IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-2024

LOWER COURT CASE NO. 95-1117 CF A02

LEROY POOLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

This appeal arises from the summary denial of a successive motion to vacate. A summary denial of a 3.851 motion is subject to de novo review by this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Pooler has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Pooler, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE

On February 13, 1995, Mr. Pooler was charged by indictment with first degree murder, burglary of a dwelling while armed with a firearm and attempted first degree murder (R.1, 42-43), in Palm Beach County, Florida.

After a trial, on January 17, 1996, the jury returned a verdict of guilty on all counts (T. 1321).

The penalty phase proceedings commenced on February 7, 1996 (T. 1362). By a vote of nine to three the jury recommended a sentence of death (T. 1630). The trial court sentenced Mr. Pooler to death on March 29, 1996 (T. 1700).

On direct appeal, this Court affirmed. *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997). Mr. Pooler filed a petition for writ of certiorari in the U.S. Supreme Court, which was denied on October 5, 1998. *Pooler v. Florida*, 525 U.S. 848 (1998).

On September 17, 1999, Mr. Pooler filed a Rule 3.851 motion (PCR. 1-22). Following an evidentiary hearing, the circuit court entered an order denying all relief on November 4, 2005 (PCR. 1961-2055).

On January 31, 2008, this Court affirmed the denial of postconviction relief. *Pooler v. State*, 980 So. 2d 460 (2008).

On May 19, 2008, Mr. Pooler filed a federal habeas corpus petition in the Southern District of Florida. Mr. Pooler's petition was denied on March 19, 2012.

Mr. Pooler was permitted to appeal a single issue to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the denial of his petition for writ of habeas corpus. *See Pooler v. Sec'y*, 702 F.3d 1252 (11th Cir. 2012). The U.S. Supreme Court denied certiorari on October 7, 2013. *Pooler v. Crews*, 134 S.Ct. 191 (2013).

On May 25, 2016, Mr. Pooler filed a successive Rule 3.851 motion based upon *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 134 S.Ct. 1986 (2014) (PCR2. 26-53). The State responded on July 15, 2015 (PCR2. 61-85).

On January 4, 2017, Mr. Pooler filed an amended Rule 3.851 adding claims concerning *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (PCR2. 339-78). On April 13, 2016, the State responded (PCR2. 152-177).

At the direction of the circuit court, Mr. Pooler filed a second amended Rule 3.851 motion on April 13, 2017 (PCR2. 178-210). The State responded on May 3, 2017 (PCR2. 202-227).

A case management conference was held on July 28, 2017 (PCR2. 285-335).

On October 12, 2018, the circuit court entered an order summarily denying Mr. Pooler's successive Rule 3.851 motion (PCR2. 239-251).

On November 11, 2018, Mr. Pooler timely filed a notice of appeal (PCR2. 253-254).

STATEMENT OF THE FACTS

Mr. Pooler maintains that he is intellectually disabled and that the State is prohibited from executing him due to the Eighth Amendment. However, because the circuit court summarily denied his claim, finding that it was time barred, he did not have the opportunity to fully and fairly develop the record. This was so despite the circuit court's pronouncement that even on the limited record before it, "there appears to be evidence in the record that would support at least granting an evidentiary hearing" on Mr. Pooler's claim (PC-R2. 248-9, n.6). This evidence included:

At the time of his trial proceedings, on September 15, 1995, the trial court held a hearing to determine whether Mr. Pooler was competent to stand trial.[1] Dr. Stephen Alexander was one of the experts who testified as to Mr. Pooler's competency. Dr. Alexander saw Mr. Pooler for two hours at the Palm Beach County Jail (T. 71). After questioning Mr. Pooler's capacity to challenge witnesses and his understanding of courtroom procedures, Dr. Alexander found that the deficits were serious enough to find Mr. Pooler incompetent to proceed (T. 71-72). He further noted that Mr. Pooler's ability to consult with counsel was "extremely limited" and that conversations with defense

[1]Trial counsel was concerned that Mr. Pooler did not understand what was going on (T. 77).

counsel would be flawed (T. 72). According to Dr. Alexander, defense counsel was likely to get misconceptions about Mr. Pooler's statements (T. 72). Further, Mr. Pooler's misunderstandings would hamper defense counsel's ability to prepare and present an adequate defense (T. 73).

At that same hearing, defense counsel presented argument to the trial court regarding Mr. Pooler's competency. He stated, "I explained things to [Mr. Pooler]. My investigator explained things to him and the other attorney in my office explained things to him and we come back scratching our heads. We are not sure we are getting through." (T. 77). Subsequently, the court appointed two other experts to examine Mr. Pooler for competency.

On November 15, 1995, the trial court heard testimony from Dr. Laurence Levine and Dr. Norman Silversmith regarding Mr. Pooler's competency. Dr. Levine, a neuropsychologist, testified that he saw Mr. Pooler on two occasions for a total of six hours (T. 99-100).[2] Dr. Levine found Mr. Pooler's intelligence to be borderline (T. 107-08).[3] Dr. Levine found the test results to be "somewhat less effective" based upon what he believed was Mr. Pooler's educational background, military service, vocational

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[2]Dr. Levine did not do a psychological evaluation of Mr. Pooler (T. 114).

[3]Dr. Levine also noted in his report that Mr. Pooler stated he had suffered a number of traumatic injuries, which included a motor vehicle accident "[s]ome thirty years ago" in which he "went through the windshield." (D-Ex. 16).

history and vocation (T. 110).[4]

Dr. Levine concluded that Mr. Pooler would be expected to have difficulties with assisting his attorney in planning a defense and in his ability to realistically challenge the prosecution witnesses (T. 115)(D-Ex. 16). This was based on the fact that Mr. Pooler had limited intellectual ability, attentional limitations, limited vocabulary, limited reading and writing ability, and an inefficient ability to learn and remember new information (D-Ex. 16). Dr. Levine made several recommendations that would rehabilitate Mr. Pooler to the status of meeting all the criteria in order to be considered competent to stand trial (D-Ex. 16). These included:

> 1. Mr. Pooler acquires information best if it is in small amounts and repeated often. This should be kept in mind whenever there is the need for him to learn any new materials. He may need help in breaking down the information to be learned into smaller amounts to facilitate his acquisition.
>
> 2. Mr. Pooler may need more consultation time from his attorney to help him understand pre-

[4]Dr. Levine testified that Mr. Pooler told him that he was an average student in school and that he was honorably discharged from the military as a sergeant (T. 121). In his report, Dr. Levine stated, "These results indicated that [he] is of low average overall intellectual capability. These findings are somewhat inconsistent with his academic, vocational, and military history, *as reported*, which would have predicted a somewhat higher level of overall performance." (D-Ex. 16)(emphasis in original). Dr. Levine later noted in his report that "[i]t may very well have been that he was significantly learning disabled as a child and that he was passed through a system that did not recognize such problems." (D-Ex. 16).

> trial legal arguments and documents. When in court, it should be kept in mind that Mr. Pooler may not be comprehending a good bit of the information coming his way due to his significantly limited vocabulary and other problems as listed above. His attorney will need to be aware of this and to take the necessary time in order to help him understand complex legal issues and terms. These issues will need to be explained in simpler terms that Mr. Pooler can understand.

(D-Ex. 16).

Dr. Norman Silversmith, a psychiatrist, also evaluated Mr. Pooler for competency and found him to be competent to proceed (T. 134, 137). Dr. Silversmith's evaluation of Mr. Pooler lasted approximately one hour (T. 139). Dr. Silversmith did not perform any standard clinical psychological tests on Mr. Pooler (T. 140).[5] Thereafter, the trial court found Mr. Pooler competent to proceed (T. 153).

After he was convicted of first-degree murder, penalty phase proceedings commenced on February 7, 1996 (T. 1362). The defense presented the testimony of Dr. Levine who testified that he had been appointed by the trial court for the purpose of performing a competency evaluation on Mr. Pooler (T. 1379). During his testing, he found that Mr. Pooler's performances were below average, most of them being in the low average to mildly impaired range (T. 1381). Dr. Levine also testified that there were

[5]Dr. Silversmith testified that it was not his purpose to make a specific psychiatric diagnostic determination (T. 141-42).

inconsistencies in the information that he received from Mr. Pooler versus the test results (T. 1388-89). Mr. Pooler told Dr. Levine that he graduated high school, was a sergeant in the military, and that he was able to hold a job for an extended period of time. However, the test results painted a different picture and there were discrepancies that should not have been there (T. 1390). Although Dr. Levine found Mr. Pooler competent, he had reservations regarding Mr. Pooler's ability to assist his attorney in preparing a defense and in Mr. Pooler's ability to challenge prosecution witnesses (T. 1396).

Dr. Alexander testified that he had been appointed by the court to examine Mr. Pooler for competency (T. 1486). Dr. Alexander testified that defense counsel "became concerned that he [Mr. Pooler] did not seem to be catching onto all of the information or did not retain it, and counsel wanted him evaluated to determine if he was competent to proceed to trial." (T. 1486). Following the evaluation, it was Dr. Alexander's opinion that Mr. Pooler was not competent to proceed (T. 1487). Mr. Pooler did not have the capacity to relate pertinent information to his attorney;[6] he was greatly misinformed as to what his role in the proceedings were and what appropriate court procedure was; and he totally misunderstood the proceedings and

[6]Dr. Alexander testified that Mr. Pooler was of limited intelligence (T. 1492; 1497).

due to those misunderstandings and misperceptions, he might possibly be disruptive to the process of the trial (T. 1487).[7]

Dr. Alexander did not give Mr. Pooler an intelligence test, but estimated his IQ to be between 75 and 85 (T. 1492). Dr. Alexander then testified that Mr. Pooler completed high school and spent six years in the military (T. 1492).

On February 8, 1996, by a vote of nine to three, after receiving unconstitutional instructions, the jury recommended a sentence of death (T. 1630). The trial court sentenced Mr. Pooler to death on March 29, 1996 (T. 1700).

During his postconviction proceedings, Mr. Pooler presented the testimony of additional mental health experts in support of his ineffective assistance of counsel claim: Dr. Michael Brannon, a forensic psychologist who examined Mr. Pooler, initially performed a competency evaluation prior to the evidentiary hearing and later performed a forensic evaluation for the purpose of mitigation (PCT. 304, 311, 313).[8] In conducting his evaluation for mitigation, Dr. Brannon reviewed extensive background materials (PCT. 316-17), and reviewed the report of Dr. Michael Gutman, a psychiatrist, who was hired by postconviction counsel

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[7]Dr. Alexander testified that Mr. Pooler was not malingering and that he was trying his best to answer questions and was fully cooperative to the extent of his ability (T. 1499-1500).

[8]Dr. Brannon ultimately found that Mr. Pooler was competent to proceed (PCT. 313).

to conduct a mental health evaluation on Mr. Pooler (D-Ex. 17).[9]

Based on his evaluation, Dr. Gutman determined that Mr. Pooler suffered from several mental health illnesses, including borderline IQ (D-Ex. 17). Mr. Pooler was a "simplistic, uncomplicated individual with concrete thinking." (D-Ex. 17)

Dr. Brannon also performed the Test of Memory Malingering, which showed no evidence of malingering (PCT. 317-18).[10] Further, Dr. Brannon performed the Wechsler Adult Intelligence Scale, Third Edition, and found that Mr. Pooler has an IQ of 75, which is in the borderline range (PCT. 318, 350). This was consistent with the IQ test that was performed on Mr. Pooler when he was a child, as reflected in the school records (PCT. 319-20).[11] Mr. Pooler had an IQ of 75 according to childhood testing conducted when he was in first and second grade (PCT. 319-20)(D-Ex. 2).[12]

Specifically, with regard to Mr. Pooler's academic records,

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[9]Dr. Gutman evaluated Mr. Pooler on January 27, 2000 (D-Ex. 17).

[10]There were, however, cognitive deficits or disabilities (PCT. 318).

[11]Dr. Brannon testified that the IQ score of 80 that Dr. Levine reported was based on a partial IQ test (PCT. 320). This is the least accurate of the IQ tests, and it is meant to get provisional information while preparing the WAIS-III (PCT. 335).

[12]The school records also reflect that Mr. Pooler was "very slow" and struggled in school. Teachers were concerned that he needed guidance and that "[h]e may get with the wrong crowd easily." (D-Ex. 2).

Dr. Brannon stated:

> School records show a pretty consistent pattern of sub par performance including what I said before, **the IQ score of 75 which I believe ended in a steady decline in his school performance over the years with commentaries by various teachers, one or more, about him being slow academically ...**

(PCT. 331)(emphasis added).

SUMMARY OF THE ARGUMENT

1. Mr. Pooler is intellectually disabled; his death sentence violates the Eighth Amendment. The circuit court's determination that his claim is time barred conflicts with *Atkins'* mandate that the "the Constitution 'places a substantive restriction on the State's power to take the life' of a[n intellectually disabled] offender". *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Imposing a time bar on Mr. Pooler's claim contravenes the Eighth Amendment, *Atkins* and *Hall v. Florida*, 572 U.S. 701 (2014).

2. Pursuant to this Court's interpretation of Florida Statute § 921.141, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Mr. Pooler's death sentence violates the Eighth Amendment because the jury did not unanimously find all of the elements required to convict him of capital murder.

3. Mr. Pooler's sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments as the jury's sense of responsibility at the penalty phase was inaccurately diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. POOLER'S SUCCESSIVE RULE 3.851 MOTION AS TIME BARRED.

A. HISTORY AND DEVELOPMENTS OF INTELLECTUAL DISABILITY AS A BAR TO EXECUTION IN FLORIDA

Florida first recognized intellectual disability as a bar to execution by statute enacted in 2001. *See* Fla. Stat. § 921.137(1) (2001). That statutory definition of intellectual disability required that specific criteria be met:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. **The term "significantly subaverage general intellectual functioning," for purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test** specified in the rules of the Department of Children and Family Services.

Id. (emphasis added). Thus, pursuant to the plain language of the statute, an IQ cutoff of 70 was required for a capital defendant to be considered intellectually disabled.

Shortly thereafter, on June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). The *Atkins* Court held that the imposition of the death penalty on the intellectually disabled constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Court held: "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such

punishment is excessive and that the Constitution **'places a substantive restriction on the State's power to take the life'** of a mentally retarded offender." *Id*. at 321, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986)(emphasis added).

The United States Supreme Court reasoned:

> Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318 (footnotes omitted). However, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id*. at 317. Thus, Florida's statute dictated the criteria by which intellectual disability was defined. Significantly, by the terms of the statute a bright line IQ score of 70 or below was required in order to establish intellectual disability.

Indeed, a few years after the *Atkins* decision, this Court confronted the very issue of what it meant to have significantly subaverage general intellectual functioning, as defined by Fla. Stat. § 921.137(1). Roger Cherry appealed the denial of his

successive Rule 3.851 motion asserting that he was exempt from execution because of his intellectual disability. Two experts were appointed by the circuit court to conduct evaluations of Cherry, one proposed by the State and one proposed by the defense. Though not mentioned in this Court's opinion, both of the experts found that Cherry was intellectually disabled pursuant to the clinical definition of intellectual disability. *Cherry v. State*, Case No. SC02-2023, Initial Brief at 1-2. This was so despite the fact that Cherry's IQ score on the WAIS-III was 72. *Id* at 2. However, despite the uncontradicted expert testimony that Cherry was intellectually disabled, the State asserted and the circuit court held that Cherry's IQ score of 72 precluded him from obtaining relief due to the specific requirement set forth in Fla. Stat. § 921.137(1) that an IQ score be "two or more standard deviations from the mean score on a standardized intelligence test", i.e. a 70. *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007).

On appeal, this Court upheld the circuit court's reasoning and stated that the statute was clear and unambiguous in requiring an IQ score of 70 or below in order to be considered intellectually disabled:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." **One standard deviation on the WAIS-III, the IQ test administered in the**

instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes:

> When [a] statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004). When the statutory language is clear, "courts have no occasion to resort to rules of construction — they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker*, 668 So. 2d 989, 990-91 (Fla. 1996).

Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64-5 (Fla. 2005). Because the circuit court applied the plain meaning of the statute, it did not err in its conclusion that Cherry failed to meet this first prong.

In *Atkins*, the Supreme Court recognized that the various sources and research differ on who should be classified as mentally retarded. For this reason, it left to the states the task of setting specific rules in their determination statutes. The Legislature set the IQ cutoff score at two standard deviations from the mean, and this Court has enforced this cutoff:

> The evidence in this case shows [the defendant]'s lowest IQ score to be 79. Pursuant to *Atkins*, ... a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." Under Florida law, one of the criteria to determine if a person is mentally

> retarded is that he or she has an IQ of 70 or below. *See* § 916.106(12), Fla. Stat. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).
>
> *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).
>
> Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. **Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.**

Cherry, 959 So. 2d at 912-913 (footnotes omitted)(emphasis added).

Thereafter, on May 27, 2014, the United States Supreme Court rendered its decision in *Hall v. Florida*, 572 U.S. 701 (2014), in which it determined that use of a rigid requirement that a capital defendant must have an IQ score of 70 or lower in order to argue intellectual disability precluded his or her execution was unconstitutional. Thus, *Hall* specifically overruled this

Court's decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007).

Following the *Hall* decision, the United States Supreme Court further affirmed that the analysis of an intellectual disability claim must provide conjunctive consideration of the criteria required to establish intellectual disability, and that the criteria is informed by medical practice. *Brumfield v. Cain*, 135 S.Ct. 2269 (2015).

Subsequently, this Court issued its opinion in *Oats v. State*, 181 So. 3d 457 (Fla. 2016). In *Oats*, this Court reversed a circuit court's order finding Oats had not established intellectual disability due to the failure to prove the onset prior to the age of 18 prong. *Id*. at 459. This Court determined that the circuit court's analysis of a single prong to deny Oats' claim did not comport with *Hall*; that the circuit court had not considered relevant record evidence in denying the claim; and that the circuit court "conflated the term 'manifested' with 'diagnosed'". *Id*. at 459-60. This Court remanded for further proceedings, including permitting the parties to present additional evidence so that a "full reevaluation" of whether Oats is intellectually disabled could be conducted. *Id*. at 471.

In addition to initial appeals related to intellectual disability determinations, this Court also reviewed several appeals and petitions in which individuals sought reconsideration of their intellectual disability claims in light of *Hall*. In

Walls v. State, 213 So. 3d 340 (Fla. 2016), this Court held that *Hall* was retroactive. This Court reasoned:

> The rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty, while requiring a more holistic review means more defendants may be eligible for relief. Accordingly, the *Hall* decision removes from the state's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below. **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 IQ scores than before.**

Id. at 346 (emphasis added). And, this Court determined that Walls was entitled to a new evidentiary hearing because "he did not receive the holistic review to which he is now entitled" under *Hall*. *Id*. at 347. *See also Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016); *Thompson v. State*, 208 So. 3d 49 (Fla. 2016); *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

However, this Court affirmed the denial of further proceedings in light of *Hall* in several cases. *See Quince v. State*, 241 So. 3d 58 (Fla. 2018); *Zack v. State*, 228 So. 3d 41 (Fla. 2017); *Jones v. State*, 231 So. 3d 374 (Fla. 2017). In those cases, the circuit courts had already determined that the defendant had not established one of the three prongs, regardless of the bright-line rule overruled in *Hall*.

Specifically, in *Zack*, in summarizing Zack's failed 2004 attempt to raise an *Atkins* claim, this Court noted the long-held

strict 70 IQ cutoff for determining intellectual disability in Florida, citing *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000) (applying strict 70 IQ cutoff for finding of intellectual disability as mitigation):

> Zack filed a successive postconviction motion on December 1, 2004, raising an *Atkins* claim. The trial court denied the claim without an *Atkins* hearing, finding that after a review of the expert trial testimony none had found Zack's I.Q. to be near the required statutory figure of 70 in order to establish intellectual disability. This Court affirmed the trial court's denial. In its order, this Court relied on *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000), and held that "Zack has not provided any new evidence of [intellectual disability] and previous evidence demonstrates that his I.Q. was well above the statutory figure of 70 or below."

228 So. 2d 41, 45-46 (Fla. 2017). Thus, again, this Court made clear that the only reading of the statute at the time that Mr. Pooler was required to amend his Rule 3.851 motion was that a defendant must have a qualifying IQ score of 70 or below.

This Court was also presented with appeals from capital defendants who had not presented a claim of intellectual disability after *Atkins* was decided, but instead presented their claims after *Hall*. First, in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), this Court issued an order affirming the circuit court's decision that Rodriguez's claim was time barred as "there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*".

Thereafter, this Court issued its opinion in *Blanco v.*

State, 249 So. 3d 356 (Fla. 2018), in which this Court concluded that Blanco's intellectual disability claim was "foreclosed by the reasoning of this Court's decision in *Rodriguez*.".

In Mr. Pooler's case, the circuit court relied on *Rodriguez* and *Blanco* to summarily deny Mr. Pooler's claim (PC-R2. 247-48).

B. MR. POOLER'S CASE

Hall's dictate that capital defendants in Florida with scores above 70 must be provided "a fair opportunity to show that the Constitution prohibits their execution", *Hall*, 572 U.S. at 724, propelled Mr. Pooler to file his successive Rule 3.851 as, in the wake of *Atkins*, his reading of the statute and its plain meaning, like this Court's and several circuit court's, was clearly erroneous.

Mr. Pooler had two full-scale IQ scores contained in his record: during the initial postconviction proceedings, Dr. Brannon performed the WAIS-III and found that Mr. Pooler had an IQ of 75 (PCT. 318, 350). This was consistent with the IQ test that was performed on Mr. Pooler when he was a child, as reflected in the school records (PCT. 319-20).[13] Specifically, Mr. Pooler had an IQ of 75 according to testing conducted when he

[13]Dr. Brannon testified that the IQ score of 80 that Dr. Levine reported was based on a partial IQ test (PCT. 320). This is the least accurate of the IQ tests, and it is meant to get provisional information while preparing the WAIS-III (PCT. 335).

was in first and second grade (PCT. 319-20)(D-Ex. 2).[14] In *Brumfield*, the United States Supreme Court reiterated that an IQ test result of 75 is "entirely consistent with intellectual disability." 135 S.Ct. at 2279.

Additionally, trial counsel's concerns about Mr. Pooler's inability to understand and assist in his defense, which was the impetus that prompted the competency proceedings, are exactly the type of deficits recognized in *Atkins*: "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 2250; *see also Hall*, 572 U.S. at 709 ("A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Id.*, at 320–321, 122

[14]The school records also reflect that Mr. Pooler was "very slow" and struggled in school. Teachers were concerned that he needed guidance and that "[h]e may get with the wrong crowd easily." (D-Ex. 2).

S.Ct. 2242.").

Likewise, Mr. Pooler's performance in school, the military, his work experience and his relationships with others show a consistent pattern of adaptive deficits.

Based on the evidence before it, the circuit court stated: "there appears to be evidence in the record that would support at least granting an evidentiary hearing" on Mr. Pooler's claim.

Mr. Pooler submits that he has presented sufficient evidence of intellectual disability to warrant an evidentiary hearing. In *Hall*, the United States Supreme Court held:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. ... The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

572 U.S. at 724. Mr. Pooler must be provided such a fair opportunity.

C. THE CIRCUIT COURT'S ORDER AND ISSUE BEFORE THE COURT

There is no dispute that Mr. Pooler did not file a motion alleging that he suffered from intellectual disability within the time parameters set forth in the 2004 version of Fla. R. Crim P. 3.203(d)(4)(C). Rule 3.203 directed: "If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a

claim under this rule within 60 days after October 1, 2004." Therefore, the circuit court summarily denied Mr. Pooler's claim finding that it was time barred and relying on this Court's order in *Rodriguez* and opinion in *Blanco* (PC-R2. 247-48).

Mr. Pooler recognizes this Court's precedent but requests that this Court revisit the issue as the current analysis violates the Eighth Amendment to the United States Constitution.

1. Pursuant to the Eighth Amendment, the State is prohibited from imposing the death penalty on an intellectually disabled defendant.

The United States Supreme Court in *Atkins* stated: "the Constitution 'places a substantive restriction on the State's power to take the life' of a[n intellectually disabled] offender." 536 U.S. at 321, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986). The fact that the United States Supreme Court found that the Eighth Amendment placed a "substantive restriction on the State's power" to take an intellectually disabled defendant's life caused the circuit court to enunciate the flaw in this Court's reasoning when imposing a time bar on an intellectual disability claim. The circuit court stated:

> While this Court is obligated to follow the Florida Supreme Court's precedent on this issue, the Court questions whether that precedent, and specifically, its strict application of the procedural time-bar in cases such as this, is at odds with the United States Supreme Court's rulings in *Atkins* and *Hall*. The Supreme Court made clear in those cases that the issue was whether "the Constitution 'places a substive restriction on the State's power to take the life' of a[n intellectually disabled] offender."

> *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). **The distinction between a substantive right and a substantive bar on state power is significant: a right can be waived by its holder, but a constitutional bar on state power is more absolute.**
>
> It is with this distinction in mind that this Court has struggled to reconcile *Hall's* holding with the strict application of Rule 3.203's time-bar required by the Florida Supreme Court in *Rodriguez* and *Blanco*. To be clear, this Court recognizes our justice system has a compelling and constitutional need for finality, and perhaps no more is that true than in cases involving the death penalty. *See e.g., Witt v. State*, 387 So. 2d 922, 924-27 (Fla. 1980). **But if *Atkins* represents a substantive bar on State power – as both the United States and Florida Supreme Court have clearly held that it does – how can it ever be "waived" by a defendant? Under this Court's reading of *Atkins* and *Hall*, as well as the majority opinion in *Walls*, the execution of an intellectually disabled person would violate the Eighth Amendment in all cases, not just those in which an intellectually disabled person timely raised the issue.** *See also Walls*, 213 So. 3d at 348-49 (Pariente, J., concurring)("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations this Court looks to when dtermining if a subsequent decision of the United States Supreme Court should be applied."). That is why **this Court finds strict application of a procedural time-bar to prevent an evidentiary hearing in this context so troubling, particularly when, as here, there appears to be evidence in the record that would support at least granting an evidentiary hearing on this issue had Defendant timely filed his claim.**

(PC-R2. 10-11, n.6)(emphasis added).

In the context of intellectual disability and Mr. Pooler's case, the circuit court recognized *Atkins*' mandate: persons with intellectual disability may not be executed. *Atkins*, 536 U.S. at 321. The Court held:

> If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

Id. at 319.

Thereafter, in *Hall*, the United States Supreme Court reiterated *Atkins*' mandate:

> No legitimate penological purpose is served by executing a person with intellectual disability. *Id*., at 317, 320, 122 S.Ct. 2242. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.

Hall, 572 U.S. at 708.

Pursuant to these dictates, it is clear that it is not an intellectually disabled defendant's right to be free from execution, but rather the State is constitutionally mandated to ensure that it does not execute an intellectually disabled defendant. In this regard, Mr. Pooler cannot be time barred or waive the Eighth Amendment prohibition against his execution any more so than a juvenile convicted of first-degree murder and volunteering for the death penalty could be sentenced to death or executed. *See Roper v. Simmons*, 543 U.S. 551 (2002).[15] To do so

[15]Had an attorney of a juvenile who had been sentenced to death been provided incorrect information about the juvenile's birth date, believing that the defendant was eighteen and one day at the time of the crime, and failed to file a motion in the wake of *Roper*, surely, if the error came to light, prior to the

would not comport with the Eighth Amendment. Quite simply, the Eighth Amendment categorically bars the execution of defendants who are intellectually disabled and Mr. Pooler falls squarely into that class of individuals.

Furthermore, in the context of Eighth Amendment prohibitions on punishment of certain classes of individuals, courts have refused to recognize waivers by defendant's of the State's Eighth Amendment limits in punishment. For example, in *Trop v. Dulles*, 356 U.S. 86, 100-1 (1958), the United States Supreme Court held that the punishment of banishment was unconstitutional because it was cruel and unusual. Thereafter, courts held that a defendant could not waive the prohibition of the punishment even if the State provided such a choice. *See Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962); *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360-61 (W.D. Va.

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execution, that the birth certificate was in error and the defendant was actually one day away from his eighteenth birthday, the juvenile could not be considered to have waived the claim that his or her death sentence violated the Eighth Amendment. The State could not execute the juvenile. Yet, that is essentially what has occurred in Mr. Pooler's case: His postconviction attorney was provided with clear and unambiguous language that an IQ score must be 70 or below, i.e. two standard deviations below the mean, and therefore did not believe Mr. Pooler fell into the class of defendants whom the State was constitutionally prohibited from execution. However, when that information was corrected, *see Hall*, the circuit court construed Mr. Pooler's actions as a waiver and now risks executing an intellectually disabled defendant though all indications support, at a minimum, granting Mr. Pooler an evidentiary hearing.

1979)("Banishment was a condition voluntarily and knowingly agreed to by petitioner in this course of the plea bargain negotiations, although for reasons outlined below, this court holds that the condition is unenforceable."); *Henry v. State*, 280 S.E.2d 536, 536 (S.C. 1981)("[T]he trial judge was without authority to impose banishment from the State as a condition of prohibition, even if appellant agreed to the sentence.").

Thus, applying a time bar to Mr. Pooler's claim is no less offensive to the Eighth Amendment bar of executing an intellectually disabled defendant as the bright-line IQ score that this Court applied to defendants in *Cherry v. State*. Both decisions "conflict with the logic of *Atkins* and the Eighth Amendment." *Hall*, 572 U.S. at 721. Indeed, applying a time bar to Mr. Pooler nullifies the United States Supreme Court's decision in *Atkins* and "the Eighth Amendment's protection of human dignity would not become a reality." *Id.*

2. Mr. Pooler and his postconviction counsel cannot be faulted for failing to file a futile pleading.

In *Atkins*, the United States Supreme Court recognized that the determination of intellectual disability was a factual one. In this regard the Court left the autonomy of the states intact: "Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus. ... 'we leave to the State[s] the task of developing appropriate ways

to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 536 U.S. at 317.

In Florida, the Legislature had already promulgated a statute which set forth the appropriate way to determine how to fulfill its constitutional obligations under the Eighth Amendment. *See* Fla. Stat. § 921.137 (2001). The statutory definition of intellectual disability required that specific criteria be met:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. **The term "significantly subaverage general intellectual functioning," for purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test** specified in the rules of the Department of Children and Family Services.

Id. (emphasis added). Thus, pursuant to the plain language of the statute, an IQ cutoff of 70 was required for a capital defendant to be considered intellectually disabled.

Mr. Pooler had filed his Rule 3.851 motion when *Atkins* issued. In fact, the circuit court allowed him the opportunity to amend his motion following the United States Supreme Court's decisions in *Atkins* and *Ring v. Arizona*, 536 U.S. 304 (2002). At that time, the statute clearly indicated that a full-scale IQ score of 70 or below was required in order to meet the criteria for intellectual disability. Mr. Pooler had two full scale IQ scores available to postconviction counsel: a 75 from Dr.

Brannon's testing (PCT. 318, 350), and a 75 from childhood testing (PCT. 319-20). Mr. Pooler had no IQ score of 70 or below. Thus, postconviction counsel faced with requirements that he did not meet could not raise the claim on Mr. Pooler's behalf.

Mr. Pooler was not relying on this Court's opinion in *Cherry v. State*, as it had not been issued at the time. However, *Cherry v. State* is relevant in that it shows that Mr. Pooler drew the same meaning from the statute that this Court did - a Court made up of unquestionably reasonable and fair-minded jurists. And, the meaning that this Court took from the statute was that without a full-scale IQ score of 70 or below a capital defendant could not establish intellectual disability. In fact, in *Cherry*, the capital defendant had been diagnosed by two experts, one of whom was hand-picked by the State, as intellectually disabled; yet, because he had no qualifying IQ score this Court affirmed the denial of his claim.

In *Cherry*, this Court stated:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. **As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear.**

Cherry, 959 So. 2d at 912 (footnotes omitted)(emphasis added). Despite this Court's determination that the language in the statute was clear, Mr. Pooler has been faulted for failing to raise a claim in which he did not meet the statutory criteria for intellectual disability.

In *Foster v. State*, __ So. 3d __, 2018 WL 6816598 *7 (Fla.), this Court stated: "Before *Hall*, Foster's IQ score of 75, the only score that has ever been presented in court, **disqualified him as a matter of law from being considered intellectually disabled in Florida.**" (Emphasis added). This Court held that the standard for intellectual disability "had not been announced by this Court at the time of the original postconviction court's decision, **but the standard was driven by the statutory definition of [intellectual disability] that was alrady in effect at that time, *see* § 921.137, Fla. Stat. (2001).**" *Id.* at *5, n.8 (Emphasis added).

It is illogical for the circuit court to time bar Mr. Pooler's claim when this Court has recognized that a claim, similar to Mr. Pooler's in that the IQ score was a 75 and not a 70 or below, disqualified him from obtaining relief. By its own terms, the definition for intellectual disability contained in the statute deprived Mr. Pooler from having a viable claim. Mr. Pooler and his counsel cannot be faulted for failing to anticipate *Hall*. *See Cherry v. State*, 781 So. 2d 1040, 1053 (Fla.

2000)("We have consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law. *See Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992); *Stevens v. State*, 552 So. 2d 1082, 1085 (Fla. 1989)."). A holding imposing a time bar violates the Eighth Amendment and fundamental fairness; Mr. Pooler is being held to a standard that many Florida jurists did not meet.

In light of Florida's statute, Mr. Pooler "had little reason to investigate or present" an intellectual disability claim. *See Brumfield v. Cain*, 135 S.Ct. 2269, 2281 (2015). In fact, had he done so he would have failed; his claim was futile. Mr. Pooler must be provided a fair opportunity to present his claim.

3. *Hall* announced a new rule of criminal law and must be applied retroactively to Mr. Pooler.

New rules of constitutional law are retroactively applicable to cases on collateral review in two circumstances. The first circumstance, relevant here, is where a new substantive rule of constitutional law is announced. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 728 (2016)("courts must give retroactive effect to new substantive rules of constitutional law."). Substantive rules "include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), and citing *Teague v. Lane*, 489 U.S. 288, 307 (1989)).

In *Atkins*, this Court announced a substantive rule of constitutional law because it prohibited a certain category of punishment (the death penalty) for a class of defendants (the intellectually disabled). This Court's decision in *Hall* should also be understood as announcing a new substantive rule. Indeed, in *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), this Court held that *Hall* is retroactive: "*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 IQ scores than before.".

However, while this Court held that *Hall* is retroactive, the circuit court, based on *Rodriguez* and *Blanco*, paradoxically determined that Mr. Pooler's claim of intellectual disability - which was not viable before Hall — is time barred because it was not brought in the wake of *Atkins* (i.e., before *Hall*). These two concepts — that *Hall* constitutes a previously unavailable substantive rule but that an intellectually disabled capital defendant may nonetheless be barred from relief for failing to raise the claim prior to *Hall* — are inconsistent.

The circuit court's determination also violates the constitutional principles the United States Supreme Court announced in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The holding of *Montgomery* is clear: "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." *Montgomery*, 136 S. Ct. at 731-32. Although this Court said in *Walls* that it was giving retroactive effect to *Hall*, here the circuit court rendered the retroactivity of *Hall* meaningless.

In Mr. Pooler's case, although *Atkins* had already been decided at the time Mr. Pooler sought postconviction relief from his current sentence, the Eighth Amendment protection afforded by *Atkins* was unavailable to him because his qualifying IQ scores of 75 placed him beyond the strict IQ cutoff of 70. It was not until the United States Supreme Court decided *Hall*, which found the 70 IQ cutoff unconstitutional, that Mr. Pooler had a viable intellectual disability claim. Because this Court has found *Hall* to be retroactve, Mr. Pooler must be provided a fair opportunity to present his claim.

4. The Supremacy Clause requires that Mr. Pooler receive the benefit of *Hall*.

Walls makes clear that *Hall* "increase[d] the number of potential cases in which the State cannot impose the death penalty." *Walls*, 213 So. 3d at 346. As *Walls* explained, "more defendants may be eligible for relief . . . more than just those cases in which the defendant has an IQ score of 70 or below." *Id.*

(emphasis added). To prohibit allowing Mr. Pooler to receive the benefit of *Hall*, based on a time bar, would be a violation of the Supremacy Clause, just as surely as Louisiana's refusal to apply *Miller v. Alabama* to life sentences mandatorily issued for juvenile homicides was. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

D. CONCLUSION.

Denying Mr. Pooler an opportunity to demonstrate that he is innocent of the death penalty due to a time bar runs afoul of the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (The death penalty cannot "be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner.").[16] Further, it would fall short of the demand that the death sentence be imposed in a reliable

[16]The imposition of a time bar is undoubtedly arbitrary in that other similarly situated capital defendants have been provided a fair opportunity to litigate the issue of their intellectual disability despite procedural obstacles. *See Johnston v. State*, Florida Supreme Court Case No. SC10-356 (granting stay of execution and permitting litigation of intellectual disability claim based on a new IQ score on the WAIS-IV being within the SEM, despite all previous scores being outside the range); *Coleman v. State*, 64 So. 3d 1210 (Fla. 2011)(allowing appellant to raise intellectual disability claim on appeal and remanding for an evidentiary hearing despite postconviction counsel's having waived the claim on the record during initial evidentiary hearing); *Phillips v. State*, 249 So. 3d 596 (Fla. 2018)(holding that appellant be permitted to raise an intellectual disability claim when this Court remanded for a re-sentencing based upon *Hurst v. Florida*, 136 S.Ct. 616 (2016), though appellant had not previously raised such a claim at his trial proceedings).

manner under *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988), and *Bevel v. State*, 221 So. 3d 1168, 1182 (Fla. 2017). Mr. Pooler submits that the circuit court erred in applying a time bar to his claim and that if such a time bar is applicable the language of the statute and circumstances of his case establish good cause to allow him to proceed on his claim. *See* Fla. Rule Crim Pro. 3.203 (f).

ARGUMENT II

MR. POOLER'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court not only addressed constitutional issues, it also construed the version of § 921.14, Fla. Stat., in effect before 2016 and explained:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Id. at 53. This Court observed that it had required in the past and continued to require the "additional factfinding" it found to be necessary before a death sentence could be considered as a punishment. "As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death

penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.' *Id.* at 313. (emphasis added)(quoting § 921.141(3), Fla. Stat. (1985))." *Hurst v. State*, 202 So. 3d at 53.

Most significantly, this Court in *Hurst v. State* explained that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was necessary **"to essentially convict a defendant of capital murder**." *Id.* at 53-54 (emphasis added). Thus, those facts constituted the elements of the higher degree of murder. Proof of the statutorily defined facts was necessary to convict of that higher degree of murder for which death was a sentencing option.

In *Hurst v. State*, this Court reiterated this:

> [**A]ll the findings necessary for imposition of a death sentence are "elements**" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before 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.** We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. *See Brooks v. State*, 762 So.2d 879, 902 (Fla.2000). As the relevant jury instruction states: "Regardless of your findings ... you are neither compelled nor required to recommend a sentence of

> death." Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases. Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence. *See Henyard v. State*, 689 So.2d 239, 249 (Fla.1996) (quoting *Alvord v. State*, 322 So.2d 533, 540 (Fla.1975)).

Id. at 57-58 (emphasis added).

This aspect of *Hurst v. State* was again explained in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). There, this Court noted how an earlier decision had failed to recognize the statutorily identified facts as elements of capital murder:

> [O]ur retroactivity analysis in *Johnson* hinged upon our understanding of *Ring*'s application to Florida's capital sentencing scheme at that time. Thus, we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime. Specifically, because we were still bound by *Hildwin*, we did not properly analyze the purpose of the new rule in *Ring*, which was to protect the fundamental right to a jury in determining each element of an offense.

Asay, 210 So. 3d at 15-16.

Thus, *Hurst v. State* recognized that before a death sentence was an authorized sentence, the State had to prove the defendant's guilt of the elements of capital murder beyond a reasonable doubt. This Court acknowledged it had not previously recognized these facts as elements. *Asay*, 210 So. 3d 1, 15-16 (Fla. 2016)(noting it had not previously "treat[ed] the aggravators, the sufficiency of the aggravating circumstances, or

the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime."). In Florida, the elements of capital murder changed.

Previously, this Court had regarded the existence of one aggravating factor as all that was necessary to authorize the imposition of death. In *State v. Steele*, a decision specifically identified in *Hurst v. State* as abrogated, this Court held:

> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that *Ring* applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

State v. Steele, 921 So. 2d 538, 545-46 (Fla. 2005). *See also Ault v. State*, 53 So. 3d 175, 206 (Fla. 2010)("Under Florida law, in order to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the

existence of at least one aggravating circumstance listed in the capital sentencing statute."). No other elements were recognized.[17]

When *Hurst v. State* issued, Justice Canady wrote a dissenting opinion which was joined by Justice Polston. 202 So. 3d at 70. In his opinion, Justice Canady objected to how the majority opinion had turned facts referenced in the statute into elements:

> Contrary to the majority's view, "each fact necessary to impose a sentence of death" that must be found by a jury is not equivalent to each determination necessary to impose a death sentence. The case law makes clear beyond any doubt that when the Court refers to "facts" in this context it denotes "elements" or their functional equivalent. And the case law also makes clear beyond any doubt that in the process for imposing a sentence of death, once the jury has found the element of an aggravator, no additional "facts" need be proved by the government to the jury. After an aggravator has been found, all the determinations necessary for the imposition of a death sentence fall outside the category of such "facts."

Hurst v. State, 202 So. 3d at 77. Later in his dissent, Justice Canady repeated that he took issue with the majority's elevation of "facts" referenced in the statute into elements:

> whether the aggravation is sufficient to justify a

[17]At Mr. Pooler's trial, the jury was not instructed that it had to find sufficient aggravating circumstances to exist beyond a reasonable doubt. The jury was instructed if it concluded that sufficient aggravating circumstances existed, it had to determine whether mitigating circumstances existed which outweighed the aggravating circumstances. The jury was not instructed that it had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

> death sentence; whether mitigating circumstances (which are established by the defendant) outweigh the aggravation; whether a death sentence is the appropriate penalty—are not elements to be proven by the State. Rather, they are determinations that require subjective judgment.

Id. at 82. From Justice Canady's dissent, it is clear that he objected to the majority's elevation of all of the statutorily identified facts to the status of elements of capital murder when they had not previously been so treated.[18]

In *Richardson v. United States*, 526 U.S. 813, 817 (1999),[19] the United States Supreme Court observed:

> Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez-Torres v. United*

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[18]Justice Canady and Justice Polston also dissented from the holding in *Perry v. State,* 210 So. 3d 630 (Fla. 2016), that Chapter 2016-13 is unconstitutional. *Perry* issued on the same day *Hurst v. State* issued. In his dissent in *Perry,* Justice Canady cited to his reasoning in his *Hurst v. State* dissent. *Id.* at 641 (Cannady, J., concurring in part and dissenting in part).

[19]In *Richardson*, the United States Supreme Court explained: "In this case, we must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to each of which the jury must agree unanimously and separately." *Richardson*, 526 U.S. at 817-18. *Richardson's* construction of the statute was subsequently found by the circuit courts to be a change in substantive law that applied retrospectively. "By deciding that the jury had to agree unanimously on each of the offenses comprising the 'continuing series' in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law. *Bousley*, 523 U.S. at 620, 118 S.Ct. 1604." *Santana-Madera v. United States,* 260 F.3d 133, 138 (2nd Cir. 2001). *See Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002).

> *States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson v. Louisiana*, 406 U.S. 356, 369–371, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for a higher degree of the offense to be proven by the State beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.").

Mr. Pooler also relies upon this Court's holding in a number of cases in which death sentences were vacated on remand that the statutory construction set out in *Hurst v. State* would govern at the new "penalty phase" proceedings ordered, even in cases in which the murders at issue had been committed in 1981, fourteen years before the murder for which Mr. Pooler received a death sentence. *See Card v. Jones*, 219 So. 3d 47 (2017); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). Mr. Pooler submits that under *Hurst v. State* and the revised § 921.141, the new "penalty phases" ordered in *Card* and *Johnson* were proceedings to assess a

defendant's guilt of capital murder. A unanimous jury would have to find that the State had proven beyond a reasonable doubt the elements of capital murder, i.e. at the time of the 1981 homicides: 1) there were aggravating factors; 2) those aggravating factors were sufficient to justify a death sentence; and 3) the aggravating factors found to exist at the time of the 1981 homicides outweighed the mitigating circumstances presented by the defense.

In *Lebron v. State*, 799 So. 2d 997, 1019-20 (Fla. 2001), the Florida Supreme Court observed that: "'[I]t is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.' *State v. Smith*, 547 So.2d 613, 616 (Fla.1989) (quoting with approval *Heath v. State*, 532 So.2d 9, 10 (Fla. 1st DCA 1988)), quoted in *Bates v. State*, 750 So.2d 6, 19 (Fla.1999) (Harding, C.J., specially concurring)." Applying the substantive law in *Hurst v. State* and the revised § 921.141 in Card's case means that it was Florida's substantive law in 1981. And if the State must prove Mr. Card is guilty of capital murder as to a 1981 homicide before he can receive a death sentence, that means that Florida's substantive criminal law set forth in *Hurst v. State* and the revised § 921.141 was also the substantive criminal law at the time of the homicide in Mr. Pooler's case.

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the United States Supreme Court explained that substantive rulings regarding the scope of a criminal statute are to be applied retroactively:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).

Mr. Pooler submits that the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require this Court's construction of Fla. Stat. § 921.141 in *Hurst v. State* to be applied in his case under *Fiore v. White*, 531 U.S. 225 (2001), and *In re Winship*, 397 U.S. 358 (1970). *See Bunkley v. Florida*, 538 U.S. 835 (2003). While the construction of § 921.141 is a question of state law, how and to whom a state's substantive criminal law defining a criminal offense is applied must comport with the Due Process Clause of the Fourteenth Amendment under *Fiore* and *Winship*. A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is

substantive law. It is not a procedural rule. The analyses used to determine when a new procedural rule is to be applied retroactively do not apply to the issues Mr. Pooler raises. *Bousley v. United States*, 523 U.S. 614, 620 (1998)("[B]ecause *Teague[v. Lane*, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

B. THE CIRCUIT COURT'S RULING

In its order denying relief, the circuit court found that *Hurst v. State* was not retroactive, relying on *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2016)(PC-R2. 249-50). However, the circuit court's citation to the decision in *Hitchcock v. State* indicates that the basis for the denial of relief was due to its conclusion that the constitutional components of *Hurst v. State* are not retroactive under the standard adopted in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court in *Hitchcock v. State* stated:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *See, e.g., Zack v. State*, --- So.3d ----, 42 Fla. L. Weekly S656, 2017 WL 2590703 (Fla. June 15, 2017); *Marshall v. Jones*, 226 So.3d 211, 2017 WL 1739246 (Fla. May 4, 2017); *Lambrix v. State*, 217 So.3d 977 (Fla. 2017); *Willacy v. Jones*, No. SC16-497, 2017 WL 1033679 (Fla. Mar. 17, 2017); *Bogle*

> *v. State*, 213 So.3d 833 (Fla. 2017); *Gaskin v. State*, 218 So.3d 399 (Fla. 2017). Hitchcock is among those defendants whose death sentences were final before *Ring*, and his arguments do not compel departing from our precedent.
>
> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to *Asay*.

Hitchcock, 226 So. 3d at 217. Thus, the decision in *Hitchcock* relied upon the decision in *Asay*, 210 So. 3d 1 (Fla. 2016). The basis for the ruling in *Asay* that *Hurst v. State* was not retroactive to cases final before June 24, 2002, was its application of the retroactivity analysis set forth in *Witt*. *Asay*, 210 So. 3d at 16-22. As was explained in *Witt*, the retroactivity analysis it formulated was to be used when considering whether changes in constitutional law should be applied to cases that were final before the change in constitutional law was announced. *Witt*, 387 So. 2d at 930 ("Even within the narrow area of major constitutional law changes, there must be some restriction on the number of tribunals which can adopt law changes sufficient to warrant relief in post-conviction proceedings.").

This Court's ruling rested upon its ruling in *Asay* that

Hurst v. State was not retroactive under *Witt* to cases final before June 24, 2002.

In *Bunkley v. Florida*, 538 U.S. 835 (2003), the United States Supreme Court reversed this Court's decision in *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002). At issue in *Bunkley v. State* was whether Bunkley was entitled to relief from his conviction of armed burglary as a result of this Court's decision in *L.B. v. State*, 700 So. 2d 370 (Fla. 1997), which construed the statutory provision defining what constituted a "weapon," the possession of which was a necessary element of armed burglary. The statute provided that a common pocketknife was not a weapon for purposes of the criminal offense of armed burglary. In *L.B*, this Court ruled that a knife with a blade of four inches or less was a common pocketknife under the statute, and thus not a weapon for purposes of armed burglary.

Bunkley v. State used the retroactivity analysis set forth in *Witt v. State* to conclude that the decision in *L.B.*, a case of statutory construction, was not retroactive and Bunkley could not rely upon the decision since his conviction was final before *L.B.* was decided.

The United States Supreme Court vacated the decision in *Bunkley v. State* saying: "*Fiore* controls the result here. As Justice Pariente stated in dissent, 'application of the due process principles of *Fiore*' may render a retroactivity analysis

'unnecessary.' 833 So.2d, at 747. The question here is not just one of retroactivity." *Bunkley v. Florida*, 538 U.S. at 840. The United States Supreme Court elaborated:

> Although the Florida Supreme Court has determined that the *L.B.* decision was merely an "evolutionary refinement" in the meaning of the "common pocketknife" exception, it has not answered whether the law in 1989 defined Bunkley's 2 ½- to 3-inch pocketknife as a "weapon" under § 790.001(13). Although the *L.B.* decision might have "culminat[ed] ... [the] century-long evolutionary process," the question remains about what § 790.001(13) meant in 1989. 833 So.2d, at 745. If Bunkley's pocketknife fit within the "common pocketknife" exception to § 790.001(13) in 1989, then Bunkley was convicted of a crime for which he cannot be guilty-burglary in the first degree.

Bunkley v. Florida, 538 U.S. at 840-41.

This Court's use of the *Witt* analysis to decide the statutory construction of § 921.141 set forth in *Hurst v. State* is contrary to *Bunkley*. The question is when did Florida's substantive criminal law make it necessary for a factfinder to find that the statutorily identified facts set forth in § 921.141 had been established before a death sentence could be imposed. In *Hurst v. State*, this Court indicated that this factfinding had been a longstanding requirement:

> However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding that now must be conducted by the jury. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), under Florida law, "The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances." *Id.* at 313, 111 S.Ct. 731 (emphasis added) (quoting § 921.141(3), Fla. Stat.

(1985)).

Hurst v. State, 202 So. 3d at 53.

Besides disregarding *Fiore v. White* and the Due Process Clause implications as to the statutory construction aspect of *Hurst v. State*, the circuit court erroneously relied on *Witt v. State* and the concept of retroactivity of a procedural ruling on constitutional law as to matters of substantive criminal law. Indeed, in many ways that was the point that was at the heart of *Bunkley v. Florida*.[20]

The homicide at issue in *Hurst v. State* was committed on May 2, 1998. The substantive criminal law that governs in *Hurst v. State* is the law that was in place on May 2, 1998. Under the

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[20]Substantive changes in criminal law are outside the purview of the retroactivity analyses used to address whether procedural rules emanating from judicial decisions set out new rulings of constitutional law should be applied retroactively. *See Bousley v. United States*, 523 U.S. 614, 620 (1998). ("[B]ecause *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress."). *See Thompson v. State*, 887 So.2d 1260, 1263-64 (Fla. 2004) ("[T]he question of retroactivity under *Witt [v. State]* is not applicable to this case because we are examining a change in the statutory law of this state not a change in decisional law emanating from this Court or the United States Supreme Court"). The analysis set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), was for determining when court rulings that resulted in "constitutional changes of law" were retroactive.

The analysis of whether substantive criminal law applies to events that predate the law is distinct from and completely different than how courts analyze when a collateral litigant is entitled to the benefit of a judicial decision announcing new procedural law.

Florida Constitution, the law in place on May 2, 1998, governed both as to the criminal offense that was or was not committed and the punishment to be imposed on any conviction. Changes in the substantive law enacted after the date of the offense were barred from having any affect on the prosecution of punishment of a crime committed before the changes were effective.

C. MR. POOLER'S DEATH SENTENCE STANDS IN VIOLATION OF THE DUE PROCESS CLAUSE AND IN VIOLATION OF THE EIGHTH AMENDMENT

The question under the Due Process Clause and *Fiore v. White* is on what date did the statutory construction set out in *Hurst v. State* become the controlling law identifying the elements of capital murder. The answer to that question requires an examination of the dates of the homicides in cases in which new penalty phase proceedings have been ordered at which the State will have to prove the elements of capital murder beyond a reasonable doubt to the satisfaction of a unanimous jury.

As Justice Scalia noted in his concurring opinion in *Ring v. Arizona*, the legislature's labels cannot control and be allowed to circumvent constitutional requirements; what matters is functionality and whether the functioning criminal process meets constitutional requirements. *Ring v. Arizona*, 536 U.S. 584, 610 (2002)(Scalia, J., concurring)("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives— **whether the statute calls them**

elements of the offense, sentencing factors, or Mary Jane —must be found by the jury beyond a reasonable doubt.")(emphasis added).

While the new proceedings ordered in *Hurst v. State* may carry the label, "new penalty phase," its functionally is a guilt phase. For purposes of the Due Process Clause and *Fiore v. White* and *In re Winship*, it is a guilt phase proceeding. Thus, if the statutory construction set out in *Hurst v. State* is to control as to whether the defendant is guilty of capital murder and the sentencing range has increased to include death as a possible sentence, that means that on the date of the homicides at issue the statutory construction set out in *Hurst v. State* is the governing substantive law. Because this Court ordered new penalty phases to be conducted in two cases[21] in which the homicides at issue were committed in 1981, the statutory construction of § 921.141 identifying the elements of capital murder dates at least to 1981 under *Fiore v. White*.

What the elements of a criminal offense are has long been recognized as substantive law. When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for a higher degree of the offense to be proven by the State beyond a reasonable doubt.

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[21]*See Card v. Jones*, 219 So. 3d 47 (2017), and *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016).

Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)("The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty."). Every element of a criminal offense must be proven by the State beyond a reasonable doubt. The jury in Mr. Pooler's case was not told that all of the elements of capital murder had to be proven beyond a reasonable doubt. Moreover, the judge was unaware of that the beyond a reasonable doubt burden of proof applied. He only used that standard as to identifying the aggravating circumstances. Under *Fiore v. White* and *In re Winship*, Mr. Pooler has not been convicted of capital murder. Unless he is convicted of capital murder, his death sentence exceeds the statutory maximum set for a conviction of the lesser included offense of first degree murder.

ARGUMENT III

MR. POOLER'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS THE JURY'S SENSE OF RESPONSIBILITY AT THE PENALTY PHASE WAS INACCURATELY DIMINISHED IN VIOLATION OF *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985).

Throughout Mr. Pooler's capital trial the jury was repeatedly told they were simply recommending an advisory sentence to the trial judge. *See* T. 274, 275, 276, 277, 278, 280, 286, 287, 290, 292, 293, 299, 300, 306, 346, 413, 421, 422, 423, 424, 426, 427, 431, 432, 434, 436, 437, 438, 439, 440, 441, 442,

443, 444, 445, 446, 447, 448, 449, 450, 453, 454, 455, 457, 458, 477, 485, 489 (voir dire); T. 1362 (State's opening statement at the penalty phase); T. 1360, 1361, 1620, 1621, 1623, 1625, 1626, 1627 (jury instructions). And, as the jury left the courtroom to deliberate about whether or not to recommend that Mr. Pooler be sentenced to death, they were instructed that the final decision on the sentence rested with the trial judge (T. 1620).

At the time of Mr. Pooler's 1996 trial, what the jury was told may have been consistent with the procedure set forth in Florida law at that time. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). But, it was clearly inaccurate and unconstitutional. This is because it was recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as **bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.")(emphasis added).

Indeed in *Caldwell v. Mississippi*, a unanimous jury verdict in favor of a death sentence was vacated because the jury was not

correctly instructed as to its sentencing responsibility.[22] *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence. Part of feeling the weight of a juror's sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918)(prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it

[22]In *Caldwell*, the prosecutor responding to defense counsel's argument had stated in his closing argument to the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id.* at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the United States Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341. *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id.* at 331.

was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting death sentence cannot stand. *Caldwell*, 472 U.S. at 341.

While *Caldwell* was the law before Mr. Pooler's death sentence became final, it was ruled to be inapplicable to Florida capital proceedings by this Court. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden*, this Court held that under Florida's sentencing scheme, the jury was not responsible for the sentence and thus *Caldwell* was not applicable to jury instructions in Florida telling the jury that its role was advisory:

> In *Caldwell*, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellant review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Darden is no longer the law. The comments, argument and instructions heard by to Mr. Pooler's jury refer numerous times

to the advisory nature of the jury's sentencing recommendation, and thus clearly and repeatedly diminished the jury's sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the U.S. Constitution.

Mr. Pooler acknowledges that this Court has decided the issue presented here in *Jones v. State*, 256 So. 3d 801 (Fla. 2018). In *Jones*, this Court held:

> Nor is Jones entitled to relief on his other claims. Jones's claim that his death sentence violates *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and the Eighth Amendment is foreclosed by our recent decision in *Reynolds v. State*, 251 So.3d 811, 82543 (2018), in which we held that "a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law" (citing *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994).

256 So. 3d at 802. However, Mr. Pooler requests that this Court revisit the issue because, due to the faulty jury instructions, Mr. Pooler's death sentence violates the United States Constitution. Relief is required.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, **LEROY POOLER**, urges this Court to reverse the circuit court's order and remand to allow him to litigate his claim that his intellectual disability precludes his execution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Leslie Campbell, Assistant Attorney General, on this 8th day of February, 2019.

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CERTIFICATION OF TYPE SIZE AND STYLE

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