

No. SC17-2198

IN THE
Supreme Court of Florida

JERMAINE FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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I. Mr. Foster’s intellectual disability claim is not procedurally barred

The State has repeatedly argued that Mr. Foster “received a full hearing on his intellectual disability claim in which he was afforded an opportunity to present evidence as to all three prongs of the test.” *See, e.g.*, Answer Brief at 13. *This is blatantly inaccurate.* Mr. Foster has *never* had the opportunity to present evidence in support of an intellectual disability claim, either under *Atkins v. Virginia*, 536 U.S. 304 (2002), or under *Hall v. Florida*, 134 S. Ct. 1986 (2014). Both his penalty phase and his 3.851 evidentiary hearing predated *Atkins*. It was impossible for him to present evidence in support of a claim that his intellectual disability rendered him ineligible for the death penalty because this was not yet a claim recognized by any court. Moreover, prior review of the limited intellectual disability evidence Mr. Foster did present before *Atkins* was insufficient to pass muster as constitutional review of Mr. Foster’s intellectual disability claim.

A. Mr. Foster has never had the opportunity to present evidence of intellectual disability under *Atkins* or *Hall*

The State is incorrect that Mr. Foster has had a hearing on intellectual disability. The State relies on Mr. Foster’s penalty phase and 3.851 proceedings to suggest that such a hearing occurred, but both of these proceedings predated *Atkins*. First, the evidence presented at Mr. Foster’s 1994 trial was not presented in support of an intellectual disability claim but rather as mitigation. As described in Mr. Foster’s initial brief, he did present evidence of his intellectual disability during his

penalty phase as mitigation, leading the trial court to find “mental retardation” as a non-statutory mitigating factor. However, because *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its determination that the execution of people with intellectual disabilities is not unconstitutional was still good law, the trial court’s finding of intellectual disability did not preclude Mr. Foster from receiving a death sentence. Moreover, at trial, Mr. Foster’s presentation of his intellectual disability was not based on the three-pronged test for intellectual disability now required: (1) significantly subaverage intelligence, (2) adaptive deficits, and (3) onset before age 18. *See Oats v. State*, 181 So. 3d 457, 466 (Fla. 2015).

The United States Supreme Court and this Court have distinguished any pre-*Atkins* presentations of mitigation evidence from a full hearing on an intellectual disability claim. In *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the United States Supreme Court held that the state courts in Louisiana made an unreasonable determination of facts under 28 U.S.C. § 2254 for basing the decision not to grant a post-*Atkins* evidentiary hearing on pre-*Atkins* mitigation evidence presented at trial. The Court explained: “At his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability.” *Brumfield*, 135 S. Ct. at 2282. Instead, “the state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield’s intellectual disability was not at issue.” *Id.* This Court similarly distinguished mitigation

evidence from a full *Atkins* hearing in *Thompson v. State*, 208 So. 3d 49 (Fla. 2016). After the postconviction court “determined that Thompson’s claim was procedurally barred because the issue of intellectual disability was raised as mitigation and litigated in Thompson’s 1989 resentencing proceeding,” this Court remanded for a hearing after finding that “this determination was in error because the evidence was presented for mitigation, not as evidence of intellectual disability as a bar to execution.” *Id.* at 54.

Justice Anstead’s dissent from this Court’s denial of Mr. Foster’s initial request for an evidentiary hearing under *Atkins* properly identified this flaw in this Court’s analysis. *Foster v. State*, 929 So. 2d 524, 537 (Fla. 2006). He criticized the majority for “overlook[ing] the critical distinction between the presentation of evidence of mental retardation as a mitigator or incidental to a claim of ineffectiveness of counsel, and the very different presentation of a claim of mental retardation as a bar to execution as established in *Atkins* and by our 2004 rule.” *Id.* at 540. He believed it erroneous to summarily resolve the *Atkins* claim based on “the evidence of mitigation presented at an earlier stage of the case.” *Id.* The State is false in its assertion that the pre-*Atkins* mitigation evidence in this case bars Mr. Foster from raising an *Atkins/Hall* claim now.

Mr. Foster’s pre-*Atkins* 3.851 proceedings also do not provide a bar to his current *Atkins/Hall* claim. During Mr. Foster’s Rule 3.851 proceedings in early

2002, the circuit court granted a hearing on Mr. Foster's claim that trial counsel was ineffective during the guilt phase for failing to present evidence of Mr. Foster's diminished capacity due to voluntary intoxication. When counsel explained to the circuit court what the evidentiary hearing would entail, he was clear that the purpose of calling Mr. Foster's co-defendant Leondra Henderson was to show the extent of Mr. Foster's substance use the day of the crime. PCR. 460. Post-conviction counsel had also retained Dr. Dee and described Dr. Dee's purpose at the evidentiary hearing:

[W]e will be calling Doctor Dee who testified in the original case in the mitigation aspect, much of that testimony dealing with his evaluations of the defendant and the fact that he was at that time borderline mentally retarded and that coupled with the intoxication aspects, the diminished capacity resulting from his borderline retardation coupled with the intoxication, or voluntary intoxication aspects of what he consumed that day.

PCR. 461. As counsel suggested, Dr. Dee testified at the hearing to establish that, because of Mr. Foster's intellectual disability, he is more likely to be affected by drugs and alcohol which would affect his ability to conform his behavior to the law. While he responded to questions about Mr. Foster's intellectual disability, the purpose of his testimony was to support the *guilt phase* ineffective assistance claim pertaining to an intoxication defense. It had nothing to do with Mr. Foster's sentence and whether he was ineligible for a death sentence. Just as with the penalty phase proceedings, at the time of the Rule 3.851 hearing, counsel for Mr. Foster "had little reason to investigate or present evidence relating to intellectual disability."

Brumfield, 135 S. Ct. at 2282. On appeal to this Court, post-conviction counsel made clear that “actual mental retardation was never raised in any proceeding, trial, direct appeal, and post conviction, until the Appellant’s Motion for Rehearing” *Foster*, No. SC03-1331, Initial Brief at 26. *Atkins* and its test did not exist at that time. It is clear from the record, then, that since *Atkins*, Mr. Foster has never been “afforded an opportunity to present evidence as to all three prongs of the test” as the State has repeatedly claimed.

B. Prior treatment of Mr. Foster’s intellectual disability claim was inadequate under *Hall*, *Moore*, and *Brumfield* and does not bar his current *Hall* claim

The State suggests that prior review of Mr. Foster’s *Atkins* claim conforms to federal law under the requirements of *Hall*, *Brumfield*, and *Moore v. Texas*, 137 S. Ct. 1039 (2017). The State’s suggestion is without merit.

First, the State erroneously suggests that there was no error under *Hall* because Mr. Foster was allowed to present evidence on all three prongs of the intellectual disability test. However, Mr. Foster did not have the opportunity to present intellectual disability evidence after *Atkins* announced the three-part test. Any development and analysis of intellectual disability evidence before *Atkins* bear no resemblance to what is constitutionally required in reviewing intellectual disability claims today.

The procedural history of Mr. Foster's post-*Atkins* attempt to get a hearing on intellectual disability sheds light on the prior review of his *Atkins* claim. Once the United States Supreme Court issued its opinion in *Atkins*, post-conviction counsel moved to reopen the evidentiary hearing to present *Atkins* evidence. Counsel specifically argued that "*Atkins* required the [s]tate[s] to develop reliable procedures for prohibiting the execution of the mentally retarded and due process and equal protection require that Foster have access to any such procedure." PCR. 545.

The State's response to this post-conviction rehearing motion is particularly telling of how Mr. Foster's intellectual disability claim has historically been treated. The State emphasized Mr. Foster's 75 I.Q. score and highlighted in bold font *Atkins*' references to a 70 I.Q. score. SPCR. 78. The State also discounted Mr. Foster's adaptive deficits as the realities of his "ghetto street life-style." SPCR. 80. It argued:

The criteria Dr. Dee listed to suggest that Defendant had low adaptive behavior skills were actually characteristics typical of most street drug dealers. Few of them hold jobs, have bank accounts, or for that matter engage in any of the activity typical of a non drug dealer lifestyle. To hold that a ghetto street life-style, in and of itself, constitutes a low level of adaptive functioning skills, would make a mockery of the requirement, because all persons in that social milieu would automatically qualify.

SPCR. 79-80.

The circuit court denied Mr. Foster's motion. The circuit court found that Mr. Foster's I.Q. score of 75 was "at most [] borderline to even begin to consider whether

a person is mentally retarded.” PCR. 619. It also found that even if 75 was a qualifying score, Mr. Foster did not have adaptive deficits because he supported himself, provided shelter for Leondra Henderson, and communicated with his trial attorney. PCR. 620-21. Finally, the circuit court did not find onset before 18, because Mr. Foster was not in special education and there was not any indication that his teachers thought he was intellectually disabled. PCR. 621. This “analysis” on the three prongs was based on evidence Mr. Foster presented to support other claims before *Atkins* announced the three-pronged test.

On appeal, post-conviction counsel argued that the circuit court should have granted a hearing on Mr. Foster’s *Atkins* claim. In doing so, he highlighted the same problems with relying on pre-*Atkins* evidence as the Supreme Court addressed in 2015 in *Brumfield*. The initial brief included the explanation: “At the evidentiary hearing, Foster was attempting to show that his diminished capacity was further exacerbated by the drugs and alcohol he consumed. *The defense was not trying to prove mental retardation . . .*” *Foster*, No. 03-1331, Initial Brief at 26. Counsel also asserted that “it [was] clear from the record that at least a prima facie case of mental retardation was established,” *id.*, and that “[o]nce this prima facie showing was established, a full hearing on all *Atkins* issues should have been granted.” *Id.* Post-conviction counsel was especially concerned about the onset-before-18 prong, explaining that “the defense did not have that opportunity at the evidentiary hearing

as, again, *Atkins* was not in existence, to establish that specific factor.” *Id.* at 27. In fact, at the time of Mr. Foster’s 3.851 appeal, this Court had not even determined whether *Atkins* was retroactive, so post-conviction counsel and the State briefed its retroactivity. *Id.* at 30; Answer Brief at 58-59. The State, of course, argued that it was not. *Id.* As post-conviction counsel ultimately concluded, “This is a new world in death penalty litigation.” Initial Brief at 29.

Despite this significant change in capital litigation, this Court affirmed the circuit court’s decision without remanding for a hearing. It largely adopted the circuit court’s opinion, including the circuit court’s language that Mr. Foster’s 75 I.Q. score was “borderline” for where the court would “even begin to consider” the other prongs. *Foster*, 929 So. 2d at 532. It also adopted the circuit court’s reliance on Leondra Henderson’s testimony that Mr. Foster had taken him in when he left home and trial counsel’s testimony that Mr. Foster had communicated with counsel. *Id.* at 533. Despite the fact that post-conviction counsel emphasized that Mr. Foster had never had the opportunity to present evidence of the onset-before-18 factor because he did not know such a prong existed before *Atkins*, this Court faulted Mr. Foster for not presenting evidence on that prong. *Id.* Ultimately, this Court referenced the pre-*Atkins* presentation of evidence in concluding that no hearing was warranted, because “Foster was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue.” *Id.*

Here, too, Justice Anstead recognized the flaws inherent in this Court's previous *Atkins* ruling. In his dissent, he explained that, while Mr. Foster had not raised intellectual disability in his initial 3.851 motion, he "could not have brought his mental retardation claim until after the evidentiary hearing occurred because *Atkins* had not yet been decided." *Foster*, 929 So. 2d at 538-39. The evidentiary hearing "focused on the claims raised in Foster's petition and did not adequately address the requirements of establishing mental retardation under *Atkins*" because *Atkins* did not yet exist. *Id.* at 539.

Neither the circuit court's ruling—nor this Court's affirmance—are tantamount to the consideration of the three prongs that *Hall* requires. As explained in the initial brief, this Court has already determined in other cases that even where defendants were allowed to present evidence of the other prongs despite I.Q. scores between 70 and 75, any prior consideration "was tainted by the brightline cutoff of 70 for IQ scores established by this Court" *Thompson*, 208 So. 3d 49, 58 (Fla. 2016). In *Walls v. State*, 213 So. 3d 340 (Fla. 2016), this Court explained:

[A]lthough 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 IQ score below 70 – a fact which may have affected his presentation of evidence at the hearing.

Walls, 213 So. 3d at 347 (emphasis added). See also *Franqui v. State*, 211 So. 3d 1026, 1031-32 (Fla. 2017) (granting a new hearing post-*Hall* because the defendant “may have significantly limited his presentation because he knew that he could not meet the first prong of intellectual disability,” so the defendant “did not receive the holistic evaluation of his claim that he is entitled to under *Hall*”); *Thompson*, 208 So. 3d at 59 (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”).

The State’s answer brief did not address the language in *Walls* regarding *Walls*’ prior evidentiary hearings, and it did not cite *Franqui* or *Thompson* at all to offer any explanation for why the three-prong analysis in Mr. Foster’s case differed from these other cases in a way that made the prior review in Mr. Foster’s case “adequate” where the others were not. The State also failed to explain how Mr. Foster’s pre-*Atkins* presentation of evidence could even target the then-nonexistent three-pronged test at the time of his prior hearings. As the “taint” of the brightline cutoff was enough to affect these other post-*Atkins* hearings, the State cannot credibly argue that Mr. Foster was better prepared to develop his intellectual disability claim in 1994 and 2002 when *Penry* was still the law.

Next, the State relies on *Brumfield* to posit that the United States Supreme Court’s discussion of Louisiana’s intellectual disability statute was based on state law and did not impose a “nationwide standard.” Answer Brief at 13. This argument is flawed. *Brumfield* shows that any standards states produce must still align with federal constitutional mandates. In Louisiana, defendants were entitled to an evidentiary hearing on their *Atkins* claims if they raised a reasonable doubt as to their intellectual capacity. *Brumfield*, 135 S. Ct. at 2281. The state courts had denied Brumfield a hearing because of his pre-*Atkins* mental health evidence during the penalty phase. *Id.* at 2278-79. The United States Supreme Court found this denial of a hearing unreasonable because it ignored federal law in reviewing Brumfield’s *Atkins* claim; for example, the Louisiana Supreme Court found Brumfield’s score of 75 was disqualifying. *Id.* at 2277. In reviewing the state court record, the United States Supreme Court found enough reasonable doubt to warrant a hearing under state law. *Id.* at 2281. The Court also explained that when deciding whether Brumfield had established that reasonable doubt, Brumfield did not have “the opportunity to develop the record for the purpose of proving an intellectual disability claim. . . . [T]he state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield’s intellectual disability was not at issue.” *Id.* at 2281-82. That the *Brumfield* Court reached this conclusion

through the deferential lens of § 2254 further confirms that states must heed federal law in adopting their individual intellectual disability statutes.

The State is correct that Florida has its own intellectual disability statute with its own standards. And in Florida, the standard for an evidentiary hearing on intellectual disability is even lower than in Louisiana's. Under Rule 3.203, capital defendants may move to exclude the death penalty due to intellectual disability, and the courts "shall" hold an evidentiary hearing. There is no threshold burden of proof in Florida as there is in Louisiana. Following *Atkins*, Mr. Foster should have received the hearing he sought. The fact that he did not is more reason to grant one now under *Hall*; it is not a procedural bar as the State would suggest.

Finally, the State argues that *Moore* is inapposite to Mr. Foster's case because Texas used an outdated, 23-year-old standard for intellectual disability rather than a current one. Answer Brief at 11-12. This is an interesting position for the State to take considering that when Mr. Foster presented evidence of his intellectual disability, it was in 1994—24 years ago. Yet, the State asks this Court to rely on Mr. Foster's outdated, pre-*Atkins* presentation to deny his *Hall* claim now.

Moreover, the prior analysis of Mr. Foster's *Atkins* claim contravenes *Moore*'s principles. Both the post-conviction court and this Court relied heavily on Dr. Dee's testimony about various socioeconomic factors and "cultural deprivation" that affected Mr. Foster's upbringing to find that these were alternative explanations

for any adaptive deficits. This is the same mistake the Texas Court of Criminal Appeals made when it “concluded 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.” *Moore*, 137 S. Ct. at 1051. The United States Supreme Court explained that this analysis was in error because “[t]hose traumatic experiences . . . count in the medical community as ‘*risk factors*’ for intellectual disability,” *id.*, and that “[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.* This Court also found that Mr. Foster

was supporting himself and functioning on his own, albeit, by illegal drug sales. He was even able to provide shelter and sustenance for another, Leondr[a] Henderson. His communication skills, as evidenced by his meetings with his trial attorney and by his own testimony before this Court, did not indicate significant limitations.

Foster, 929 So. 2d at 533. In discussing these points, this Court did not consider Dr. Dee’s testimony that Mr. Foster did not keep a job, did not keep any accounts, and had “always depended on other people for support,” *id.*, nor did the Court consider that Mr. Foster had to live with others, had a poor memory, and was a follower, PCR. 78-79. This treatment of the evidence is similar to the problematic treatment the Texas CCA employed and which garnered reversal in *Moore*. The *Moore* Court found the Texas CCA similarly erred when it “recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money,”

Moore, 137 S. Ct. at 1050, to downplay Moore’s deficits. As the Supreme Court pointed out, “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.” *Id.* So contrary to the State’s arguments, prior review of Mr. Foster’s intellectual disability claim does not align with *Moore* either.

From the State’s emphasis on Mr. Foster’s 75 I.Q. score and “ghetto street life-style” to both courts’ reliance on pre-*Atkins* evidence to analyses that contravene the requirements in *Hall*, *Brumfield*, and *Moore*, the prior review of Mr. Foster’s *Atkins* claim fell far below federal constitutional standards and do not bar Mr. Foster’s current *Hall* claim.

In another attempt to circumvent constitutional requirements, the State argues that Mr. Foster’s use of the medical community’s guidance as outlined in *Hall* and *Moore* is actually an effort to create a new standard for determining intellectual disability even though the three-prong test has not changed since *Atkins*. Answer Brief at 28. This is not so. Mr. Foster does not refute that the same three-part test from *Atkins* still exists. However, there is now a more informed understanding of how the medical community diagnoses intellectual disability. Both *Hall* and *Moore* require states to make their intellectual disability determinations in a way that is “informed by the medical community’s diagnostic framework.” *Hall*, 134 S. Ct. at 2000. To this end, the states “have flexibility but not unfettered discretion in enforcing *Atkins*’ holding.” *Moore*, 137 S. Ct. at 1052-53. “The medical

community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, current manuals offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* at 1053 (internal citations omitted). The United States Supreme Court has also provided a rationale for looking to the medical community in defining intellectual disability: "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S. Ct. at 1999.

So despite the State's suggestion, there is no dispute that *Hall* changed the three-prong test. Instead, Mr. Foster asserts that the evidence he presented at his penalty phase and 3.851 evidentiary hearing, both of which pre-dated *Atkins*, were not intended to meet any standard provided in *Atkins*, and the prior review of his *Atkins* claim never should have been based on those presentations of evidence. Nor did this Court's prior review conform to the standards provided by the medical community or *Atkins* and its progeny.

To protect defendants' Eighth Amendment rights, "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001. Mr. Foster's mitigation presentation at the penalty phase and ineffective assistance of counsel presentation during his 3.851

proceedings, both of which preceded *Atkins*, do not suffice as a “fair opportunity” to present his intellectual disability evidence and do not now bar his *Hall* claim.

II. The record below establishes that Mr. Foster has an intellectual disability and is ineligible for the death penalty

The State argues that Mr. Foster “failed to put forth any additional facts not already addressed by the court.” Answer Brief at 22. In reality, Mr. Foster submitted a proffer including an affidavit from Dr. Jethro Toomer, the sworn declarations of five lay witnesses, and Mr. Foster’s school record to the circuit court. That proffer constitutes “additional facts.” However, the State suggests that Mr. Foster’s proffer is procedurally barred because this information was known to Mr. Foster at the time of his trial.

Once again, the State ignores clear United States Supreme Court precedent. Mr. Foster may have known his relatives and the information they had about his intellectual capabilities at the time of trial, but he did not know that eight years after his trial, *Atkins* would preclude death sentences for the intellectually disabled. *Brumfield* speaks directly to this point: because pre-*Atkins* defendants “had little reason to investigate or present evidence relating to intellectual disability,” state courts reviewing their pre-*Atkins* presentation of evidence “should [take] into account that the evidence before it was sought and introduced at a time when [] intellectual disability was not at issue.” 135 S. Ct. at 2281-82. The State’s assertion

that Mr. Foster can now be faulted for not presenting his relatives and peers at his 1994 penalty phase to testify as to his intellectual capabilities belies all logic.¹

Rather than addressing Mr. Foster’s proffer in the circuit court, the State relied almost entirely on its procedural arguments and citing to this Court’s prior findings regarding the pre-*Atkins* evidence. In its Answer Brief here, the State *for the first time* offered brief argument as to two pieces of the proffered evidence.² If the State is now suggesting that it does have factual disputes with Mr. Foster’s proffer—arguments that the State did not raise below—this does not provide a reason to deny Mr. Foster’s claim but instead concedes that a hearing is necessary to resolve those factual disputes.

Even on paper, however, the State’s arguments do not undermine Mr. Foster’s proffer. The State now disputes whether Mr. Foster’s placement in exceptional student education because of his inability to express himself and understand language skills at a level appropriate for his age, *see* SPCR. 600, is sufficient to

¹ The State also argues that Mr. Foster hired a new expert to get more “favorable” results, so Dr. Jethro Toomer’s affidavit should not be considered. Answer Brief at 22. Dr. Henry Dee, the original expert in this case, passed away before *Hall*. It would be impossible to retain him to review Mr. Foster’s intellectual disability claim in light of *Hall*, *Brumfield*, and *Moore*.

² The State’s new factual bases for denying Mr. Foster’s claims were not preserved for appeal, as they were not raised in the court below. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (“[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.”).

establish the onset-before-18 prong, although this is one of the many pieces of evidence Mr. Foster supplied below in support of that prong. *See* Initial Brief at 36-38 (describing evidence proffered below in support of the onset-before-18 prong).

The State also takes issue with the declaration from Mr. Foster's codefendant and former peer, Leondra Henderson. Mr. Henderson previously testified that Mr. Foster took Mr. Henderson in when he left home at fifteen. Recently, Mr. Henderson provided a sworn statement, included in Mr. Foster's proffer, where he described the conditions under which the two actually lived. He explained that he had to set up their utilities because Mr. Foster was unable to do so himself, that he paid their bills because Mr. Foster could not read them, and that he—not Mr. Foster—took care of the grocery shopping and cooking. *See* SPCR. 522. The State did not explain how Mr. Henderson's prior testimony that Mr. Foster invited Mr. Henderson to come live with him and his current elaboration that Mr. Henderson ended up taking care of everything once he moved in are inconsistent.

The proffer of Mr. Foster's language therapy and Mr. Henderson's description of their home were two factors of many Mr. Foster included in his proffer to establish the second and third prongs of intellectual disability. *See* Initial Brief at 27-38. The State still has not provided any arguments to refute any of the other evidence.

If this Court properly relies on the record before it, it should find that Mr. Foster has established intellectual disability and remand for a sentence of life without

the possibility of parole. In the alternative, if this Court feels that the State's attempt to counteract two pieces of Mr. Foster's proffer creates a factual dispute that warrants a resolution, then this Court should remand for an evidentiary hearing.

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

A. *Hurst* applies retroactively to Mr. Foster's case

The State erroneously suggests that this Court's *Ring*³ cutoff to determine *Hurst*'s retroactivity is not arbitrary and capricious and does not violate Mr. Foster's equal protection rights. Answer Brief at 30. In support of this argument, the State notes that retroactivity always involves a cutoff. *Id.* at 32. Mr. Foster already acknowledged in the initial brief that denying retroactivity to every defendant always entails a cutoff. Initial Brief at 46. However, the issue is this Court's arbitrary *Ring*-based distinction between similarly situated defendants whose cases were on collateral review at the time *Hurst* was announced, and that this Court centered its cutoff around *Ring* without consideration of defendants' equal protection rights. As the State noted, some defendants whose convictions were final at the time both *Hurst* decisions were announced are getting *Hurst* relief. Answer Brief at 32. The problem is that others in the exact same procedural posture are not.

To get around the constitutional implications of this cutoff, the State relies on *Engquist v. Oregon Dep't of Corrs.*, 553 U.S. 591 (2008), arguing: ““The Equal

³ *Ring v. Arizona*, 536 U.S. 584 (2002).

Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike.” Answer Brief at 33 (quoting *Engquist*, 553 U.S. at 601). The State then claims that Mr. Foster is not similarly-situated to “post-*Ring*” defendants, because those defendants were sentenced under an unconstitutional scheme whereas Mr. Foster was not. *Id.* 33-34. This is indisputably false. *All pre-Hurst defendants were sentenced under the same unconstitutional system.* Mr. Foster was sentenced under Fla. Stat. 921.141, the same as every defendant getting *Hurst* relief.

Florida’s sentencing scheme did not suddenly become unconstitutional when the United States Supreme Court decided *Hurst*. “A penalty imposed pursuant to an unconstitutional law is no less void, because the prisoner’s sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). Florida’s capital sentencing statute has always been unconstitutional, and Mr. Foster was sentenced under this unconstitutional statute in the same way that other defendants receiving *Hurst* relief were. Thus, Mr. Foster and many of the defendants getting *Hurst* relief are “persons who are in all relevant respects alike,” *Engquist*, 553 U.S. at 601. That is, they were all sentenced under the same unconstitutional statute; their convictions were final when the courts announced the *Hurst* decisions; and their cases were in a collateral postconviction

posture. To treat some defendants on collateral review differently than other defendants on collateral review is an equal protection violation.

The State also argues that *Hurst* is not retroactive because it was not a substantive change in the law. Answer Brief at 36. The State argues a change is only substantive where it involves the class of defendants eligible for punishment or what conduct the State can punish. *Id.* Once again, the State is confusing the procedure necessary to protect a substantive right to claim that the change was in and of itself procedural. This is precisely what *Montgomery* warned against, urging courts not to “conflate[] a procedural requirement necessary to implement a substantive guarantee with a rule that regulate[s] only the manner of determining the defendant’s culpability.” *Montgomery*, 136 S. Ct. at 734-35 (internal citation omitted). Instead, “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish.” *Id.* at 735. Here, to protect the Sixth and Eighth Amendment rights to a unanimous jury finding as to each element required to impose a death sentence beyond a reasonable doubt, procedural changes were necessary. This does not make the change in law itself procedural.

Moreover, the State argues that there cannot be a due process violation, because any *Hurst* error occurred in the sentencing phase, and a “due process violation impairs the truth-finding function and raises doubts as to the accuracy of a

guilty verdict.” Answer Brief at 35. It is obvious, however, that capital defendants have due process rights in the penalty phase. The central holding in *Hurst* was that Florida’s scheme requiring the jury to provide an advisory sentencing recommendation while the judge was the actual decision-maker was unconstitutional because “*the Due Process Clause*[] requires that each element of a crime be proved to a jury beyond a reasonable doubt” and that any fact enhancing a defendant’s sentence, including those in a capital penalty phase, “must be submitted to a jury.” *Hurst*, 136 S. Ct. 616, 621 (2016) (emphasis added). Mr. Foster’s due process rights were violated when the judge, not the jury, decided to impose his death sentences.

B. The *Hurst* error was not harmless

The State argues that the *Hurst* error in this case was harmless. First, it suggests that there is no problem with this Court’s per se harmless rule where the jury was unanimous because unanimity only “begins the evaluation process into the factors which influenced the unanimous recommendation.” Answer Brief at 40. The State identifies how the analysis *should* occur but now how it has been carried out. To date, this Court has not found a *Hurst* error not harmless in a single case with a unanimous jury. Instead, it merely rubber stamps the harmless error finding based on that unanimity. As explained in the initial brief, *see* Initial Brief at 58-64, this superficial review violates the requirement of an individualized harmless error analysis that considers the entire record. *See Chapman v. California*, 386 U.S. 18

(1967). Moreover, this individualized process is not the analysis the circuit court underwent, as it did not even reach the harmless error analysis. SPCR. 646.

The State also argues that, in an individualized analysis in this case, the trial court found four aggravating circumstances and one statutory mitigating circumstance, so this, in addition to the “horrific” facts of the crime, renders any *Hurst* error harmless. Answer Brief at 42. Any harmless analysis, however, would also include the non-statutory mitigating factors, including the trial court’s finding that Mr. Foster is intellectually disabled and the extensive testimony about his traumatic childhood during his penalty phase. The State also did not provide any explanation of how the facts of Mr. Foster’s case are distinguishable from other cases where *Hurst* relief was granted. *See, e.g., Dubose v. State*, 210 So. 3d 641, 645 (Fla. 2017) (finding error not harmless in case involving a child victim); *Johnson v. State*, 205 So. 3d 1285, 1288 (Fla. 2016) (finding error not harmless in case with three death sentences imposed for each of three victims). Clearly the only differentiation between these cases is the unanimous jury vote in Mr. Foster’s case. This is not enough to find the *Hurst* error in his case harmless when the State itself acknowledges the jury did not make any specific factual findings as to the aggravators and mitigators in Mr. Foster’s case. *See* Answer Brief at 40. This Court is no more able to speculate as to the jury findings in this case than it was in the cases where *Hurst* relief was granted.

Finally, the State argues there is no *Caldwell*⁴ error affecting the harmless error review. It relies on this Court’s pre-*Hurst* holdings that *Caldwell* does not apply in Florida. Answer Brief at 43. In light of *Hurst*, however, the validity of those decisions is now questionable. The State also argues that the jury instructions informing jurors that their decision was merely advisory did not violate Florida law at the time. *Id.* at 44. But the rationale behind *Caldwell*’s holding that it was error for the jury to believe the final decision rested elsewhere was that the jury would not understand its responsibility in making its sentencing determination and would “choose to minimize the importance of its role.” *Caldwell*, 472 U.S. at 333. The Court observed, “[O]ne can easily imagine that . . . the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.” *Id.* The jurors here similarly did not bear the full weight of the responsibility for voting to end another’s life. The jurors were informed that the judge would make the ultimate sentencing decision, so there is too great a risk that this affected the jury’s deliberations and final decision.

IV. Mr. Foster’s due process rights were violated when the State failed to include the aggravating factors in its indictment

The State did not provide any arguments to preclude relief on this claim. It merely argued that Mr. Foster should have raised this claim on direct appeal, so it is

⁴ *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985).

procedurally barred. Answer Brief at 45. The State also argued that this Court has repeatedly denied this claim and should continue to do so here. *Id.* at 46.

The *Hurst* decisions defeat both of these arguments. Trial counsel did file a pretrial motion seeking notice of the aggravating factors the State intended to pursue. However, as Mr. Foster's trial predated *Hurst*, there was no basis for any prior counsel to make the argument that the aggravating factors were "elements" of Mr. Foster's death sentence and should have been included in the indictment. This changed when *Hurst* clarified that the aggravating factors are elements of a death sentence that must be found by a jury. *Hurst v. Florida*, 136 S. Ct. at 621. Accordingly, the aggravating factors should have been included in Mr. Foster's indictment. This Court's prior holdings to the contrary, which the State relies on, *see* Answer Brief at 46, all predate *Hurst* and are no longer valid.

V. Conclusion

For the reasons above and in Mr. Foster's initial brief, this Court should reverse the circuit court's order, vacate Mr. Foster's death sentences, and remand for the purpose of imposing sentences of life in prison without the possibility of parole. In the alternative, this Court should remand for an evidentiary hearing on the Mr. Foster's adaptive deficits and manifestation of intellectual disability before age 18.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 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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