Filing # 80472815 E-Filed 11/07/2018 02:50:27 PM

IN THE SUPREME COURT OF FLORIDA

No. SC18-1172

Lower Court Case No. 571994CF0000397XXAXMX

GARY LAWRENCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR SANTA ROSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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RECEIVED, 11/07/2018 02:53:26 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

CITATIONS TO THE RECORD 1

ARGUMENT IN REPLY 2

1. MR. LAWRENCE'S INTELLECTUAL DISABILITY CLAIM IS NOT PROCEDURALLY BARRED 2

2. MR. LAWRENCE IS INTELLECTUALLY DISABLED, AND THE CIRCUIT COURT ERRED IN SUMMARILY DENYING HIS CLAIM 3

   A. The State's arguments support Mr. Lawrence's proffer that he has significantly subaverage intellectual functioning 5

   B. According to the Supreme Court in *Moore* and *Hall* and this Court in *Wright*, strengths cannot be used to undermine weaknesses, and Mr. Lawrence presents evidence of adaptive deficits 7

   C. The State's own brief demonstrates that Mr. Lawrence's intellectual disability manifested before the age of 18.. 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATION OF FONT 11

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 6, 9

City of St. Petersburg v. Siebold et al, 48 So. 2d 291 (Fla. 1950).....3

Dixon v. State, 730 So. 2d 265 (Fla. 1999).....2, 3

Hall v. Florida, 134 S. Ct. 1986 (2014) .....*passim*

Florida Sugar Distributors v. Wood, 184 So. 641 (Fla. 1938).....3

Jones v. State, 709 So. 2d 512, 533 (Fla. 1988) 4

Moore v. Texas, 137 S. Ct. 1039 (2017).....*passim*

Tomkins v. State, 994 So. 2d 1072 (Fla. 2008).....4

Walls v. State, 213 So. 3d 340 (Fla. 2017) .....*passim*

Wright v. State, 43 Fla. L. Weekly S404 (Fla. September 27, 2018) 7, 8

Rules

Fla. R. Crim. P. 3.851 .....1, 2

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lawrence's Motion to Vacate Judgements of Conviction and Sentence. The State filed its answer to Mr. Lawrence's initial brief, and this reply follows. This reply will address only the most salient points argued by the State. Mr. Lawrence relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to this Court; "PP" refers to the transcript of the penalty phase of the trial; "PCR" refers to the record on appeal from the denial of Mr. Lawrence's Rule 3.850 motion; "PCR-S" refers to the supplemental record on appeal from the denial of Mr. Lawrence's Rule 3.850 motion; and "SPCR" refers to the record on appeal from the denial of Mr. Lawrence successive Rule 3.851 that is the subject of the instant appeal. "AB" refers to the State's Answer Brief. All other references will be self-explanatory.

ARGUMENT IN REPLY

1. MR. LAWRENCE'S INTELLECTUAL DISABILITY CLAIM IS NOT PROCEDURALLY BARRED.

The circuit court's order summarily dismissing Mr. Lawrence's Rule 3.851 motion was based entirely on *Walls v. State*, 213 So. 3d 340 (Fla. 2017), and was in error. The circuit court did not make any factual findings on the merits of Mr. Lawrence's intellectual disability claim, nor did it explain why the court found the date of the *Walls* mandate controlling rather than the date of the reissued opinion.

Contrary to the State's assertion that Mr. Lawrence presented "numerous reiterations that the date of a mandate controls and governs the triggering date," (AB. 23), Mr. Lawrence presented case law in support of his argument that the last action finalizing a conviction and sentence—in this situation, the reissued *Walls* opinion—is what triggers the one-year filing deadline. The State has not cited a single case to rebut Mr. Lawrence's argument and has offered no authority that says this Court should not consider the date of the reissued opinion as the triggering event for the one-year clock to file a claim based on a new fundamental constitutional right.

Any ambiguity in procedural rules must be resolved in the way which most allows Mr. Lawrence to vindicate his rights. This Court's holding in *Dixon v. State*, 730 So. 2d 265 (Fla. 1999), was ambiguous because, although it established the issuance of the mandate as the controlling date, the Court's intent was to *maximize* the defendant's time to file a claim under a new retroactive constitutional right. In

Dixon, the mandate was the latest action. When resolving ambiguity regarding legislation, this Court has held that "[w]here two or more interpretations can reasonably be given a statute, the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute." *City of St. Petersburg v. Siebold et al,* 48 So. 2d 291, 294 (Fla. 1950) (citing *Florida Sugar Distributors v. Wood*, 184 So. 641 (Fla. 1938)). This Court should apply the same principle to its procedural rule established in *Dixon.* The interpretation that gives defendants the maximum amount of time to file a claim under a new retroactive constitutional right should control. Any other interpretation would destroy the purpose of *Dixon*.

This Court should follow Mr. Lawrence and amicus counsel's recommendation and find in favor of a more inclusive approach to the *Walls* issue. The reissuance of the corrected opinion in *Walls* on May 4, 2017, was the final action of this Court in the *Walls* case that announced that *Hall* applies retroactively. Mr. Lawrence timely filed within one year of that date. All other issues in this appeal should be remanded to the circuit court. Mr. Lawrence's intellectual disability claim is not procedurally barred.

2. MR. LAWRENCE IS INTELLECTUALLY DISABLED, AND THE CIRCUIT COURT ERRED IN SUMMARILY DENYING HIS INTELLECTUAL DISABILITY CLAIM.

The Eighth Amendment's prohibition on executing a person with intellectual disability is not subject to any sort of waiver, procedural bar, or default. As Justice

Pariente stated in her concurring opinion in *Walls*, "More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied." *Walls*, 213 So. 3d at 348. Mr. Lawrence has proffered unrefuted evidence of intellectual disability that should be evaluated after a proper hearing. "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. Lawrence's allegations are not refuted by the record. In fact, the only substantial, competent evidence before the circuit court was Mr. Lawrence's uncontested factual proffer of intellectual disability.

The State's presentation in the circuit court and on appeal to this Court does not negate Mr. Lawrence's factual proffer of evidence of his intellectual disability. The State offers qualifying scores and historical evidence of adaptive deficits that do not conclusively refute this claim. This Court should remand for a hearing in light of Mr. Lawrence's proffer of lay evidence and the findings and recommendations of the original trial expert and Mr. Lawrence's postconviction expert. *Cf. Jones v. State*, 709 So. 2d 512, 533 (Fla. 1988) ("[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.").

Prior to *Hall*, Mr. Lawrence had no way to raise a good faith claim of intellectual disability because all of his unadjusted IQ scores were above 70. Prior to the *Walls* decision holding *Hall* retroactive in Florida, Mr. Lawrence was not on notice that he could raise an intellectual disability claim in light of *Hall*. Thus, Mr. Lawrence is only now free to raise such a claim. He is entitled to a full and fair opportunity to show that the Eighth Amendment prohibits his execution as a person with intellectual disability.

A. The State's arguments support Mr. Lawrence's proffer that he has significantly subaverage intellectual functioning.

Mr. Lawrence has an IQ score of 75 without any adjustment for the Flynn effect. (SPCR.153; 170). This score was obtained using the clinically appropriate WAIS-IV. The State has not offered any evidence to rebut this IQ score but rather has conceded that Mr. Lawrence obtained a qualifying IQ score of 72 in his childhood and that Mr. Lawrence's properly corrected IQ score from the WAIS-R examination is 69. (SPCR.118). This satisfies the first prong of intellectual disability. Mr. Lawrence has, in the past and in the present, tested at or below the level of intellectual disability.

The State's own arguments support Mr. Lawrence's intellectual disability claim and underscore the need for an evidentiary hearing by highlighting pre-18 and

adult IQ scores documented in the record that "range from 72 to 110 between the ages of 7 and 60." (AB.38).

Even if this Court were to consider Mr. Lawrence's IQ scores that do not fall within the qualifying range, the court cannot disregard the IQ scores that do. The first prong of an intellectual disability determination can be satisfied with as little as one qualifying IQ score. The existence of additional scores does not negate a qualifying score obtained using clinically appropriate testing methods, as in Mr. Lawrence's case. The State cannot, on the face of Mr. Lawrence's proffer, pick and choose which tests are more significant than others and ignore certain scores because they do not comport with the State's analysis. Such factual determinations must be made by the circuit court after an evidentiary hearing at which Mr. Lawrence can present evidence about the validity of his qualifying WAIS-IV score.

The experts from trial and postconviction proceedings, Dr. James Larson and Dr. Jethro Toomer respectively, also support the need for an evidentiary hearing on Mr. Lawrence's claim of intellectual disability. The State agrees that the Eighth Amendment requires a look to the "'evolving standards of decency that mark progress in a maturing society.'" (AB.34 (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002))). Dr. Larson has updated his evaluation to reflect current medical standards and the information currently available regarding Mr. Lawrence's adaptive

deficits. (SPCR.68-76). Further, Dr. Toomer concluded that Mr. Lawrence is intellectually disabled under the current clinical and legal standards.

The existence of multiple qualifying scores and the support of two expert mental health evaluations demand an evidentiary hearing. Neither the record before this Court nor the State's arguments conclusively refute Mr. Lawrence's proffer of subaverage intellectual functioning. Because Mr. Lawrence has proffered an IQ score within the 70-75 range, he must be afforded the opportunity to present evidence regarding adaptive deficits and age of onset. These three prongs of an intellectual disability assessment should be considered in a holistic manner to balance the determination of intellectual functioning with adaptive deficits that manifested prior to age 18. *Hall v. Florida*, 134 S. Ct. 1986, 2000-01 (2014) (explaining that intellectual disability "is a condition, not a number").

B. According to the Supreme Court in *Moore* and *Hall* and this Court in *Wright*, strengths cannot be used to undermine weaknesses, and Mr. Lawrence presents evidence of adaptive deficits.

The State incorrectly argues that Mr. Lawrence relies almost exclusively on the 2018 opinions of Drs. Toomer and Larson to support his intellectual disability claim. (AB.46). The State's argument ignores Mr. Lawrence's extensive history of adaptive deficits as documented in school records and lay witness statements regarding Mr. Lawrence's childhood and adulthood. Instead, the State focuses on a few perceived adaptive strengths, primarily derived from corrections and probation

records. (AB.44-45). These few strengths gleaned from prison records do not refute Mr. Lawrence's clear record of conceptual, social, and practical deficiencies.

In evaluating Mr. Lawrence's adaptive functioning, the analysis should not be based on strengths, especially those noted in a prison setting. *Moore v. Texas*, 137 S. Ct. 1039 (2017). As a result of its holding in *Moore*, the United States Supreme Court requires the legal community focus on adaptive deficits, not adaptive strengths, and prohibits courts from overemphasizing adaptive strengths developed in a controlled setting, such as prison. *Moore*, at 1050.

In light of *Moore*, this Court has recently reiterated the significance of not relying on adaptive strengths. *Wright v. State*, 43 Fla. L. Weekly S404 (Fla. September 27, 2018). According to this Court's opinion in *Wright*, "significant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." *Id.* at 6 (citing AAIDD-11 at 47). The State acknowledges Mr. Lawrence's "difficult up-bringing, his very poor educational performance, and . . . his low intelligence level" (AB.43), and Mr. Lawrence has proffered a comprehensive presentation of impaired adaptive functioning in all three adaptive reasoning domains, dating back to his early childhood. *See* Initial Brief, at 36-43 (table). Mr. Lawrence's adaptive deficits are unrebutted and support a finding of intellectual disability.

C. The State's own brief demonstrates that Mr. Lawrence's intellectual disability manifested before the age of 18.

The State admits that Mr. Lawrence presented an IQ score of 72 from his childhood, demonstrating that he had subaverage intellectual functioning by the time he was seven years old. (AB.47). Furthermore, the history of adaptive deficits and risk factors outlined in Mr. Lawrence's Initial Brief all demonstrate that Mr. Lawrence has been intellectually disabled since he was very young. Thus, the third prong of intellectual disability is satisfied.

Mr. Lawrence's factual proffer demonstrates that Mr. Lawrence is intellectually disabled and, therefore, ineligible for the death penalty under the United States Supreme Court's Eighth Amendment decisions in *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 134 S. Cr. 1986 (2014); and *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Lawrence has successfully established a prima facie case of intellectual disability. Coupled with risk factors, he has proven by clear and convincing evidence that he has (1) significantly subaverage intellectual functioning, (2) adaptive deficits, and (3) manifestation prior to age 18.

Mr. Lawrence has never been afforded an evidentiary hearing on his claim of intellectual disability by any court. His proffered evidence of intellectual disability meet far exceeds the threshold showing required for an evidentiary hearing. In fact, his proffer meets the clear and convincing evidence standard required for this Court

to grant relief on the merits without an evidentiary hearing. But, without an evidentiary hearing, this Court cannot decide this case in the State's favor.

CONCLUSION

For the reasons set forth in this Reply Brief and in his Initial Brief, Appellant Gary Lawrence requests that this Court remand his case to the circuit court for imposition of a life sentence, or in the alternative, remand for an evidentiary hearing in the circuit court, and any other relief deemed appropriate by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

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CERTIFICATION OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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