* at 345. This Court reversed. After first finding *Hall* retroactive, *see id.* at 346, the Court explained that Walls' pre-*Hall* evidentiary hearing *did not preclude* further consideration of his post-*Hall* intellectually disability claim:

> [I]t is clear that although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled. Also, Walls' prior hearing was conducted under standards he could not meet because he did not have an I.Q. score below 70—a fact which may have affected his presentation of evidence at the hearing.

Id. at 347. Despite Walls' pre-*Hall* intellectual disability hearing, this Court remanded the case for a new evidentiary hearing "[b]ecause Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability

and was reviewed by the circuit court with the former I.Q. score cutoff rule in mind." *Id.* The same idea applies here.

Walls was not an anomaly. This Court has repeatedly acknowledged that pre–*Hall* treatment of intellectual disability claims was likely tainted by the prior unconstitutional bright line approach. In *Franqui*, this Court remanded for a new evidentiary hearing even though it was "not disputed" that the defendant had been afforded an evidentiary hearing on his intellectual disability claim after *Atkins*. 211 So. 3d at 1031. The Court explained that because the defendant "may have significantly limited his presentation because he knew that he could not meet the first prong of intellectual disability," and because "the circuit court may have determined it was unnecessary to consider or discuss the second and third prongs in detail," the defendant "did not receive the holistic evaluation of his claim that he is entitled to under *Hall*." *Id.* at 1032; *see also Thompson v. State*, 208 So. 3d 49, 59 (Fla. 2016) (remanding for an evidentiary hearing because "[a]lthough Thompson did present some evidence relating to all three prongs of the intellectual disability test, he did not receive the type of conjunctive and interrelated assessment that *Hall* requires" when the record showed a range of scores between 71 and 88).

Mr. Foster's prior record is even less adequate to resolve an intellectual disability claim than the records in *Walls*, *Franqui*, and *Thompson*, because both his penalty phase "mitigation" presentation regarding intellectual disability and his

3.851 use of intellectual disability to support an involuntary intoxication claim predated not just *Hall* but also *Atkins*. As a result, *no court has ever allowed a hearing for Mr. Foster to present evidence of intellectual disability at any time after intellectual disability became a complete bar to the imposition of a death sentence*. His penalty phase presentation included intellectual disability not as a bar to the death penalty, but only as mitigation.[8] *Cf. Thompson*, 208 So. 3d at 54 (no procedural bar where intellectual disability had been raised as mitigation because mitigation was not the same "as evidence of intellectual disability as a bar to execution"). Similarly, Mr. Foster's presentation of intellectual disability at his initial 3.851 evidentiary hearing was also not an outright intellectual disability claim but merely an explanation of how he was especially vulnerable to the effects of drugs and alcohol because of his reduced cognitive functioning. Thus, not only has Mr. Foster never had an opportunity to undergo a "holistic review" as required by *Hall*, he has never had a hearing to present a claim of intellectual disability under the three prongs articulated in *Atkins*.

[8] The trial court found mental retardation as one of Mr. Foster's non-statutory mitigating circumstances. R. 752.

4. The prior treatment of Mr. Foster's intellectual disability claim by this Court is insufficient under *Atkins*, *Hall*, *Brumfield*, and *Moore*

Not only does the reliance on the prior record contravene this Court's post-*Hall* precedent, but the prior treatment of Mr. Foster's intellectual disability claim is insufficient under *Atkins*, *Hall*, *Brumfield*, and *Moore*. Just as in *Brumfield*, the presentation of Mr. Foster's intellectual disability evidence occurred pre-*Atkins*, when he "had little reason to investigate or present evidence relating to intellectual disability." *Brumfield*, 135 S. Ct. at 2281. Then, in focusing on Mr. Foster's involvement in drug sales and his "communication" at trial, this Court overemphasized strengths rather than analyzing deficits, despite professional instruction to the contrary from the AAIDD and DSM-5. *See Moore*, 137 S. Ct. at 1050. As the DSM-5 instructs, a person may have adaptive deficits in one area but strengths in another. A person need only show deficits in *one area*—conceptual, social, or practical—to meet the criteria for adaptive deficits. DSM-5, at 38. Finally, in focusing on Dr. Dee's testimony that "socioeconomic factors" and "cultural deprivation" might also have played a role in Mr. Foster's low intellectual functioning, the Court overlooked the medical community's understanding that such circumstances are actually "'*risk factors*' *for* intellectual disability." *Id.* at 1051 (citing AAIDD-11, at 59-60) (emphasis added). "Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case

for a disability determination." *Id.* Thus, this Court's prior analysis of Mr. Foster's intellectual disability is not in accord with the current operative understanding arising from *Hall*, *Moore*, *Brumfield*, and the AAIDD-11 and DSM-5.

On the manifestation-before-age-18 prong, this Court previously relied on *factually inaccurate* information. The Court believed that Mr. Foster was not in special education, and so concluded there was no indication of intellectual disability from the school records. *Foster*, 929 So. 2d at 533. This was factually inaccurate. As is clear from Mr. Foster's school records, which he submitted below, *he was in special education*; he failed the fourth grade; and he was administratively passed along to several other grades due to his age rather than ability. As described in Part II.A, *infra*, Mr. Foster's school records are filled with indications that he suffered many adaptive deficits and that his disability manifested pre-18. The lay witness accounts described in Part II.A, *infra*, also make clear that Mr. Foster suffered many deficits as a child. Accordingly, this Court's prior pre-*Hall* conclusion on the pre-18 criterion is wrong and should not have been relied on by the court below.

II. Mr. Foster's undisputed proffer in the Circuit Court establishes that he is intellectually disabled and his death sentences should therefore be vacated

The undisputed factual proffer below establishes that Mr. Foster is intellectually disabled. The American Psychiatric Association describes the criteria for intellectual disability in the DSM-5:

A. Deficits in intellectual functions . . . confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility.

C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5, at 33; AAIDD-11, at 59-60; *Atkins*, 536 U.S. at 318; *Franqui v. State*, 211 So. 3d at 1028 (a defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage intellectual functioning; (2) adaptive deficits; and (3) manifestation before age eighteen).

A. Subaverage intellectual functioning and adaptive deficits

Here, Dr. Dee testified at the penalty phase that he administered the WAIS-R to Mr. Foster in 1994, and that Mr. Foster's I.Q. was 75. R. 319. As the State rightly conceded below, "Foster's I.Q. score fell within the range of subaverage intellectual functioning after the standard error of measurement is applied." SPCR. 327; *see also Hall*, 134 S. Ct. at 2000 ("an individual with an I.Q. test score 'between 70 and 75 or lower' may show an intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning") (citing *Atkins*, 536 U.S. at 309)). Accordingly, the issue is settled at this juncture in the case. In addition to an I.Q. score that falls within the range for intellectual disability, Mr. Foster has established,

through evidence that the State choose to not dispute below, adaptive deficits and manifestation before age 18.

The second criterion in the DSM-5 refers to adaptive deficits, or "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5, at 37. Adaptive functioning assesses a person's capacities in three areas: conceptual, social, and practical. *Id.* This criterion is "met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38.

Mr. Foster's proffer established that he exhibits myriad adaptive deficits. The proffer was not disputed by the State in the Circuit Court, and the Circuit Court made no adverse credibility finding regarding the evidence.

In these post-*Hall* proceedings, Mr. Foster submitted the report of Dr. Jethro Toomer, an experienced forensic and clinical psychologist whose expert opinions on the intellectual disability issue were relied upon by this Court in *Walls*. Dr. Toomer concluded:

> Mr. Foster does have significant adaptive deficits. It is also quite clear that these deficits originated in childhood . . . . [H]is intelligence was previously tested within the current range for an intellectual disability diagnosis. A diagnosis of intellectual disability is appropriate for Jermaine Foster under the current professional and legal standards.

SPCR. 532. Dr. Toomer found that Mr. Foster has adaptive deficits in all three of the categories provided in the DSM-5—conceptual, social, and practical—despite only needing to show deficits in one of these areas. *See* DSM-5, at 38.

In accord with Dr. Toomer's conclusions, Mr. Foster's family, peers, and other acquaintances relate that Mr. Foster was slow his entire life. SPCR. 516, 525. He had difficulty participating in normal childhood activities, such as kickball and jumping rope because he could not do them properly. *Id.* at 516. Board games such as Checkers proved too hard for him. *Id.* When he did play games, like marbles, he would lose every time. *Id.* at 528. His older relatives tried to assist him with his schoolwork, but he just could not get it. *Id.* at 516, 528. He could not read. *Id.* at 525, 527. He had problems with math concepts more difficult than simple counting, such as addition, subtraction, multiplication, and division. *Id.* at 516, 525. He was noticeably less able to understand his schoolwork than the other children in his family. *Id.* at 525.

The other children in the neighborhood and his relatives would tease Mr. Foster for being "stupid." *Id.* at 517. Mr. Foster, desperate to fit in, would do anything on a dare. *Id.* at 525, 528. He did not have the wherewithal to know when to refuse something because it was too dangerous. Other kids would make Mr. Foster do things like jump off roofs, lick 9-volt batteries, sniff ammonia, and run in front

of cars. *Id.* at 517. Mr. Foster was a follower; he would try to mimic what the other kids or family members were doing. *Id.* at 517-18, 524, 526, 529.

Mr. Foster needed his grandmother to remind him to bathe and brush his teeth. *Id.* at 517. She had to dress him, or he would leave in clothes inappropriate for the weather. *Id.* Sometimes he would leave without putting shoes on. *Id.* Other people helped cook his food and wash his clothes. *Id.* at 528. Mr. Foster needed help using simple pieces of technology, such as a pager and a VCR. *Id.*

As Mr. Foster became a young adult, he was still irresponsible. He could not live by himself. *Id.* at 517, 520, 522. He could not fill out forms, balance a checkbook, pay bills, or eat proper meals. *Id.* at 517, 522, 527. When he started living with his friend and eventual co-defendant, Leondra Henderson, Mr. Foster was unable to handle the utilities. *Id.* at 522. Mr. Henderson had to go with Mr. Foster to get the lights turned on at their trailer. *Id.* Once Mr. Foster applied for a job at McDonald's, and his aunt had to fill out the application for him. *Id.* at 525. He did not even get that job. *Id.* Another time, he asked his girlfriend to help him fill out forms for his mother. *Id.* at 519. Even as an adult, Mr. Foster could not read. *Id.* at 518, 519. His aunt wrote to his girlfriends whenever he wanted to send them a letter. *Id.* at 527-28. A former girlfriend remembers Mr. Foster writing one particular letter that was very poorly written, with many spelling and grammatical errors. *Id.* at 519.

When Mr. Foster went to prison, he would try to write letters to his family but could not even write a full sentence. *Id.* at 518.

Mr. Foster did not always understand verbal communication. *Id.* at 523. He would ask his friends what others meant when they were talking to him. *Id.* He would get frustrated if he could not understand what someone else was saying. *Id.* He would especially get confused in conversations about money. *Id.*

Mr. Foster was immature. *Id.* at 518, 521, 528. His friends describe him as "childlike" and "basically a big kid." *Id.* at 521, 523. He would try and get others to play with him, and if they refused, he would get upset and storm away. *Id.* As a young adult, he still enjoyed watching cartoons. *Id.* at 521. When one of his relatives asked him to babysit her young children, Mr. Foster left right after she did and left the kids by themselves. *Id.* at 518.

Mr. Foster was unable to do basic activities. Mr. Henderson did almost all the cooking after they moved in together. *Id.* at 522. When Mr. Foster tried, he would forget that he had something cooking and almost start a fire. *Id.* Mr. Foster could not be trusted to do the grocery shopping, as he would usually bring back the wrong items. *Id.* at 520, 523. His friends would dress him. *Id.* at 523. Otherwise, Mr. Foster would not dress properly for the weather, especially when it was cold out. *Id.* at 521; 523. He still needed reminders to keep up with his basic hygiene, such as showering or brushing his teeth. *Id.* at 521. He needed someone to accompany him when he

went somewhere, as he was unable to follow even simple directions. *Id.* at 519; 523; 526. Mr. Foster only ever had one real job: a cart pusher at Winn Dixie. *Id.* at 526. The job only lasted a few days. *Id.*

These accounts by his friends and relatives align with the testimony of Dr. Dee, the psychologist who evaluated Mr. Foster prior to his trial. Much like these lay witnesses, Dr. Dee testified, "I think from behavior, he could be considered mildly retarded, he didn't keep a job or kept any accounts, he always depended on other people for support." PC-R. 78. Dr. Dee explained that even as an adult, Mr. Foster lived with others and that his memory function was very poor. *Id.* at 78-79. He also explained that Mr. Foster was the type of person who, "to a person he looked up to and relied on . . . he [would] do whatever you asked him to do." *Id.* at 82. Dr. Dee described Mr. Foster as "a follower, he was never a leader." *Id.* When asked about adaptive deficits on cross-examination at the post-conviction evidentiary hearing, Dr. Dee again explained that Mr. Foster "never had a job for a substantial period of time. He hasn't finished school. He was not really functioning literal. He had a lot of cultural deprivation." *Id.* at 97.

School records confirm Mr. Foster's adaptive deficits. In the third, fifth, and eighth grades, Mr. Foster took tests that combined the skills he was learning in school with those he needed in the real world. In third grade, Mr. Foster was unable to perform simple tasks like identifying specific details, distinguishing between the

real and unreal, identifying irrelevant sentences, putting words in alphabetical order, solving word problems involving addition, and subtracting to solve practical money problems under 50 cents. SPCR. 575-77. In the fifth grade version of the test, Mr. Foster could not identify the order of events in a paragraph; distinguish between fact and opinion; identify sets of words in alphabetical order; write simple sentences, arrange four sentences into a paragraph, use commas between the names of cities and states and the day of month and year; capitalize proper nouns; put three numbers of less than 1,000 in order; tell the time on the hour, half-hour, quarter-hour, or minutes; solve real-world problems by subtracting two 3-digit numbers; solve real-world problems by multiplying a 1-digit and a 2- or 3- digit number; solve purchase problems involving change from one dollar; or read bar graphs or pictographs. *Id.* at 572-73.

Perhaps most revealing are Mr. Foster's results from the eighth grade version of the test, where the results actually define what broader sets of skills Mr. Foster was unable to perform. On the reading test, he was unable to identify the meaning of words using context and prefixes or suffixes; find the main idea in a paragraph; understand cause and effect; distinguish between fact and opinion; or obtain information from an index, table of contents, or dictionary. The test concluded that Mr. Foster could not demonstrate knowledge of basic vocabulary, determine word meaning from word parts, demonstrate inferential comprehension skills, or

demonstrate evaluative comprehension skills. *Id.* at 566, 568. On the writing test, Mr. Foster struggled to make subjects and verbs agree; could not write at least three sentences on the same topic; was unable to include the necessary information in a phone message, written message, invitation, or announcement; could not address a business envelope or complete order blanks and simple forms; and had difficulty with grade-appropriate spelling, including the months, days, and numbers 1 to 121. *Id.* The results of his writing test showed he could not compose grammatically correct sentences, write a paragraph expressing ideas clearly, write for the purpose of supplying information, write letters and messages, fill out common forms, or spell correctly. *Id.* Finally, on the math portion, Mr. Foster was unable to add three numbers, each with no more than three decimal places; subtract two numbers, each with no more than two decimal places; solve real-world problems by multiplying a 2-digit and a 3-digit number; or solve real-world problems of comparison shopping (purchase less than ten dollars). *Id.* at 567. In the summary of these results, the school concluded that Mr. Foster, among other things, could not solve real-world problems involving whole numbers, solve money problems, solve measurement problems, or interpret graphs, tables, and maps. *Id.* at 568. These results confirm the deficits provided by both lay and expert witnesses.

B. Mr. Foster's subaverage intellectual functioning and adaptive deficits manifested before age 18

Dr. Toomer's report also finds that pre-18 onset is established by Mr. Foster's history. *See* SPCR. 532. Mr. Foster's undisputed proffer in the Circuit Court confirms that intellectual and adaptive deficits manifested before age 18.

Mr. Foster exhibited his intellectual and adaptive deficits from childhood onward. Many of the impairments described by his family and companions included information from when Mr. Foster was a child. *See, e.g.*, SPCR. 527 ("Though Jermaine is four years older than I am, I took it upon myself to care for him because I knew he was unable to take care of himself. Even when I was as young as ten, he required my help."); *id.* at 525 ("I often tried to help [Jermaine] with his studies. He just didn't get it. I have children of my own. None of them had nearly the same amount of difficulties."); *id.* at 519 ("While we were dating, he was involved with the Juvenile Justice System. I had to constantly remind him when he had court or probation dates and then get him there."); *id.* at 516 (Jermaine "could not comprehend what he was trying to learn, be it reading, writing, or math. I tried to help him but could never break through. I recall the great difficulties he had at school.").

Mr. Foster's school records, described in Part II.A, *supra*, show that he had difficulties starting in elementary school. All of the above-described adaptive deficits as illustrated in his test results were between third grade and eighth grade.

As early as first grade, Mr. Foster failed to receive an "Excellent" rating in any of his subjects. *Id.* at 537. In his first grade "safety" class, he received grades of G– ("G" represents good progress), and NI ("needs improvement"). *Id.* When Mr. Foster was in 4th grade, he took the standardized Iowa tests. His score was about the same as a typical student in the eighth month of second grade. *Id.* at 574. On the reading portion of the test, his score was consistent with a student in the second half of first grade. *Id.* Overall, his score was in the fourth percentile nationally, meaning that 95% of fourth-graders scored better than he did. *Id.* He ended up repeating the fourth grade. *Id.* at 539. In junior high, Mr. Foster received a grade as low as 1 in English on a 0-100 point scale. *Id.* at 550.

Mr. Foster was placed in special education and the speech/language therapy program. *Id.* at 586. He was in special education by fourth grade. SPCR 587. By middle school, Mr. Foster was unable to function in any school program, and so was often sent to the Polk County Opportunity Center in middle school. *See, e.g.*, *id.* at 564.

In addition to repeating the fourth grade, at several points during his schooling Mr. Foster was "administratively advanced" to the next grade due to his age rather than his ability as a student. Following second grade, Mr. Foster was administratively placed in third grade. *Id.* at 537. After failing fourth grade, Mr. Foster was administratively placed into fifth grade the following year. *Id.* at 538. At

age 16, he was still in eighth grade and was administratively advanced to ninth grade. Mr. Foster was in ninth grade when he dropped out, unable to keep up at all. *Id.* at 561.

Mr. Foster's impairments, as shown through the report of Dr. Toomer, witness accounts, and his school records provide ample evidence of his intellectual and adaptive deficits prior to age 18. In combination with his low I.Q. and adaptive deficits, Mr. Foster meets all three prongs that establish intellectual disability.

III. Because Mr. Foster is intellectually disabled, his death sentences violate the Eighth Amendment and relief should be granted; at a minimum, an evidentiary hearing is appropriate

Because Mr. Foster is intellectually disabled, his death sentences violate the Eighth Amendment. *Hall*, 134 S. Ct. at 1990; *Atkins*, 536 U.S. at 321. Mr. Foster meets all three prongs of intellectual disability. As acknowledged by the State at the argument before the Circuit Court, Mr. Foster's I.Q. of 75 "falls within the test's acknowledged and inherent margin of error, [so that] the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *See Hall*, 134 S. Ct. at 2001; *see also Hall v. State*, 201 So. 3d 628, 637 (Fla. 2016) (because Hall had already established one prong, onset before age 18, it was no longer at issue and this Court focused on the other two prongs). Mr. Foster has also demonstrated that he has adaptive deficits in not just one, but all three of the "accepted broad categories of adaptive functioning–conceptual skills,

social/interpersonal skills, and practical skills." *Wright*, 213 So. 3d at 899 (denial of *Hall* relief vacated and case remanded for full consideration). This includes his inability to fill out simple forms and blank checks, follow directions or read maps, take responsibility for his own court dates and appointments, maintain his own personal hygiene, dress appropriately for the weather, understand what others are saying to him, know when he is being taken advantage of, and keep track of his own utilities and bill payments, among others. Both his low intellectual functioning and adaptive deficits manifested before he reached the age of 18, as shown by his school records and lay witness accounts that illustrated his poor performance in school, enrollment in special education, and inability to pick up practical skills, even when they were taught in the classroom.

In "turn[ing] to the record" in this case, this Court should find that "[Mr. Foster] has presented sufficient evidence to establish that he meets the statutory definition of intellectual disability." *Hall v. State*, 201 So. 3d at 635. The submission in the Circuit Court establishes that Mr. Foster should receive relief under *Hall*, and his death sentences should be vacated. The only substantial, competent evidence before the Circuit Court was the uncontested factual proffer submitted by Mr. Foster. *Cf. Jones v. State*, 709 So. 2d 512, 533 (Fla. 1998) ("[T]he record contains no competent substantial evidence to support its summary dismissal of the testimony. The trial court's order denying relief thus is defective."). Just as in *Hall*, "[t]he record

evidence in this case overwhelmingly supports the conclusion that '[Foster] has been [intellectually disabled] his entire life.'" *Hall*, 201 So. 3d at 638 (quoting *Hall v. State*, 109 So. 3d 704, 712-14 (Fla. 2012) (Pariente, J., concurring) (first alteration added)). This Court should likewise grant relief in Mr. Foster's case. *See id.* at 634 (after "turn[ing] to the record" to determine whether Hall had established his intellectual disability claim, this Court vacated his death sentence and remanded with instructions to enter a life sentence).

Alternatively, this Court may also remand for an evidentiary hearing, as it did in *Walls*, *Franqui*, and *Thompson*, and allow Mr. Foster to present additional evidence in support of his intellectual disability claim, and specifically his adaptive deficits and onset before the age of 18. Not only did Mr. Foster's proffer support each prong of the intellectual disability test, but the State's arguments did not dispute the tendered evidence. "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant's] allegations as true to the extent they are not conclusively refuted by the record." *Tomkins v. State*, 994 So. 2d 1072 (Fla. 2008). Mr. Foster's allegations are not refuted by the record.

While the State conceded Mr. Foster's I.Q., Mr. Foster's evidence also established that he has evidence of adaptive deficits—including, *inter alia*, his inability to dress appropriately without a reminder, fill out job applications, or live independently—and that these impairments developed in Mr. Foster's childhood—

as shown by his repeated advancement to the next grade level based on age rather than ability, placement in special education, inability to understand basic board games, and susceptibility to accept dangerous dares by the other children in his neighborhood. A hearing is especially appropriate here given the fact that Mr. Foster's trial and post-conviction hearing both pre-date *Atkins*, when Mr. Foster "had little reason to investigate or present evidence relating to intellectual disability." *Brumfield*, 135 S. Ct. at 2281. Mr. Foster has never had a hearing specifically on his *Atkins*/*Hall* claim.

This Court should either find Mr. Foster intellectually disabled and grant relief on the current record, as in *Hall*, or remand to allow Mr. Foster to present his evidence at a hearing, as in *Walls* and other cases.

ARGUMENT II

I. Mr. Foster's death sentences violate *Hurst v. Florida* and *Hurst v. State*

Mr. Foster's death sentences violate *Hurst v. Florida* and *Hurst v. State*. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators

outweighed the mitigation. Florida's unconstitutional scheme first required an advisory jury to render a generalized sentencing recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id.* at 622. The Court held that before making its recommendation, the jury, not the judge, must make the findings of fact required to impose the death penalty under Florida law. *Id.*

In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires unanimous jury fact-finding as to (1) which aggravating factors were proven, (2) whether those aggravators were "sufficient" to impose the death penalty, and (3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59.[9] This Court made clear that each of those determinations are "elements" that must be found by a unanimous jury beyond a reasonable doubt. *Id.* at 57; *see also Jones v. State*, 212 So. 3d 321, 343 (Fla. 2017). In addition to rendering unanimous findings on each of those elements, this Court explained that the jury must unanimously recommend the death

[9] As this Court correctly noted in *Hurst v. State*, "in interpreting the Florida Constitution and the rights afforded to persons within this State, this Court may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." 202 So. 3d at 57. This Court's unanimity holding was consistent with the constitutional "evolving standards of decency," *Atkins*, 536 U.S. 304 at 312, which have led to a national consensus that death sentences may be imposed only upon unanimous jury verdicts.

penalty before a death sentence may be imposed. *Hurst v. State*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Court further cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id.* at 57-58 ("We equally emphasize that . . . we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

Mr. Foster's jury was never asked to make unanimous findings on any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, Mr. Foster's jury rendered only a unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed

that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the mitigation.

Accordingly, Mr. Foster's death sentences violate the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*.

A. *Hurst* should be applied retroactively to Mr. Foster's case

1. Using *Ring* as a cutoff to determine retroactivity violates the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection

The Circuit Court's use of *Ring* as a cutoff to determine retroactivity violates the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. The Supreme Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined the Supreme Court's Fourteenth Amendment precedents

holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

Moreover, the United States Supreme Court has long understood the question of retroactivity to arise in particular cases *at the same point in time*: when the defendant's conviction or sentence becomes "final" upon the conclusion of direct review. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Teague*, 489 U.S. at 304-07. The Court's modern approach to determining whether retroactivity is required by the United States Constitution is premised on that assumption. *See, e.g.*, *Montgomery*, 136 S. Ct. at 725 ("In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided.").

The Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2006), which held that states may apply constitutional rules retroactively even when the United States Constitution does not compel them to do so, also assumed a definition of retroactivity based on the date that a conviction and sentence became final on direct review. *See id.* at 268-69 ("[T]he Minnesota court correctly concluded that federal law does not *require* state courts to apply the holding in *Crawford* to cases

that were final when that case was decided . . . [and] we granted certiorari to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so.") (emphasis in original).

None of the Supreme Court's precedents involve the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review. However, the *Ring* cutoff creates such a partial retroactivity scheme.

This *Hurst* retroactivity cutoff at *Ring* involves a kind and degree of arbitrariness that far exceeds the level justified by traditional retroactivity jurisprudence. The *Ring* cutoff divides prisoners into two classes based on the date their sentences became final relative to the June 24, 2002, decision in *Ring*, which was issued nearly 14 years before *Hurst*. In *Asay v. State*, 210 So. 3d 1, (Fla. 2016), this Court held that the *Hurst* decisions do not apply retroactively to Florida prisoners whose death sentences became final on direct review before *Ring*. *Id.* at 21-22. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court held that the *Hurst* decisions do apply retroactively to prisoners whose death sentences became final after *Ring*. *Id.* at 1283.

As an initial matter, this Court described its rationale for the cutoff as follows: "Because Florida's capital sentencing statute has essentially been unconstitutional

since *Ring* in 2002, fairness strongly favors applying *Hurst* retroactively to that time," but not before then. *Mosley*, 209 So. 3d at 1280. But Florida's capital sentencing scheme did not become unconstitutional when *Ring* was decided—*Ring* recognized that Arizona's capital sentencing scheme was unconstitutional. Florida's capital sentencing statute was always unconstitutional, and it was recognized as such in *Hurst*, not *Ring*. This approach raises serious questions about line-drawing at a prior point in time. There will always be earlier precedents of the United States Supreme Court upon which a new constitutional ruling builds.

The effect of the cutoff also does not meet its aim. This Court's rationale for drawing a retroactivity line at *Ring* is undercut by the court's denial of *Hurst* relief to prisoners whose sentences became final before *Ring* but who correctly but unsuccessfully challenged Florida's unconstitutional sentencing scheme after *Ring*, while granting relief to prisoners who failed to raise any challenge, either before or after *Ring*. If prisoners whose sentences became final after *Ring* are deserving of *Hurst* relief because Florida's scheme has been unconstitutional since *Ring*, then prisoners who actually challenged Florida's scheme after *Ring* would also receive relief in a non-arbitrary scheme. Mr. Foster's case is in this category. *See Foster*, 929 So. 2d at 531. But, as it stands, he cannot access *Hurst* relief because he falls on the wrong side of the unconstitutional bright-line retroactivity cutoff.

The *Ring* cutoff also does not reliably separate Florida's death row into meaningful pre-*Ring* and post-*Ring* categories. In practice, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002, decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense, such as whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court's summer recess; or how long the assigned Justice took to draft the opinion for release, among others.

In one striking example involving two CHU clients, this Court affirmed Gary Bowles's and James Card's unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Both prisoners petitioned for a writ of certiorari. Mr. Card's sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). However, Mr. Bowles's sentence became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. However, Mr. Bowles, whose case was decided on direct appeal on *the same day* as Mr. Card's, falls on the other side of this Court's current retroactivity cutoff. His *Hurst* claim

was recently summarily denied by this Court. *Bowles v. State*, No. SC17-1754, 2018 WL 579107 (Fla. Jan. 29, 2018).

Another arbitrary factor affecting whether a defendant receives *Hurst* relief under this Court's date-of-*Ring* retroactivity approach includes whether a resentencing was granted because of an unrelated error. Under the current retroactivity rule, "older" cases dating back to the 1980s with a post-*Ring* resentencing qualify for *Hurst* relief, while other less "old" cases do not. *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but who was granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under the *Ring*-based approach, a defendant who was originally sentenced to death before Mr. Foster, but who was later resentenced to death after *Ring*, would receive *Hurst* relief while Mr. Foster does not.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two

classes are created to receive different treatment, as this Court has done, the question is "whether there is some ground of difference that rationally explains the different treatment . . . ." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. This Court's rule falls short of that demanding standard.

Furthermore, the cutoff forecloses *Hurst* relief to the class of death-sentenced prisoners for whom relief makes the most sense. In fact, several features common to Florida's "pre-*Ring*" death row population compel the conclusion that denying *Hurst* relief in their cases, while affording *Hurst* relief to their "post-*Ring*" counterparts, is especially perverse.

Florida prisoners who were tried for capital murder before *Ring* are more likely to have been sentenced to death by a system that would not produce a capital sentence—or sometimes even a capital prosecution—today. Since *Ring* was decided, as public support for the death penalty has waned, prosecutors have been

increasingly unlikely to seek and juries increasingly unlikely to impose death sentences.[10]

Florida prisoners who were sentenced to death before *Ring* are also more likely than post-*Ring* prisoners to have received those death sentences in trials that involved problematic fact-finding. The past two decades have witnessed broad recognition of the unreliability of numerous kinds of evidence—flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth—that was widely accepted in pre-*Ring* capital trials.[11] Forensic disciplines

[10] *See, e.g.*, Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sep. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four decades/ ("the number of death sentences imposed in the United States has been in steep decline in the last two decades. In 1998, there were 295 death sentences imposed in the United States; in 2002, there were 166; in 2017 there were 39. Death Penalty Information Center, *Facts About the Death Penalty* (updated December 2017), at 3, *available at* https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[11] *See, e.g.*, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (2016) (Report of the President's Counsel of Advisors on Science and Technology), *available at* https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/other_useful_information/forensic_information/pcast_forensic_science_report_final.pdf (evaluating and explaining the procedures of the various forensic science disciplines.

that were once considered sound fell under deep suspicion following numerous exonerations.[12]

Post-*Ring* sentencing juries are more fully informed of the defendant's entire mitigating history than juries in the pre-*Ring* period. The American Bar Association ("ABA") guideline requiring a capital mitigation specialist for the defense was not even promulgated until 2003.[13] Limited information being provided to juries was especially endemic to Florida in the era before *Ring* was decided.[14] The capital defense bar in Florida, as a result of various funding crises and the inadequate screening mechanism for lawyers on the list of those available to be appointed in

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[12] *See, e.g.*, Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 166 (2007) (observing that faulty forensic science has often caused wrongful convictions).

[13] ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. Feb., 2003), Guidelines 4.1(A)(1) and 10.4(C)(2), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003).

[14] *See*, *e.g.*, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF FLORIDA'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES, American Bar Association (2006) [herein "ABA Florida Report"]. The 462 page report concludes that Florida leads the nation in death-row exonerations, inadequate compensation for conflict trial counsel in death penalty cases, lack of qualified and properly monitored capital collateral registry counsel, inadequate compensation for capital collateral registry attorneys, significant juror confusion, lack of unanimity in jury's sentencing decision, the practice of judicial override, lack of transparency in the clemency process, racial disparities in capital sentencing, geographic disparities in capital sentencing, and death sentences imposed on people with severe mental disability. *Id*. at iv-ix.

capital cases, produced what former Chief Justice of the Florida Supreme Court Gerald Kogan described as "some of the worst lawyering" he had ever seen.[15] As a result, since 1976, Florida has had 27 exonerations—more than any other state—all but five of which involved convictions and death sentences imposed before 2002.[16] And as for mitigating evidence, Florida's statute did not even include the "catch-all" statutory language until 1996.[17]

The "advisory" jury instructions were also so confusing that jurors consistently reported that they did not understand their role.[18] If the advisory jury did recommend life, judges—who must run for election and reelection in Florida—could impose the death penalty anyway.[19] In fact, relying on the cutoff, this Court

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[15] Death Penalty Information Center, *New Voices: Former FL Supreme Court Judge Says Capital Punishment System is Broken*, *available at https://deathpenaltyinfo.org/new-voices-former-fl-supreme-court-judge-says-capital-punishment-system-broken* (citing G. Kogan, *Florida's Justice System Fails on Many Fronts*, St. Petersburg Times, July 1, 2008.

[16] Death Penalty Information Center, *Florida Fact Sheet*, *available at* https://deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=8&race=All&dna=All.

[17] ABA Florida Report at 16, citing 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, Fla. Stat. 921.141(6)(h) (1996).

[18] The ABA found one of the areas in need of most reform in Florida capital cases was significant juror confusion. ABA Florida Report at vi.

[19] *See* ABA Florida Report at vii ("A recent study of death penalty cases in Florida and nationwide found . . . that the practice of judicial override makes jurors feel less

has summarily denied *Hurst* relief where the defendant was sentenced to death by a judge "overriding" a jury's recommendation of life. *See Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017).

Moreover, especially in these "older cases," the advisory jury scheme invalidated by *Hurst* implicated systematic violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1987), as occurred in Mr. Foster's case. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). In contrast to post-*Ring* cases, the pre-*Ring* cases did not include more modern instructions leaning towards a "verdict" recognizable to the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Finally, prisoners whose death sentences became final before *Ring* was decided in 2002 have been incarcerated on death row longer than prisoners sentenced after that date. Notwithstanding the well-documented hardships of Florida's death row, *see, e.g.*, *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from the denial of certiorari), they have demonstrated over a longer time that they are

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personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.").

capable of adjusting to a prison environment and living without endangering any valid interest of the state. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from the denial of certiorari).

Taken together, these considerations show that this Court's partial non-retroactivity rule for *Hurst* claims involves a level of arbitrariness and inequality that is hard to reconcile with the Eighth and Fourteenth Amendments.

2. *Hurst* should be applied retroactively to Mr. Foster's case under the Supremacy Clause of the United States Constitution

The federal Constitution protects Mr. Foster's right to *Hurst* retroactivity. Federal law requires *Hurst* to be applied retroactively even by state courts applying state retroactivity doctrines.

Mr. Foster's federal right to *Hurst* retroactivity is highlighted by the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See id.* at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery*, the Appellant initiated a state post-conviction proceeding seeking

retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles unconstitutional). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)) held that *Miller* was not retroactive under state retroactivity law. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that, under the United States Constitution, may not be denied to Florida defendants on state retroactivity grounds. In fact, in *Hurst v. State*, this Court announced two substantive rules. First, this Court ruled in *Hurst v. State* that the Sixth Amendment requires that juries decide, *beyond a reasonable doubt*, whether each of the elements of a death sentence have been satisfied—certain aggravating factors have been proven, the aggravators are sufficient to impose the death penalty, and the aggravators outweigh the mitigation. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). The Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to *all* defendants. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

Second, this Court held in *Hurst v. State* that the Eighth Amendment requires the jury's finding of the elements during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As this Court made clear, the function of the unanimity-of-fact-finding rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at *47-48. That makes the rule substantive, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions, *see Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to Mr. Foster.

B. The *Hurst* error is not harmless

1. State courts may not apply harmless-error rules that obstruct the underlying federal constitutional right

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject a federal constitutional claim. In *Chapman v. California*, 386 U.S. 18 (1967), the United States Supreme Court defined "harmless" constitutional errors as those errors which had no reasonable possibility of contributing to the result, and "*in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22-23. Thus, the harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* The beyond-a-reasonable-doubt standard applicable to harmless-error rules is satisfied when, in light of the record as a whole, a federal constitutional error had no reasonable probability of contributing to the result. *Id.* at 22, 24.

Since *Chapman*, the Supreme Court has reiterated that the burden of proving a constitutional error harmless beyond a reasonable doubt rests with the State, as the beneficiary of the error. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court has emphasized that proper harmless-error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And the Court has made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual

record. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error").

2. This Court's per se harmlessness rule perpetuates the underlying federal constitutional error by failing to allow for individualized review of the error's impact in the context of the record as a whole

Under its per se harmless-error rule, this Court has uniformly denied relief in every case where the jury unanimously rendered a death recommendation pre-*Hurst*, regardless of the underlying facts. This rule contravenes the requirement that state courts, especially in capital cases, conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds. In contrast to established principles of constitutional law, the rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case in which the advisory jury unanimously recommended death.

The Supreme Court's precedent is clear that harmless-error analysis must include a fact-specific review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose v. Clark*, 478 U.S. 570, 583 (1986) ("We have held that *Chapman* mandates consideration of the *entire record*

prior to reversing a conviction for constitutional errors that may be harmless."); *see also Fulminante*, 499 U.S. at 306 (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt").

Here, Mr. Foster had compelling mitigation evidence. As described above, Dr. Dee testified to Mr. Foster's intellectual disability and diminished mental functioning. R. 319-21. A licensed social worker, Janet Vogelsang, provided a summary of Mr. Foster's life, including physical abuse, neglect, intergenerational intellectual impairment, and psychological and emotional battering. See R. 116-117. The trial court found the statutory mitigating factor that Mr. Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *Foster*, 679 So. 2d at 751. The trial court found several other non-statutory mitigating factors, including that Mr. Foster suffered an abusive childhood, suffered from organic brain damage and has a low I.Q., and suffered from a substance abuse problem. *Id.* at 752-53. Despite Mr. Foster's detailed, record-based arguments regarding the impact of the *Hurst* error on his death sentence, the Circuit Court refused to address them. *See* SPCR. 646 ("Mr. Foster presents extensive argument, but no further discussion is warranted.").

The per se rule flouts the reasoning in *Barclay v. Florida* that "[this] Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958; *see also Sochor v. Florida*, 504 U.S. at 541 (harmless-error rulings must be accompanied by specific reasoning grounded in the whole record); *Clemons v. Mississippi*, 494 U.S. at 752 (same); *Parker v. Dugger*, 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

The per se rule relieves the State of its burden to prove *Hurst* errors harmless beyond a reasonable doubt. *See Fulminante*, 499 U.S. at 297 ("*Our review of the record leads us to conclude* that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the [error] was harmless error.") (emphasis added). In *Hurst*, this Court stated that "the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the] death sentence." *Hurst v. State*, 202 So. 3d at 68. But this idea has now been abandoned through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. Even though it is undisputed that Mr. Foster's death sentence was imposed under a capital sentencing

scheme that violated the Federal Constitution, the per se rule for unanimous-jury-recommendation cases effectively leaves the State with no burden at all.

This Court also seemed to recognize in *Hurst v. State* that a pre-*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at the penalty phase was sufficient to support a death sentence. *See* 202 So. 3d at 68. But even if it did, that would still not save the per se rule. *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (explaining that the state does not meet burden of establishing that error in a capital sentencing is harmless merely by showing that the evidence in the record is sufficient to support a death sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation, and that it would have done so beyond a reasonable doubt.

3. The per se harmlessness rule fails to ensure sufficient reliability in Mr. Foster's death sentences

In order to determine whether there is a "reasonable possibility" that a *Hurst* error contributed to a death sentence, *see Chapman*, 386 U.S. at 23, a reliable harmless-error analysis must begin with what *Hurst* held that a jury must do for a Florida death sentence to be constitutional: make the findings of fact regarding the elements required for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a

reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.

The second and third of these elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would have held the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as this Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty.* The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n.7. The United States Supreme Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the well-established Eighth Amendment's requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

Accordingly, the vote of a defendant's pre-*Hurst* advisory jury cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have

made, or an average rational jury would make, the three specific *findings of fact* to support a death sentence in a constitutional proceeding.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently.

The State bears the burden of dispelling these possibilities beyond a reasonable doubt on an individualized basis. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The per se rule relieves the State of its burden. In a capital case, this violates the federal constitutional requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also Godfrey*, 446 U.S. at 428 ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

4. The per se harmlessness rule relies entirely on advisory jury decisions infected with *Caldwell* error

In *Caldwell v. Mississippi*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. 472 U.S. at 328-29. The United States Supreme Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held 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 sentence lies elsewhere." *Id.* at 328-29.

Here, the jurors in Mr. Foster's case were repeatedly told by the trial court that their recommendation was advisory and that the final sentencing decision rested solely with the judge.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters:*

An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors told researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961.

The per se harmless-error rule for *Hurst* claims cannot predict, without review of the specific record, that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously reached the same conclusion as the advisory jury that was told that its role was subordinate. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same).

Caldwell errors must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). However, the Circuit Court did not conduct an analysis of the entire record in Mr. Foster's case. It did not consider Mr. Foster's intellectual disability and the compelling mitigation evidence, as described in Argument II, Part I.B.2, *supra*, that

had been presented during the penalty phase and how the jury's reduced sense of responsibility in the sentencing determination affected the jury's assessment of this mitigation evidence. The failure of this Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Appellant's, is inconsistent not only with the United States Supreme Court's harmless-error precedents, but also with the Eighth Amendment.

5. The per se rule relies entirely on advisory jury decisions not capable of supporting harmless-error analysis under *Sullivan*

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the United States Supreme Court recognized that there are some jury errors that cannot be subjected to harmless-error analysis. The error in *Sullivan* was the trial court's defective instruction to the jury regarding the requirement that each element of the offense must be found beyond a reasonable doubt—an error that the Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. The Court unanimously held that even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). Without a constitutionally-valid jury verdict, the Court found, "the entire premise of *Chapman* review is simply absent," *id.* at 281,

because such review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (emphasis in original).

The per se harmless-error rule for *Hurst* claims presents the question whether *Chapman* and the Supreme Court's other harmless-error precedents permit state courts in capital cases to rest harmless-error rulings *entirely* on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. The Supreme Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all the elements for a death sentence under Florida law. As the Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial judge, not the jury, to make findings of fact. Florida's improper jury instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.

Sullivan instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error

scrutiny can operate." *Id.* (emphasis in original). The Court's per se harmless-error rule directly contradicts that principle. The rule relies entirely, to the exclusion of all other considerations, on the votes of advisory juries. The Supreme Court held in *Hurst* that those juries conducted no valid fact-finding within the meaning of the Sixth Amendment. Under *Sullivan*, the per se harmlessness rule is unconstitutional because it relies entirely on a non-verdict to uphold a sentence of death.

ARGUMENT III

I. The failure by the State to include the aggravating factors it intended to seek in Mr. Foster's indictment violated his Fourteenth Amendment due process rights

Mr. Foster's indictment did not include the aggravating factors the State intended to pursue at his trial. R. 289-92. Before his trial, Mr. Foster filed a consolidated motion for a statement of particulars as to the aggravating factors and motion to dismiss the indictment for lack of notice as to the aggravators, R. 449, which was denied, R. 10. In his recent 3.851 motion, Mr. Foster again raised this issue, asserting that essential elements to a crime or sentence must be included in the indictment, and the *Hurst* decisions make clear that aggravating factors are elements that must be found by a jury beyond a reasonable doubt to impose a death sentence. The Circuit Court erred in denying Mr. Foster's claim. It ruled that aggravating factors are not elements and that any dependence on *Hurst* renders the claim meritless since *Hurst* is not retroactive. Both conclusions were erroneous.

A. Aggravating factors are "elements" that must be included in an indictment and proven beyond a reasonable doubt before a death sentence may be imposed

Aggravating factors are "elements" that must be proven beyond a reasonable doubt before a death sentence may be imposed. Accordingly, they must be included in the indictment. This Court has recognized that it is "fatal to the indictment" if that indictment "entirely omits averment of an element of the offense, or fails to state the circumstances which constitute the definition of the offense charged when necessary to advise the prisoner of the nature of the charge against him . . . ." *Mills v. State*, 51 So. 278, 280 (Fla. 1910). *See also Adams v. State*, 72 So. 473, 474 (Fla. 1916) (an indictment is "legally insufficient" where it "fails to allege . . . an essential element of a crime"). "[A] conviction on a charge not made by the indictment or information is a denial of due process of law." *State v. Gray*, 435 So. 2d 816, 818 (1983).

Here, counsel for Mr. Foster filed a pretrial motion seeking to dismiss the indictment as defective because it failed to provide the aggravating factors, and counsel also asked for a bill of particulars providing the aggravators the State intended to seek. Both motions were denied: the aggravating circumstances were not viewed as elements that needed to be included in the indictment.

Hurst v. Florida and *Hurst v. State* now make clear, however, that the aggravating circumstances *are* essential elements to the sentence. In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing

scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) *the aggravating factors that were proven beyond a reasonable doubt*; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. The Court held that before making its recommendation, the jury must make the findings of fact required to impose the death penalty under Florida law. *Id.* In *Hurst v. State*, this Court held that, in addition to the principles articulated in *Hurst v. Florida*, the Eighth Amendment also requires *unanimous* jury fact-finding as to each of these elements, 202 So. 3d at 53-59, and that these findings must be beyond a reasonable doubt, *id.* at 57.

Accordingly, these elements must be included in the indictment. Because Mr. Foster's indictment did not include the aggravating factors, it "entirely omit[ted] averment of an element of the offense" and was fatally defective. *Mills*, 51 So. at 280. Mr. Foster's death sentences, which were "not made by the indictment or information" were a denial of due process of law" and should be vacated. *See Gray*, 435 So. 2d at 818.

B. *Hurst* should apply retroactively to Mr. Foster's case

The Circuit Court ruled that Mr. Foster's claim must fail because *Hurst* is not retroactive to Mr. Foster's case. However, as described previously in Argument II,

Part I.A, use of the *Ring* cutoff to determine retroactivity violates the Eighth Amendment's prohibition against arbitrary and capricious capital punishment and the Fourteenth Amendment's guarantee of equal protection.

In *Godfrey*, the United States Supreme Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined the Supreme Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner*, 316 U.S. at 541. A state does not have unfettered discretion to create classes of condemned prisoners.

As noted in Argument II, Part I.A, none of the Supreme Court's precedents address the novel concept of "partial retroactivity," whereby a new constitutional ruling of the Court may be available on collateral review to *some* prisoners whose convictions and sentences have already become final, but not to all prisoners on collateral review. However, the *Ring* cutoff imposes such a partial retroactivity scheme. This is especially arbitrary because, in practice, the date of a particular Florida death sentence's finality on direct appeal in relation to the June 24, 2002,

decision in *Ring* can depend on a score of random factors having nothing to do with the offender or the offense, such as whether there were delays in a clerk's transmitting the direct appeal record to this Court or whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court.

The *Ring*-based cutoff not only infects the system with arbitrariness, but it also raises concerns under the Fourteenth Amendment's Equal Protection Clause. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt*, 405 U.S. at 447. The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner*, 316 U.S. at 541. When a state draws a line between those capital defendants who will receive the benefit of a fundamental right afforded to every defendant in America—decision-making by a jury—and those who will not be provided that right, the justification for that line must satisfy strict scrutiny. This Court's rule falls short of that demanding standard.

As also described previously in Argument II, Part I.A, federal law requires *Hurst* to be applied retroactively even by state courts applying state retroactivity doctrines. The United States Supreme Court has explained that where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See*

Montgomery, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.").

The *Hurst* decisions announced substantive rules that, under the United States Constitution, may not be denied to Florida defendants on state retroactivity grounds. First, this Court ruled in *Hurst v. State* that the Sixth Amendment requires that juries decide, *beyond a reasonable doubt*, whether each of the elements of a death sentence have been satisfied. Such findings are manifestly substantive. *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural). Second, this Court held in *Hurst v. State* that the Eighth Amendment requires the jury's finding of the elements during the penalty phase to be unanimous. That makes the rule substantive, *see Welch*, 136 S. Ct. at 1265 ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions, *see Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into procedural one).

Because the rules announced in the *Hurst* decisions are substantive, this Court has a duty under the federal Constitution to apply them retroactively to Appellant.

In sum, Mr. Foster's claim depends on the well-established principle that the essential elements to a conviction, or sentence, must be included in the indictment. The State failed to do so here when it omitted the aggravating factors it intended to seek from his indictment, and Mr. Foster's death sentences should be vacated.

CONCLUSION

For the foregoing reasons, Mr. Foster respectfully requests that, in light of the record below, this Court find Mr. Foster intellectually disabled, vacate his death sentences, and impose sentences of life imprisonment without the possibility of parole. At a minimum, the Court should remand for an evidentiary hearing on Mr. Foster's adaptive deficits and onset before the age of 18. The Court should also recognize that Mr. Foster's death sentences violate *Hurst v. Florida* and *Hurst v. State* and vacate the sentences on that basis. Finally, Mr. Foster's due process rights were violated by the State's failure to include the aggravating factors it intended to seek in Mr. Foster's indictment, and Mr. Foster's death sentences should be vacated on this basis as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018 the foregoing was served via the e-portal to Assistant Attorney General Doris Meacham, counsel for the State, at doris.meacham@myfloridalegal.com and capapp@myfloridalegal.com, and Chris Anderson at chrisaab1@gmail.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated initial brief is in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Billy H. Nolas
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