IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-2024

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT IN REPLY

PRELIMINARY MATTERS

First, in its "Statement of the Case and Facts", the State sets forth a lengthy recitation of the Eleventh Circuit Court of Appeals' "discussion of Pooler's mental health presentation." (Answer Brief at 7-11; hereinafter "AB at __"). However, to be clear, the issue before the Eleventh Circuit concerned only whether trial counsel was ineffective at the penalty phase of Mr. Pooler's capital trial under the sixth amendment. Thus, the facts as set forth do not present an accurate picture of the facts contained in the record concerning the eighth amendment argument before this Court. Most significantly, Dr. Levine's IQ score was was based on a partial IQ test (PCT. 320), and was not an accurate score. Further, Dr. Levine only conducted a copetency evaluation and did not conduct a psychological evaluation of Mr. Pooler (T. 114).

Also, in the summary of argument, as to Mr. Pooler's Argument II, the State contends that there is no sixth amendment violation in Mr. Pooler's case. However, Mr. Pooler is not raising a sixth amendment claim. The State's misunderstanding of Mr. Pooler's argument is discussed infra. *See* Reply Brief at 12-19.

ARGUMENT I

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

The State argues that Mr. Pooler's claim is time-barred (AB at 14, 22). In asserting this argument, the State argues that it does not matter that Mr. Pooler reached the same conclusion as this Court and many circuit courts throughout the State that Fla. Stat. § 921.137(1) (2001), precluded his claim (AB at 19). However, contrary to the State's argument, according to this Court, the plain language of the statute precluded Mr. Pooler's claim. Thus, Mr. Pooler, like this Court, relied on the statutory language and the plain meaning of that language in determining that he could not avail himself to an intellectual disability claim in 2002. Mr. Pooler's interpretation was not compelled by this Court's opinion in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), but rather confirmed by this Court's opinion. Mr. Pooler should not be faulted for arriving at the same conclusion that this Court arrived at in interpreting Fla. Stat. § 921.137(1) (2001).

Also, in arguing that the circuit court did not err in imposing a time bar to Mr. Pooler's eighth amendment claim, the State cites *Block v. North Carolina ex re. Bd. of University and School Lands*, 461 U.S. 273 (1983), to assert the proposition that a constitutional claim may become time barred (AB at 18). At issue in *Block* was the Quiet Title Act of 1972 (QTA), which

allowed parties to sue the U.S. government in a civil action relating to title disputes where the United States claims an interest. *Id.* at 275-276. However, the QTA imposed a time limitation on a party bringing a suit against the United States: "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* at 277. However, the Court made clear that even a waiver of an action by a plaintiff did not strip the plaintiff of any property rights because the plaintiff retains title. *Id.* at 291. Thus, the waiver simply means that "[t]he title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Id.*

Thus, the distinction between *Block* and the procedural bar that has been erected in Mr. Pooler's case is three-fold: first, the statute of limitations in the quiet title suit only begins to run once the claim accrued, i.e., was known or should have been known by the party. Here, Mr. Pooler could not have known that his claim existed because the plain language of the statute required an IQ cutoff of 70 for a capital defendant to be

considered intellectually disabled. It was not until the United States Supreme Court issued its opinion in *Hall v. Florida*, 572 U.S. 701 (2014), that Mr. Pooler should have and would have known that his claim of intellectual disability was neither futile nor frivolous.

Second, in *Block*, plaintiff did not waive his or her right to the title or interest in the land, therefore, plaintiff suffered no constitutional violation. *See Block*, 461 U.S. at 291-2. Here, Mr. Pooler, an intellectually disabled defendant may be put to death in violation of the eighth amendment. Clearly, the risk of a waiver or procedural bar in a QTA cannot be compared to the risk that has been created by this Court's order in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), and *Blanco v. State*, 249 So. 3d 356 (Fla. 2018).

Finally, and related to the second distinction, surely an action concerning property rights cannot serve to provide succor to stripping a capital defendant of his eighth amendment right. In *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976), the United States Supreme Court held: "death is a punishment different from all other sanctions in kind rather than degree." This qualitative difference from other criminal punishments and certainly actions related to property rights is what compels "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 304. Thus, the

State's reliance on *Block* is atrociously misplaced.

In asserting *Block* as counter authority to the opinions cited by Mr. Pooler, the State points out that *Trop*, *Dear Wing Jung* and the other opinions do not discuss time bars (AB at 18). However, Mr. Pooler's point is that the United States Supreme Court has made clear that a criminal defendant cannot waive his or her right to be free from cruel and unusual punishment under the eighth amendment. *See Trop v. Dulles*, 356 U.S. 86, 100-1 (1958); *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. 1979); *Henry v. State*, 280 S.E.2d 536, 536 (S.C. 1981). Here, the time bar imposed causes the same result as a waiver: Mr. Pooler, an intellectually disabled individual, has waived his eighth amendment right. Thus, just as a waiver is not permitted in the eighth amendment context, neither is a time bar.

The State also asserts that *Walls v. State*, 213 So. 3d 340 (Fla. 2016), is not fully retroactive (AB at 19, 21). Specifically, the State contends that in order to obtain the benefit of *Hall*, a capital defendant must have raised a timely *Atkins* claim (AB at 19). However, in *Walls* this Court conducted an analysis of retroactivity pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and determined that *Walls* was fully retroactive.

Therefore, the State's argument that Mr. Pooler is

procedurally barred from his intellectual disability claim is in direct conflict with the concept of a retroactivity finding. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) (finding that *Hitchcock v. Dugger*, 481 U.S. 393 (1987) "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default."). As this Court explained in *Witt*:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of postconviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (emphasis added). A *Witt* retroactivity conclusion is grounded upon a finding that the change in law was "drastic" and "sweeping" and established a new "fundamental constitutional right." Fla. R. Crim. P. 3.851(d)(2)(B). This Court found that *Hall's* holding striking down Florida's bright-line 70 IQ cutoff met these criteria, reasoning:

> The Supreme Court's rejection of Florida's mandatory IQ score cutoff means defendants with IQ scores that are higher than 70 must still be permitted to present evidence of all three prongs of the test for intellectual disability. The *Hall* decision requires courts to consider all prongs of the test in tandem. As we have recognized, this means that "if one of the prongs is relatively less strong, a finding of

> intellectual disability may still be warranted based on the strength of the other prongs." *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015). 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. *Cf. Falcon v. State*, 162 So. 3d 954, 961-62 (Fla. 2015) (rejecting State's argument that because a Supreme Court decision only invalidated a statute as applied to a specific subgroup of people, the decision was only a procedural refinement such that retroactive application was unnecessary).

Walls v. State, 213 So. 3d 340, 346 (Fla. 2016).[1] There was no condition in *Walls* that a defendant would have to have previously brought his claim in order to obtain an opportunity to establish his intellectual disability under *Hall*. Thus, this Court made *Hall* fully retroactive to capital cases where the defendants convictions and sentences had already become final — not conditioning retroactivity on any preservation requirement — such as this Court did in *James v. State* under the doctrine of fundamental fairness in applying *Espinosa* to postconviction cases (finding Florida's heinous, atrocious, and cruel ("HAC")

[1]And, contrary to the State's argument (*see* AB at 20), this Court in *Walls* made clear that *Hall* expanded the class of individuals not subject to the death penalty due to the broader consideration of IQ scores and holistic approach to the intellectual disability analysis.

aggravator to be unconstitutionally vague), in which it required that defendants had challenged the HAC aggravator both at trial and on direct appeal prior to *Espinosa* in order to get the benefit of *Espinosa* in postconviction.

The State also argues that *Hall* did not announce a substantive rule of constitutional law (AB at 20-21). However, a review of this Court's recent analysis in *Foster v. State*, __ So. 3d __, 2018 WL 6816598 (Fla.), provides a compelling explanation of how radically *Hall* changed the legal landscape in Florida regarding filing and litigating intellectual disability claims, to the extent that it defeats a procedural bar based on a prior negative ruling on the merits of Foster's ID claim. In *Foster*, Foster raised an intellectual disability claim post-*Atkins* in postconviction and the circuit court denied the claim, finding that Foster had failed to prove any of the three prongs of ID, including IQ, based on his single score of 75. When Foster raised a post-*Hall* claim, the circuit court summarily denied the claim as procedurally barred as having been previously decided on the merits. This Court "disagreed and [held] that Foster is entitled to an evidentiary hearing on his intellectual disability claim for the same reasons that we granted evidentiary hearings in *Walls* and *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017)":

> Upon review of the record in *Walls*, we determined that, although Walls had previously received consideration of his intellectual disability claim after an evidentiary hearing, the proceedings in that case were not

sufficient to show compliance with the "holistic review" required by *Hall* due to the effect the IQ-score cutoff likely had on those proceedings. *Walls*, 213 So. 3d at 346-47. We made the following determinations in that case:

> Walls' prior hearing was conducted under standards he could not meet because he did not have an IQ score below 70—a fact which may have affected his presentation of evidence at the hearing. Because Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability and was reviewed by the circuit court with the former IQ score cutoff rule in mind, we remand for the circuit court to conduct a new evidentiary hearing as to Walls' claim of intellectual disability.

Id. at 347. We applied this reasoning in *Franqui*, noting that because Franqui presented IQ scores over 70, "the circuit court may have determined that it was unnecessary to consider or discuss the second and third prongs [of the intellectual disability test] in detail." 211 So.3d at 1032. Similar reasoning applies to the instant case.

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. Although the original postconviction court did not cite this standard, its analysis began with skepticism that Foster could be considered intellectually disabled given his achievement of a score of 75 on an IQ test, and the court's consideration of this issue was not aided by any explanation of the standard error of measurement. Also, while the original postconviction court based its decision on Foster's failure to meet the other two prongs of the intellectual disability test, which are not IQ based, we cannot be sure that its assessment of the evidence was not tainted by a failure to view his IQ score of 75 in a proper light. Indeed, it appears that the original postconviction court viewed Foster's IQ score of 75 as evidence undermining his claim.

Foster, 2018 WL 6816598 *5 (Fla.).

This same analysis applies to Mr. Pooler's decision not to

file an intellectual disability claim in light of Fla. Stat. § 921.137(1) (2001), given that Mr. Pooler would not have received the "holistic review required by *Hall* due to the effect the IQ-score cutoff [would have] had on those proceedings." There are two types of procedural bars: a bar because a claim received a prior negative adjudication on the merits (raised by the State in Foster), and a bar because the defendant failed to raise the claim at a prior opportunity (raised by the State here). There is no principled jurisprudential basis to excuse a procedural bar for Foster but not for Mr. Pooler, under these circumstances.

Finally, as to Mr. Pooler's argument that the procedural bar imposed by the circuit court is arbitrary and capricious, the State attempts to distinguish the cases cited by Mr. Pooler (AB at 22, n.3). For example, the State argues that no decision was ever reached in the litigation of Johnston's intellectual disability claim because he died. However, Mr. Pooler's point is that the circuit court granted Johnston an evidentiary hearing on his intellectual disability claim and this Court granted a stay of execution so that he could litigate the denial of his claim before this Court. *See Johnston v. State*, Florida Supreme Court Case No. SC10-356. Thus, no procedural bar precluded Johnston from pursuing a claim brought outside of the time parameters relied on by the State here.

Likewise, in *Coleman v. State*, 64 So. 3d 1210 (Fla.

2011), this Court allowed appellant to raise an intellectual disability claim on appeal and remanded for an evidentiary hearing despite postconviction counsel having waived the claim on the record during the initial evidentiary hearing. It is unfair to allow Coleman to rescind his waiver but impose a procedural bar in Mr. Pooler's case.

And, in *Phillips v. State*, 249 So. 3d 596 (Fla. 2018), this Court held that Phillips was permitted to raise an intellectual disability claim in his resentencing proceedings despite the fact that he had not previously raised such a claim at his trial proceedings. Again, it is unfair to allow Phillips to rescind his waiver but impose a procedural bar in Mr. Pooler's case.

Mr. Pooler has established that imposing a procedural bar in his case is arbitrary and capricious and violates the eighth amendment.

Mr. Pooler submits that he is entitled to "a fair opportunity to show that the Constitution prohibits their execution". *Hall*, 572 U.S. at 724.

ARGUMENT II

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

The State argues that this Court has previously denied claims similar to Mr Pooler's (AB at 23, 24, 26). First, the State argues that *Hurst v. Florida*, 136 U.S. 616 (2016) — and its progeny — does not retroactively apply to Mr. Pooler's case (AB at 24, 25, 26, 27). Then, the State argues that because Mr. Pooler was convicted of a contemporaneous felony, any error is harmless because aggravating factors were found beyond a reasonable doubt (AB at 29). However, these arguments fail to comprehend Mr. Pooler's argument, specifically the due process violations underlying this claim and stemming from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

In *Hurst v. State*, this Court not only addressed constitutional issues, it also construed the version of §921.141, 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 previously required, and continued to require, the "additional factfinding" it held to be necessary before a death sentence could be considered as a

punishment. "As the Supreme Court long ago recognized in *Parker v. Dugger* . . . under Florida law, 'The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.'" *Hurst*, 202 So. 3d at 53.[2]

Most significantly, ths Court explained in *Hurst v. State* 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. Thus, these 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

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[2]The State incorrectly asserts that the jury must simply find the aggravating factors beyond a reasonable doubt (AB at 23). All of the jury's findings, including that the determination of whether the aggravating factors outweigh the mitigating factors must be found beyond a reasonable doubt. The State refuses to acknowledge this Court's clear precedent on this critical issue.

> 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. . . . 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.

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). 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 v. State, 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 at 15-16 (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. 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*, 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.").

The United States Supreme Court has observed:

> Calling a particular kind of fact an "element" carries certain legal consequences . . . . 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.

Richardson v. United States, 526 U.S. 813, 817 (1999). When a statute uses elements to distinguish between a lower and higher degree of an offense, due process requires the elements necessary for 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.").

In addition, 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, more than fifteen 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).

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 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), this 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.**

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

Under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, Mr. Pooler argues that this Court's construction of Fla. Stat. § 921.141 in *Hurst v. State* should 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."). Thus, the State's contention that *Fiore* is not applicable here (*see* AB at 28-29), is categorically refuted by this Court's and the United States Supreme Court's precedent.

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)

The State argues that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is of no consequence in Mr. Pooler's case because the jury heard accurate instructions. *See* AB at 31. The State's argument is pure hyperbole. In the wake of *Hurst v. Florida* and the resulting new Florida law, a jury's unanimous death recommendation is necessary in order to authorize the imposition of a death sentence. After *Hurst v. Florida*, the jury's penalty phase verdict is not advisory. The jury does bear responsibility for a resulting death sentence. Each juror has the power to exercise mercy and require the imposition of a life sentence. Accordingly, the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In *Hurst v. Florida*, the United States Supreme Court wrote that "[**t]he State cannot now treat the advisory recommendation by the jury as a necessary factual finding that *Ring* requires**." 136 S. Ct. 616, 622 (2016)(emphasis added). This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to

require the imposition of a life sentence simply by voting against a death recommendation.

Mr. Pooler's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In *Pope v. Wainwright*, this Court acknowledged that such comments and instructions relieve the jury's anxiety when faced with the responsibility that the jury was deciding to take a defendant's life. 496 So. 2d 798, 805 (Fla. 1986):

> In the instant case, petitioner argues that repeated reference by the trial judge and prosecutor to the advisory nature of the jury's recommendation overly trivialized the jury's role and encouraged them to recommend death. We cannot agree. We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. **It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by the jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a 'true sentencing jury.'** Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. Further,, if such information should lead the jury to 'shift its sense of responsibility' to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination of the appropriateness of the death sentence.

Id. (citations omitted)(emphasis added). This Court's acknowledgment surely supports Mr. Pooler's position in relation

to the *Caldwell* error in his case.

Also, as to the State's argument that Mr. Pooler's *Caldwell* claim is foreclosed by this Court's opinion in *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018), (AB at 32), Mr. Pooler submits that he is entitled to an individualized review of the inaccurate and minimizing comments that his jury repeatedly heard. Indeed, the United States Supreme Court stated the following in *Caldwell*:

> **In this case**, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

Caldwell, 472 U.S. at 341 (emphasis added).

Moreover, this Court's determination that the retroactivity analysis tied to a claim concerning the violation of the sixth amendment can be supplanted when addressing a violation of the eighth amendment is erroneous. At the time of Mr. Pooler's capital trial, this Court erroneously determined that *Caldwell* did not apply to Florida. However, clearly that jurisprudence no longer withstands scrutiny.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, **LEROY POOLER**, urges this Court to vacate the circuit's order and remand for an evidentiary hearing on his intellectual disability claim or remand for a new penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Cross Reply Brief has been furnished by electronic service to counsel of record, on this 20th day of March, 2019

/s/ Linda McDermott_____
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CERTIFICATION OF TYPE SIZE AND STYLE

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/s/ Linda McDermott
LINDA McDERMOTT