

In the Supreme Court of Florida

JOHN D. FREEMAN,

Appellant,

v.

CASE NO.: SC19-1532
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The State objects to an oral argument being conducted in this appeal of successive postconviction motion involving a case where the conviction and death sentence have been final since 1991. This Court should **not** hold an oral argument regarding this successive postconviction motion involving two claims, one of which is clearly not retroactive under this Court's controlling precedent and the other one of which is clearly untimely under this Court's controlling precedent.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's summary denial of an successive postconviction motion in a capital case raising a claim of intellectual disability.

Freeman pistol-whipped Leonard Collier to death outside the victim's home *Freeman v. State*, 563 So.2d 73, 75 (Fla. 1990). Just 22 days earlier, Freeman had stabbed Alvin Epps to death inside that victim's home. *Id.* at 75. Both murders occurred during burglaries of the victims' homes. The Epps murder was used as an aggravator in this case.

Freeman was convicted of first-degree felony murder and of burglary with an assault. *Freeman*, 563 So.2d at 74; *Freeman v. State*, 761 So.2d 1055, 1059 (Fla. 2000)(recounting the special verdict form in the guilt phase and the jury confusion regarding it and noting "the jury convicted Freeman of first-degree felony murder."). At the penalty phase, Dr. Legum, a clinical psychologist, testified that Freeman had a below average IQ and a fourth grade achievement level. *Freeman*, 761 So.2d at 1060. The jury recommended death by a nine-to-three vote. *Id.* The trial court sentenced Freeman to death, finding, among other mitigation, his low

IQ to be nonstatutory mitigation. *Freeman*, 761 So.2d at 1060 (listing the four nonstatutory mitigator found by the trial judge including low intelligence).

In the direct appeal to the Florida Supreme Court, Freeman raised five issues. *Freeman v. State*, 761 So.2d 1055, 1060 (Fla. 2000) (listing the issues raised in the direct appeal and their resolution by the Florida Supreme Court).¹ The Florida Supreme Court affirmed the conviction and death sentence. *Freeman v. State*, 563 So.2d 73, 77 (Fla. 1990).

On June 28, 1991, Freeman's death sentence became final when the United States Supreme Court denied his petition for writ of certiorari from the direct appeal. *Freeman v. Florida*, 501 U.S. 1259 (1991) (No. 90-6029).

On April 12, 1992, Freeman filed an initial state postconviction motion. On October 26, 1994, Freeman filed an amended initial state postconviction motion. In 1996, the trial court summarily denied the initial postconviction motion. *Freeman v. State*, 761 So.2d 1055, 1060 (Fla. 2000).

On appeal, the Florida Supreme Court affirmed the trial court's summary denial of many of the postconviction claims but remanded for an evidentiary hearing on the claims of ineffectiveness of defense counsel during the penalty phase. *Freeman*, 761 So.2d at 1058. Freeman had claimed that his two trial counsel, Assistant Public Defender Ann Finnell and Assistant Public Defender Patrick McGuinness were ineffective for failing to investigate and present to the jury crucial mitigating evidence from neighbors and friends, for failing to present the

¹ The five issues were: 1) the prosecutor erred in presenting Ms. Epps' testimony at the penalty phase, and the trial judge erred in denying the motion for a mistrial based on Ms. Epps' testimony; 2) the prosecutor made several improper comments during the penalty phase that required reversal; 3) the jury instructions on heinous, atrocious, and cruel were unconstitutionally vague; 4) the death penalty was proportionally unwarranted in this case; and 5) Freeman's sentence in this case must be vacated if the Epps conviction is reversed on direct appeal.

live testimony of Sorrells, for failing to have mental health experts review Freeman's family history and present this evidence along with evidence of alcohol and drug abuse, and for failing to challenge the prior violent felony, the Epps murder. *Freeman*, 761 So.2d at 1064-65. The Florida Supreme Court affirmed the summary denial of the claim of ineffectiveness regarding the Epps murder because Freeman had no "right to present this type of evidence." *Id.* at 1066. But ordered an evidentiary hearing on the other ineffectiveness claims. The Florida Supreme Court also ordered an evidentiary hearing regarding the claim that the prosecutor sought the death penalty based on racial considerations. *Id.* at 1068.

Freeman also filed a state habeas petition raising eleven issues. *Freeman*, 761 So.2d at 1061, n.3.² The Florida Supreme Court denied habeas relief. *Id.* at 1069-73.

On remand, the trial court held an evidentiary hearing on July 16-17, 2001. Dr. James E. Larson, a forensic psychologist testified at the evidentiary hearing,

² In the state habeas petition, Freeman argued ineffective assistance of appellate counsel and constitutional error regarding: 1) failing to raise the issue that the trial court erred in denying his motion for a mistrial; 2) failing to raise the argument that the trial court reversibly erred when reinstructing the jury during the guilt phase; 3) failing to argue numerous pretrial motions raised by defense counsel during the guilt phase; 4) failing to raise many of the numerous pretrial motions, objections and requests for mistrials raised by defense counsel during the penalty phase; 5) failing to argue the trial court erred in refusing to grant a continuance prior to the penalty phase; 6) failing to argue that he was denied the right to a reliable capital sentence because the jury was not properly instructed; 7) he was sentenced to death in reliance upon automatic aggravating factors which failed to guide and channel the sentencer's discretion; 8) the prosecutor's inflammatory and improper comments and arguments rendered his death sentence fundamentally unfair and unreliable; 9) the penalty phase jury instructions shifted the burden to him to prove that a life sentence was appropriate; 10) his death sentence was based upon an unconstitutionally obtained prior conviction; and 11) failing to assure that the record on appeal was complete.

as a defense expert, that Freeman suffered from a “mild neuropsychological impairment” and a “learning disability.” *Freeman v. State*, 858 So.2d 319, 326 (Fla. 2003). “Dr. Larson administered certain tests to Freeman and testified that Freeman performed poorly.” *Id.* at 326.

On July 11, 2003, the Florida Supreme Court affirmed the trial court’s denial of the initial postconviction motion following the remand. *Freeman v. State*, 858 So.2d 319 (Fla. 2003) (No. SC01-2007). The Florida Supreme Court denied the reverse *McCleskey v. Kemp*, 481 U.S. 279 (1987), claim. *Freeman*, 858 So.2d at 322-24. The Florida Supreme Court also rejected the claims of ineffectiveness in the penalty phase trial for failing to investigate and present to the jury mitigating evidence from friends and family about Freeman’s abusive home life, for failing to have mental health experts review his family history and present this evidence along with evidence of alcohol and drug abuse, and for failing to present the live testimony of David Sorrells, Freeman’s best friend, who would have testified to abuse Freeman suffered as a child. *Freeman*, 858 So.2d at 324-29. The Florida Supreme Court denied rehearing on November 25, 2003. The Florida Supreme Court issued its mandate on December 29, 2003.³

Freeman filed a petition for writ of certiorari in the United States Supreme Court from the Florida Supreme Court’s opinion denying his initial state postconviction motion. On April 26, 2004, the United States Supreme Court denied the petition. *Freeman v. Florida*, 541 U.S. 1010 (2004) (No. 03-1196).

On December 29, 2004, Freeman filed a federal habeas petition in federal district court. The federal district court denied habeas relief. The Eleventh Circuit affirmed the denial of federal habeas relief. The Eleventh Circuit rejected the

³ Freeman filed other motions in state court over the years that are not relevant to the claims in the successive motion and therefore are omitted.

reverse-*McCleskey* claim. *Freeman v. Att’y Gen.*, 536 F.3d 1225, 1230 (11th Cir. 2008) (rejecting the claim of improper prosecutorial racial bias in seeking a death sentence).

Freeman filed a petition for writ of certiorari in the United States Supreme Court from the Eleventh Circuit’s opinion denying habeas relief. On January 12, 2009, the United States Supreme Court denied the petition. *Freeman v. McCollum*, 555 U.S. 1110 (2009) (No. 08-7018).

On September 20, 2017, the federal district court appointed the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N) as substitute federal habeas counsel. *Freeman v. Sec’y, Fla. Dep’t of Corr.*, Case No. 3:03-cv-668-J-32 (M.D. Fla.) (Doc. #32).

Current successive postconviction proceedings

On October 19, 2017, Freeman, represented by registry counsel Francis Shea, filed a 3.851 postconviction motion raising two claims: 1) a Sixth Amendment right-to-a-jury-trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), and 2) an Eighth Amendment intellectual disability claim based on *Hall v. Florida*, 572 U.S. 701 (2014). (2019 ROA at 626-645). On January 10, 2018, Freeman filed a supplemental filing containing the following affidavits and reports in support of the intellectual disability claim: 1) an affidavit from Dr. Jethro Toomer which relies on Dr. Crown’s IQ testing and refers to testing given to Freeman as a youth but does not list the IQ scores before 18 years of age; 2) a report from Dr. Barry Crown reporting a full score of 72 on the Wechsler Adult Intelligence Scale (WAIS-IV) IQ test performed on October 4, 2017; 3) an affidavit from David Sorrells, a childhood friend who lived in the same neighborhood as Freeman, asserting that Freeman

was not good at school and lacked living skills; and 4) an affidavit from Wayne Watson, another childhood friend who lived in the same neighborhood as Freeman, who asserted Freeman was “really slow” in school and depended on others to live. (2019 ROA at 651-667; 755-760).

On January 11, 2018, the State filed a motion to strike the successive motion for lack of proper service. (2019 ROA at 668-670). The trial court granted the State’s motion to strike and ordered opposing counsel to refile the successive motion with proper service to the Office of the Attorney General. On January 19, 2018, Freeman filed a properly-served successive postconviction motion again raising the *Hurst* claim and the *Hall v. Florida* claim. (2019 ROA at 697-734).

On the same day the properly served successive motion was filed, January 19, 2018, the State filed an answer to the successive postconviction motion asserting that both the *Hurst* claim and the *Hall v. Florida* claim should be summarily denied. (2019 ROA at 671-696). Regarding the intellectual disability claim, the State argued that Freeman did not meet the first prong of significant subaverage intellectual functioning of the test for intellectual disability because considering the three IQ scores of 83, 84, and 72 together, Freeman’s IQ is between 77.5 and 79.6, which is above the *Hall* cut-off of 75. On March 2, 2018, Freeman filed a reply. (2019 ROA at 735-740).

On April 6, 2018, the state court granted an evidentiary hearing on the intellectual disability claim. (2019 ROA at 761-764). The trial court noted the State’s argument that considered collectively Freeman’s IQ score was above 75 points. The trial court noted that the State performed several calculations, reasoning that both the mean and median of the three scores is above 75. The trial court noted the *Hall* Court’s statement that the analysis of multiple IQ scores jointly is a “complicated endeavor” and thought that “such a ‘complicated

endeavor” was “a proper subject for expert testimony” at an evidentiary hearing. *Id.* (citing *Hall v. Florida*, 572 U.S. at 714). The trial court referred to the March 19, 2018, declaration by Gordon Taub, Ph.D. asserting that there was no professional support in the psychological community for considering IQ scores collectively. An evidentiary hearing was scheduled and then cancelled and then rescheduled.

On February 4, 2019, the State filed a motion to determine state postconviction counsel’s qualifications. (2019 ROA at 768-779). Registry counsel Shea then filed a motion to withdraw as state postconviction counsel. (2019 ROA at 780). On February 22, 2019, the trial court appointed Capital Collateral Regional Counsel - North (CCRC-N), as state postconviction counsel and on February 25, 2019, an attorney with CCRC-N filed a notice of appearance. (2019 ROA at 781-782;783-784).

On April 1, 2019, CCRC-N filed a motion to continue the evidentiary hearing due to their recent appointment. (2019 ROA at 785-799). On April 2, 2019, the State filed an objection to continuing the evidentiary hearing asserting that there was no need to continue the evidentiary hearing because much of the preparation work for the evidentiary hearing had been done by federal habeas counsel, the CHU-N, including retaining and preparing the defense intellectual disability experts. (2019 ROA at 810).⁴ In its response to the motion to continue the evidentiary hearing, the State urged the trial court to reconsider its prior ruling granting an evidentiary hearing on the intellectual disability claim, arguing that the trial court should instead summarily deny the claim as untimely relying on the

⁴ The CHU-N has been Freeman’s federal counsel since September of 2017 and they were appointed as federal counsel before the current successive postconviction motion raising the intellectual had been filed in state court.

Florida Supreme Court's recent decision in *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018). (2019 ROA at 811-812). The State explained that, in *Blanco*, the Florida Supreme Court applied a time-bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim after *Hall v. Florida*. The State noted that in this case, as in *Blanco*, Freeman had never filed a motion claiming intellectual disability in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002), or in the wake of the Florida Supreme Court adopting a rule of criminal procedure governing claims of intellectual disability, rule 3.203, in 2004. The State pointed out, that from 2002 until 2017, Freeman had not raised any claim of intellectual disability. The State argued, based "on the Florida Supreme Court's new precedent enforcing time-bars, this Court should reconsider its prior decision granting an evidentiary hearing and summarily deny the intellectual disability claim as time-barred." (2019 ROA at 812). On April 29, 2019, the trial court denied the motion to continue the evidentiary hearing. (2019 ROA at 814-829).

On July 1, 2019, approximately two months after the State urged the trial court to reconsider its original order granting an evidentiary hearing, the trial court issued an order to show cause as to why the pending intellectual disability claim should not be summarily denied as time barred. (2019 ROA at 845-847). On July 2, 2019, CCRC-N filed a response to the order. (2019 ROA at 849-860). On July 3, 2019, the State filed a reply to the order arguing that the trial court should summarily deny the intellectual disability claim as untimely without conducting an evidentiary hearing relying on Florida Supreme Court's recent precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *cert. denied*, *Harvey v. Florida*, 140 S.Ct. 117 (2019). (2019 ROA at 861-868).

On July 15, 2019, and on July 25, 2019, the trial court held hearings on the order to show cause regarding the timeliness issue. (2019 ROA at 1043-1052;1053-1059). At the hearings, the State orally asserted that the trial court should reconsider its prior ruling granting an evidentiary hearing and instead, summarily deny the intellectual disability claim. On July 19, 2019, after the first hearing on the order to show cause but before the second hearing, the State filed a notice of supplemental authority in this case with the trial court's order in the active death warrant case of *State v. Gary Ray Bowles*, case no. 16-1994-CF-012188-AXXX (Fla. Duval Cty. order dated July 11, 2019). (2019 ROA at 870-882). The State explained that the trial court in *Bowles* had summarily denied a similar intellectual disability claim as untimely based on the Florida Supreme Court's recent precedent.

On July 24, 2019, the State filed a motion to summarily deny the intellectual disability claim as untimely. (2019 ROA at 883-891). The State explained that on July 11, 2019, a trial court in the Fourth Judicial Circuit entered an order denying an intellectual disability claim in an active death warrant case due to its untimeliness and that that order was being appealed to the Florida Supreme Court as part of the warrant litigation. *State v. Gary Ray Bowles*, case no. 16-1994-CF-012188-AXXX (Fla. Duval Cty. order dated July 11, 2019); *Bowles v. State*, SC19-1184. The State urged the trial court in this case to cancel the scheduled evidentiary hearing in this case and reserve ruling on the order to show cause and the timeliness issue until the Florida Supreme Court ruled in the *Bowles* case, pointing out that, because it was warrant litigation, the Florida Supreme Court would shortly decide the issue of timeliness and the Florida Supreme Court's soon-to-be-issued opinion in the *Bowles* case would be controlling precedent in this case.

On August 13, 2019, the same day the Florida Supreme Court issued its opinion in *Bowles v. State*, 276 So.3d 791 (Fla. 2019), the State provided the trial court in this case with supplemental authority of the Florida Supreme Court's decision as support for its pending motion to summarily deny the intellectual disability claim. (2019 ROA at 895-908). This Court in *Bowles*, in an active death warrant case, had held that a similar claim of intellectual disability was untimely. In its notice of supplemental authority, the State noted that the Florida Supreme Court had rejected the same argument regarding the good cause exception to Florida Rule of Criminal Procedure, rule 3.203(f), that the attorneys in this case had made to the trial court regarding that exception.

On August 16, 2019, a few days after the Florida Supreme Court had decided *Bowles*, the trial court summarily denied the intellectual disability claim in this case. (2019 ROA at 909-914). The trial court ruled that the intellectual disability claim was untimely citing *Rodriguez v. State*, 250 So.3d 616, 616 (Fla. 2016); *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018); *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018); and *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019).

This successive postconviction appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Freeman asserts the trial court erred in summarily denying his Sixth Amendment right to a jury trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). But neither *Hurst v. Florida* nor *Hurst v. Florida* applies retroactively to Freeman because his death sentence was final in 1991. Under this Court's precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017), *Hurst v. State* does not apply to any capital case that was final prior to 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This Court has consistently and routinely denied *Hurst* relief in all capital cases where the death sentence was final before 2002. As the trial court properly concluded, *Hurst* does not apply retroactively to Freeman. Furthermore, this Court should do as many other state supreme courts have done and adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). Neither *Hurst v. Florida* nor *Hurst v. Florida* is retroactive under *Teague*. *Hurst* should not be applied retroactively to any capital case. The trial court properly summarily denied the *Hurst* claim.

ISSUE II

Freeman asserts that the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). But the trial court properly denied the claim without conducting an evidentiary hearing because the claim is both untimely and meritless. As the trial court properly concluded, the claim is untimely under this

Court's controlling precedent of *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767 (Aug. 22, 2019); *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019); and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *cert. denied*, *Harvey v. Florida*, 140 S.Ct. 117 (2019). This Court has repeatedly held that intellectual disability claims brought by capital defendants who were sentenced to death before *Atkins*, must have been raised in 2004, as required by the rule of court governing intellectual disability claims to be timely. Fla. R. Crim. P. 3.203. But Freeman did not raise this claim until 2017. The claim is over 12 years late.

Alternatively, the claim of intellectual disability is meritless. Florida's statutes and caselaw requires a capital defendant establish three criteria to establish intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen by clear and convincing evidence. A defendant must establish all three prongs and the failure to meet any one of the prong means the defendant is not intellectually disabled under both the statute and this Court's recent caselaw.

But Freeman fails the first prong; his intellectual functioning is not significantly subaverage. Freeman's three IQ scores are 83, 84, and 72. Considering all three IQ scores collectively, Freeman's IQ is between 77.5 and 79.6. Freeman's general intellectual functioning is **not** significantly subaverage. Freeman is not intellectually disabled.

The United States Supreme Court's decision in *Hall v. Florida*, which mandates an evidentiary hearing be held in certain cases, does not apply to a capital defendant, such as Freeman, whose IQ is above 75. No evidentiary hearing was

required under *Hall v. Florida*. Thus, the trial court properly summarily denied the intellectual disability claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM BASED ON *HURST V. FLORIDA*, 136 S.CT. 616 (2016), AND *HURST V. STATE*, 202 SO.3d 40 (Fla. 2016)? (Restated)

Freeman asserts the trial court erred in summarily denying his Sixth Amendment right to a jury trial claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). But neither *Hurst v. Florida* nor *Hurst v. Florida* applies retroactively to Freeman because his death sentence was final in 1991. Under this Court's precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017), *Hurst v. State* does not apply to any capital case that was final prior to 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. This Court has consistently and routinely denied *Hurst* relief in all capital cases where the death sentence was final before 2002. As the trial court properly concluded, *Hurst* does not apply retroactively to Freeman. Furthermore, this Court should do as many other state supreme courts have done and adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). Neither *Hurst v. Florida* nor *Hurst v. Florida* is retroactive under *Teague*. *Hurst* should not be applied retroactively to any capital case. The trial court properly summarily denied the *Hurst* claim.

Standard of review

The standard of review of a summarily denied postconviction claim is *de novo*. *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019) (explaining a postconviction court's decision regarding whether to grant an evidentiary hearing is a pure question of law and is reviewed *de novo* citing *Mann v. State*, 112 So.3d 1158,

1162 (Fla. 2013)), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767 (Aug. 22, 2019) (No. 19-5617)); *Jimenez v. State*, 265 So.3d 462, 474 (Fla. 2018) (explaining that because “a postconviction court’s decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review” citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

A trial court cannot err as a matter of law if the trial court follows controlling Florida Supreme Court precedent, as the postconviction court did in this case. *Mann*, 112 So.3d at 1162 (explaining that because the claims “raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief”). The trial court found that the claim was not retroactive following this Court’s decisions in *Asay* and *Hitchcock*. Therefore, there necessarily was no legal error under the *de novo* standard of review.

The trial court’s ruling

The trial court summarily denied the successive postconviction motion. (2019 ROA at 909-914). The trial court ruled that *Hurst* did not apply retroactively to Freeman because his conviction and sentence became final before *Ring v. Arizona*, 536U.S. 584 (2002), citing this Court’s precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017); and *Hannon v. State*, 228 So.3d 505 (Fla. 2017). (2019 ROA at 909-910).

Retroactivity

Under this Court’s precedent of *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017), and *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017), *Hurst v. State*

does not apply to any capital case that was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. Freeman’s sentence became final in 1991, which was over a decade before *Ring v. Arizona* was decided in 2002. *Freeman v. Florida*, 501 U.S. 1259 (1991). This Court has consistently denied *Hurst* relief in all such capital cases. See, e.g., *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017) (rejecting an argument that the Eighth Amendment, equal protection, and due process require that *Hurst* be applied retroactively even though the defendant’s death sentences were final prior to *Ring v. Arizona*), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017); *Bogle v. State*, 2019 WL 6904538, *3 (Fla. Dec. 19, 2019) (SC17-2151) (rejecting an argument that *Hurst v. State* should be applied retroactively to all capital cases and stating that this Court has repeatedly denied *Hurst v. State* relief to defendants whose death sentences were final prior to *Ring v. Arizona* citing *Reese v. State*, 261 So.3d 1246, 1246-47 (Fla. 2019)). As the trial court properly concluded, under this Court precedent, *Hurst* does not apply retroactively to Freeman.

Adopting *Teague* as the state test for retroactivity

Contrary to opposing counsel’s argument that *Hurst v. State* should be applied retroactively to all capital cases, *Hurst v. State* should not be applied retroactively to any capital case.

This Court in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), relied on the state test for retroactivity established in *Witt v. State*, 387 So.2d 922 (Fla. 1980), to hold that *Hurst v. State* did apply retroactively to cases that were not final before *Ring v. Arizona* was decided. *Mosley*, 209 So.3d at 1277. But, for all the reasons given by Justice Cantero in his concurring opinion in *Windom v. State*, 886 So.2d 915 (Fla. 2004), this Court should adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989), in place of the “now-outmoded” state test

of *Witt. Windom*, 886 So.2d at 942-50 (Fla. 2004) (Cantero, J., concurring) (advocating that Florida courts adopt *Teague*). This Court should do as many other state supreme courts have done and adopt *Teague* as the state test for retroactivity in Florida. *Windom*, 886 So.2d at 943, n.28 & n.29 (Cantero, J., concurring) (listing the numerous state supreme courts that have adopted *Teague* as the state test for retroactivity, in whole, or in part, and noting only six state supreme courts have not adopted *Teague*). Since Justice Cantero wrote his concurring opinion in 2004 several other state supreme courts have also adopted *Teague*.⁵ This Court should adopt *Teague* as the state test for retroactivity in place of *Witt*.

⁵ See, e.g., *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 840 & n.11 (Conn. 2015) (adopting *Teague* formally as the state test for retroactivity in the wake of *Danforth v. Minnesota*, 552 U.S. 264 (2008), and noting that thirty-three other states and the District of Columbia likewise apply *Teague* in deciding state law claims); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity on remand from the United States Supreme Court's decision in *Danforth* based on finality concerns). Justice Cantero listed the other state supreme courts that had not adopted *Teague* at the time of his opinion as being Alabama, Alaska, Michigan, Missouri, South Dakota, Utah, Wyoming, and also stated that Tennessee did not follow *Teague* as to state law decisions. *Windom*, 886 So.2d at 943, n.29. Since then, three of those states have adopted *Teague*. The Alabama Supreme Court has since adopted *Teague*. *Ex parte Williams*, 183 So.3d 220, 224 & n.2 (Ala. 2015) (stating that Alabama has adopted *Teague* citing *Ex parte Harris*, 947 So.2d 1139, 1143-47 (Ala. 2005), and rejecting an argument based on *Danforth* that the state should adopt a more liberal state retroactivity test), *cert. granted, judgment vacated on other grounds*, *Williams v. Alabama*, 136 S.Ct. 1365 (2016). Wyoming now follows *Teague* for federal law cases. *State v. Mares*, 335 P.3d 487, 501-04 (Wyo. 2014). Tennessee now follows *Teague* including in state law cases. *Bush v. State*, 428 S.W.3d 1, 19-20 (Tenn. 2014) (noting that the Tennessee legislature by enacting the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-122, had abrogated the prior state test for retroactivity and had adopted *Teague* for all types of cases). The trend of state courts adopting *Teague* has continued even in the wake of the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), holding that states may have more expansive tests for retroactivity than that of *Teague*.

In addition to the reasons given by Justice Cantero for adopting *Teague*, there is a historical reason for adopting *Teague* as well. *Teague* is the logical companion case of *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* created the concept of automatic pipeline retroactivity under which a defendant automatically receives benefit of any change in the law, even if the change in the law occurred many months after his trial was completed, provided his case is still pending on direct appeal. Before *Griffith*, courts performed the same retroactivity analysis on cases that were pending on direct appeal as those cases that were decades old and in postconviction without any consideration of finality.⁶ *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966) (holding the same three *Stovall/Linkletter* factors applied to both convictions pending on direct appeal and to final convictions). But once the United States Supreme Court adopted broad and automatic pipeline retroactivity for all cases pending on appeal in *Griffith*, it made logical sense to narrow the cases that received benefit of retroactivity in postconviction by adopting *Teague* a couple of years later. What many commentators misunderstand about the creation of the narrower test of *Teague* in the postconviction context was that it was a direct result of adopting a much broader and automatic test of retroactivity for all cases on direct appeal in *Griffith*. *Johnson* was dramatically broadened into *Griffith* while *Stovall* and *Linkletter* were narrowed into *Teague*. Furthermore, the

⁶ *Griffith*, 479 U.S. at 320-21 (explaining the history of retroactivity and the prior tests for retroactivity citing *Stovall v. Denno*, 388 U.S. 293 (1967) (using three factors to determine retroactivity); *Linkletter v. Walker*, 381 U.S. 618 (1965) (using three factors to determine retroactivity)). The three retroactivity factors used in both *Stovall* and *Linkletter* are: “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” *Griffith*, 479 U.S. at 321. Those three factors are the same three factors used by the state test for retroactivity of *Witt. Mosley*, 209 So.3d at 1277 (explaining that Florida’s test for retroactivity, *Witt*, uses the three factors from the older federal tests of *Stovall* and *Linkletter* citing *Witt*, 387 So.2d at 926).

combination of *Griffith* and *Teague* give finality its proper due, while *Stovall* and *Linkletter* did not.⁷ Because this Court follows *Griffith*, as it is constitutionally required to do by *Griffith* itself, it should also adopt the companion case of *Teague*. *Griffith*, 479 U.S. at 328 (holding that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”); *Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). Because *Griffith* and *Teague* are a logical complementary pair of cases, this Court should follow *Teague*.

Additionally, *Witt*, like *Stovall* and *Linkletter*, does not give finality its paramount place in retroactivity analysis. Nor does *Witt* account for the distinction between substantive and procedural or the importance of statutory interpretation decisions to retroactivity determinations. Indeed, *Witt* limits retroactivity analysis to decisions that are “constitutional in nature,” thereby excluding statutory interpretation decisions from its ambit. *Witt*, 387 So.2d at 931; *Hughes v. State*, 901 So.2d 837, 840 (Fla. 2005) (explaining under *Witt*, a change of law would not be deemed retroactive unless the change “is constitutional in nature”). It is statutory construction cases that raise the specter of legal innocence as well as *ex post facto* and notice concerns. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (applying a decision involving statutory construction of the federal use-of-a-firearm statute retroactively and explaining that decisions involving substantive federal criminal statutes necessarily carry a significant risk

⁷ *Griffith*, 479 U.S. at 321-22 (explaining that the Court in *United States v. Johnson*, 457 U.S. 537 (1982), drew a distinction for purposes of retroactivity for the first time based on finality following the logic of Justice Harlan’s dissent in *Desist v. United States*, 394 U.S. 244, 256 (1969), and concurring opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971)).

that a defendant stands convicted of an act that the law does not make criminal); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process concerns raised by statutory construction of a trespass statute); cf. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (noting the due process notice concerns of statutory retroactivity). *Witt* does not make such distinctions, but *Teague* does. This Court should adopt *Teague* in place of *Witt* and recede from *Mosley* in the remaining cases that are pending on appeal in this Court. § 43.44, Fla. Stat. (2018); *In re Amendments to Fla. Rules of Judicial Admin. & Fla. Rules of Appellate Procedure*, 125 So.3d 743 (Fla. 2013). *Teague* is simply the better test for retroactivity because it makes these types of distinctions while *Witt* does not.

Under *Teague*, *Hurst v. Florida* is not retroactive. While the United States Supreme Court has not reached the specific issue of the retroactivity of *Hurst v. Florida*, has previously held that *Ring v. Arizona* was not retroactive. *Schriro v. Summerlin*, 542 U.S. 348 (2004). The logic of *Summerlin* would apply equally to *Hurst v. Florida*. And both the Eleventh Circuit and the Ninth Circuit have reached the specific issue and have held that *Hurst v. Florida* is not retroactive under *Teague*. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1331-38 (11th Cir. 2019) (holding that *Hurst v. Florida* is not retroactive after an extensive *Teague* analysis and noting that this Court's decision in *Mosley* regarding retroactivity was a state law determination); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim because *Hurst v. Florida* did not apply retroactively). No federal circuit appellate court has held to the contrary. *Hurst v. Florida* is not retroactive.

While there are differences between the holding of the United States Supreme Court in *Hurst v. Florida* and the holding of this Court in *Hurst v. State*, *Hurst v. State* is not retroactive under *Teague* either. The United States Supreme Court in *Hurst v. Florida*, in effect, held that the finding of an aggravating factor was an

element that must be found by the jury. In contrast, this Court in *Hurst v. State* mandated additional jury findings, such as sufficiency of the aggravators, mitigation, and weighing, as well as requiring unanimity of those findings and of the jury’s final recommendation. But those additional aspects of *Hurst v. State* are not retroactive under *Teague* either. This Court recently held that those additional findings are not elements. *Rogers v. State*, 44 Fla. L. Weekly S208 (Fla. Sept. 5, 2019) (SC18-150) (explicitly receding from *Perry v. State*, 210 So.3d 630, 633 (Fla. 2016), and holding sufficiency and weight of the aggravating factors and the final recommendation of death are not elements citing *Foster v. State*, 258 So.3d 1248, 1251-53 (Fla. 2018)); *Foster v. State*, 258 So.3d 1248, 1251-53 (Fla. 2018) (holding the additional jury findings required “are not elements of the capital felony of first-degree murder”). Under both Florida statutes and this Court’s caselaw, the additional findings are not elements. § 921.141(2)(b)(1), Fla. Stat. (2018); § 921.141(2)(b)(2), Fla. Stat. (2018).⁸ None of the additional jury findings required by *Hurst v. State* are elements; rather, they are selection factors. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (contrasting eligibility factors with

⁸ According to Florida’s new death penalty statute, aggravating factors are the only elements in Florida and it is a jury’s finding of “at least one aggravating factor” that makes the defendant eligible for death. § 921.141(2)(b)(1), Fla. Stat. (2018) (stating that if the jury does “not unanimously find at least one aggravating factor, the defendant is **ineligible** for a sentence of death”) (emphasis added); § 921.141(2)(b)(2), Fla. Stat. (2018) (stating if the jury “[u]nanimously finds at least one aggravating factor, the defendant is **eligible** for a sentence of death . . .”) (emphasis added). Under the text of Florida’s death penalty statute, the only “element” of capital murder is the finding of one aggravating factor.

the selection decision).⁹ Therefore, *Hurst v. State* is not retroactive under *Teague* either.

⁹ The case of *Ivan V. v. City of New York*, 407 U.S. 203 (1972), which requires retroactive application of the beyond a reasonable doubt standard of proof, does not apply because Florida has required the aggravators to be proven at the beyond a reasonable doubt standard for decades. *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So.3d 93, 117 (Fla. 2013) (explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000)); cf. *Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven “beyond a reasonable doubt”). If a rule of law is not new, there is no retroactivity analysis required. *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1335 (11th Cir. 2019) (explaining that if a rule is not new, then a defendant is entitled to the benefit of the rule automatically without any retroactivity analysis being required, but determining that *Hurst v. Florida* was a new rule that required retroactivity analysis); *United States v. Johnson*, 457 U.S. 537, 549 (1982) (explaining when a decision of the High Court merely applied settled precedents to new and different factual situations, no real question regarding whether the later decision should apply retrospectively arises); *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a “new rule” for purpose of retroactivity as one that “breaks new ground or imposes a new obligation,” such as a decision that explicitly overrules an earlier holding). Florida’s standard of proof for aggravating circumstances is not new. So, no retroactivity analysis is required at all. And neither *Hurst v. Florida* nor *Hurst v. State* are standard of proof cases anyway. The issue in both *Hurst* cases was who decides – the judge versus the jury – not the standard of proof. And the new unanimity requirement established by this Court in *Hurst v. State* is not equivalent to a standard of proof. They are two very different concepts. This Court has explicitly held these additional determinations “are not subject to the beyond a reasonable doubt standard of proof.” *Rogers v. State*, 44 Fla. L. Weekly S208 (Fla. Sept. 5, 2019). So, *Ivan V.* is simply not at issue.

Neither *Hurst v. Florida* nor *Hurst v. State* are retroactive under *Teague*.¹⁰ Under *Teague*, *Hurst v. Florida* does not apply to any sentence that was final before January 12, 2016, when the United States Supreme Court decided that case. And, under *Teague*, *Hurst v. State* does not apply to any sentence that was final before November 3, 2016, when the Florida Supreme Court issued its mandate in that case. Freeman's death sentence was final in 1991 which was over two decades before both *Hurst v. Florida* and *Hurst v. State* were decided in 2016. Under *Teague*, *Hurst* does not apply retroactively to Freeman.

¹⁰ This Court in *Hurst v. State* also imposed a requirement of unanimity for those additional findings and the jury's recommendation of death. The issue of unanimity is currently pending in the United States Supreme Court in a non-capital case. *Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) (No. 18-5924) (granting the petition for writ of certiorari in a second-degree murder case to review Louisiana law which permits nonunanimous verdicts when ten out of twelve jurors vote to convict). It seems unlikely that the Court will overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), which permitted nonunanimous verdicts in twelve-person juries, in light of *Williams v. Florida*, 399 U.S. 78 (1970), which permits six-person juries. *Gonzalez v. State*, 982 So.2d 77, 78 (Fla. 2d DCA 2008) (noting that Connecticut, as well as Florida, permits six-person juries for life felonies and that Indiana and Massachusetts permit six-person juries for less serious felonies). Nonunanimous verdicts from ten of twelve-person juries are more difficult to obtain for the prosecution than unanimous verdicts from six-person juries. Four more persons have to vote to convict in Louisiana than in Florida. But, even if the United States Supreme Court overrules *Apodaca* in *Ramos* and requires unanimous verdicts from twelve-person juries, that holding is not likely to be retroactive. Cf. *Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), regarding Confrontation Clause rights, was not retroactive under *Teague* and observing that it is unlikely that there is any watershed rule of criminal procedure that has not yet emerged, as required by *Teague*). The unanimity requirement of *Hurst v. State* is not retroactive either.

Receding from *Mosley*

Indeed, far from receding from *Asay* and *Hitchcock* as opposing counsel advocates, this Court should recede from *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), and hold *Hurst v. State* does not apply retroactively to any capital case.

Stare decisis

The doctrine of stare decisis should not prevent this Court from receding from *Mosley*. Cf. *Okafor v. State*, 225 So.3d 768, 775-76 (Fla. 2017) (Lawson, J., concurring) (following *Hurst v. State*, despite believing it to be misguided, because it was settled law). If the *Mosley* Court had followed the doctrine of stare decisis, then *Hurst v. State* would not have been found to be retroactive. The *Mosley* Court ignored existing precedent in violation of stare decisis.

This Court's existing precedent was that right-to-jury-trial cases were not applied retroactively. This Court had routinely held that neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), nor its progeny, including its death penalty progeny, such as *Ring v. Arizona*, were retroactive under *Witt*. *Hughes v. State*, 901 So.2d 837 (Fla. 2005) (holding *Apprendi* was not retroactive after performing an extensive *Witt* analysis); *Johnson v. State*, 904 So.2d 400 (Fla. 2005) (holding that *Ring v. Arizona* was not retroactive after performing an extensive *Witt* analysis); *State v. Johnson*, 122 So.3d 856 (Fla. 2013) (holding *Blakely v. Washington*, 542 U.S. 296 (2004), was not retroactive after performing an extensive *Witt* analysis). In *Johnson*, this Court did a full-blown *Witt* analysis that consisted of over 20 paragraphs that discussed each of the *Witt* factors at length and then concluded that *Ring v. Arizona* was not retroactive. *Johnson*, 904 So.2d at 405, 407 ("we hold that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered" and "we now hold that *Ring* does not apply retroactively in Florida"). So, in three decisions involving *Apprendi*

— *Hughes*, *Johnson*, and *State v. Johnson* — this Court held that *Apprendi* was not retroactive but then, in *Mosley*, this Court held that a progeny of *Apprendi* was retroactive. The *Johnson* Court’s main reasoning for holding *Ring v. Arizona* was not retroactive was that jury factfinding, as opposed to judicial factfinding, did not seriously increase accuracy. This Court agreed with the United States Supreme Court’s observation in *Summerlin* that “reasonable minds continue to disagree over whether juries are better factfinders” than judges are and therefore, it cannot be said “that judicial factfinding **seriously** diminishes accuracy.” *Johnson v. State*, 904 So.2d at 410 (emphasis in original) (quoting *Summerlin*, 542 U.S. at 352, 355-56). The *Johnson* Court also explained that if *Ring v. Arizona* was applied retroactively, it would result in new penalty phases that would have to be conducted “decades” after the murder which would be “extremely difficult” and which would be less accurate than the prior penalty phase. *Johnson v. State*, 904 So.2d at 411. New penalty phases held years after the crime decrease reliability. But all of that logic applies equally to both *Hurst v. Florida* and *Hurst v. State*. The *Mosley* Court should have followed *Johnson* and held that *Hurst v. State* was not retroactive under *Witt*.

Furthermore, as a matter of logic, if the seminal case is not retroactive, then neither is its progeny. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing if “*Apprendi*’s rule is not retroactive on collateral review, then neither is a decision applying its rule” citing cases). It is inconsistent to hold *Apprendi* itself is not retroactive, as this Court did in *Hughes*, but then hold its progeny, *Hurst v. State*, is retroactive, as this Court did in *Mosley*. *Mosley* conflicts with *Hughes*, *Johnson*, and *State v. Johnson*, as well as with basic logic.

True stare decisis would mandate following the existing precedent of *Hughes*, *Johnson*, and *State v. Johnson* and would mean that *Hurst v. State* was not retroactive either.

While the *Mosley* Court referred to *Johnson* and acknowledged it had previously held that *Ring v. Arizona* did not apply retroactively, it brushed *Johnson* aside saying it was based on a misunderstanding of *Ring v. Arizona*'s application to Florida. *Mosley*, 209 So.3d at 1276. Justice Canady noted in his dissent that the detailed reasoning of *Johnson* was rejected by the *Mosley* majority "without any discussion of that reasoning" and observed that this "is not the way any court should treat a carefully reasoned precedent." *Mosley*, 209 So.3d at 1286 (Canady, J., dissenting). As the dissent in *Mosley* noted, the conclusion that *Hurst* is not retroactive should "ineluctably" follow from *Johnson*. *Id.* at 1285 (Canady, J., dissenting). The *Mosley* dissent also noted that the outcome in *Johnson* followed inevitably from the Court's earlier decision in *Hughes*. *Id.* at 1285-86. Justice Canady also noted that the existing precedent of *Hughes* which had held *Apprendi* was not retroactive because it merely "shifted certain fact-finding from judge to jury" but did not "impugn the 'very integrity of the fact-finding process' or 'present the clear danger of convicting the innocent,'" applied with equal force to any retroactivity analysis of *Hurst v. State*. *Id.* at 1286 (Canady, J., dissenting).

Additionally, *Mosley* is in tension with *Asay v. State*, 210 So.3d 1 (Fla. 2016). Both cases were issued by the same court on the same day and both employed a *Witt* analysis. But one case — *Mosley* — held that a violation of the right to a jury trial was retroactive and the other case — *Asay* — held that same right was not retroactive. This outcome shows that Justice Cantero's concern about the *Witt* factors being "vague and malleable" was quite justified. *Windom*, 886 So.2d at 942. Overruling *Mosley* would have the benefit of restoring consistency with *Hughes*, *Johnson*, and *State v. Johnson*, as well as with *Asay*.

As Justice Canady noted in his dissent, the *Mosley* Court had not treated this Court's precedent with the respect that it was due under the doctrine of *stare decisis*, so that doctrine certainly should not prevent this Court from overruling

Mosley. Decisions that do not respect the doctrine of stare decisis, such as *Mosley*, should not be entitled to its protections. Indeed, true respect for the doctrine of stare decisis would mandate overruling *Mosley*.¹¹

The doctrine of stare decisis is not is “an inexorable command” and the doctrine is at its “weakest” when a constitutional decision is at issue because such a decision can only be altered by constitutional amendment. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). While courts often list many considerations in the decision to overrule precedent, in many ways, it is reliance on the existing precedent that is the critical factor in any stare decisis analysis because that is the main basis for the entire doctrine of stare decisis in the first place. *Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (noting that “reliance interests are of particular relevance” in stare decisis analysis and then overruling precedent after determining that “no reliance interests” were implicated); *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (observing that stare decisis has special force when legislators or citizens have acted in reliance on a previous decision); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH & LEE L. REV. 411, 414 (2010) (noting reliance interests are a critical part of stare decisis and advocating that reliance considerations rather than other considerations play the determinative

¹¹ Nor is the *Mosley* Court’s reliance on *James v. State*, 615 So.2d 668 (Fla. 1993), entitled to the protection of the doctrine of stare decisis. *Mosley*, 209 So.3d at 1274-75 (discussing the fundamental fairness rationale of *James*). *James* was an unwarranted deviation from the established state test for retroactivity of *Witt*. *James*, 615 So.2d at 671 (Grimes, J., dissenting) (explaining that *Espinosa v. Florida*, 505 U.S. 1079 (1992), was not retroactive under *Witt* and observing that the “public can have no confidence in the law if court proceedings which have become final are subject to being reopened each time an appellate court makes a new ruling”); *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting) (advocating the abrogation of *James* altogether because it is irreconcilable with *Witt* as it gave “no consideration to the framework for retroactivity established in *Witt*”).

role in whether to overrule precedent).¹² The doctrine of stare decisis is based on the recognition that even bad decisions can be valuable and should not be corrected because numerous actors may have made critical decisions based on that bad decision and overruling such decisions can cause great losses, especially in civil cases due to those reliance interests. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that adhering to precedent is usually the wise policy, because often “it is more important that the applicable rule of law be settled than it be settled right”). As the United States Supreme Court explained in *Payne*, a capital case where the Court overruled its precedent, considerations in favor of stare decisis are “at their acme in cases involving property and contract rights, where reliance interests are involved” but observing “the opposite is true” in cases “involving procedural and evidentiary rules” and then overruling precedent because no such reliance interests were at stake. *Id.* at 828. *See also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining the role of stare decisis is “reduced” when applied to procedural rules which do not serve as “guides to

¹² This Court’s stare decisis jurisprudence does on occasion put the overriding emphasis on reliance but it does not do so consistently. *Compare Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (listing many considerations but noting that “reliance interests are of particular relevance” in stare decisis analysis and then overruling precedent after determining that “no reliance interests” were implicated), *with N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 637-38 (Fla. 2003) (listing many considerations of unworkable, reliance, disruption, and dramatic change in the premises but incorrectly stating that stare decisis is at its “zenith” when dealing with a “divisive societal controversy” and refusing to overrule precedent). Stare decisis is not at its “zenith” when dealing with a “divisive societal controversy”; actually, it is at its nadir when dealing with such controversies. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling, unanimously, the “separate but equal” doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

lawful behavior”).¹³ *Hurst* is not a guide to lawful behavior; it is a guide to trial procedures only.

Here, as in *Payne*, there is no such countervailing reliance interests at stake. Neither Freeman nor any other capital defendant actually relied to their detriment on either *Mosley* or *Hurst*. Indeed, Freeman did not rely on either *Apprendi* or *Ring v. Arizona* because neither of those cases had been decided at the time of this murder in 1986. The existing precedent at the time of this murder was *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), which were the cases overruled by the United States Supreme Court in *Hurst v. Florida*. *Hurst v. Florida*, 136 S.Ct. at 623 (“We now expressly overrule *Spaziano* and *Hildwin* in relevant part.”). And, under either *Spaziano* and *Hildwin* or *Hurst*, Freeman could still be sentenced to death for this murder. Not only do criminal defendants not rely on procedural cases, such as *Spaziano*, *Hildwin*, *Hurst*, or *Mosley*, when committing murder, they do not change their legal positions during trials, appeals, or postconviction proceedings in reliance on those types of

¹³ While reliance interests are often highest in the civil context, reliance interests can be at stake in the criminal context as well. Both the State and, on occasion, a criminal defendant can have justifiably relied on existing law as the basis for their conduct. See, e.g., *Davis v. United States*, 564 U.S. 229 (2011) (holding, when the police conduct a search based on objectively reasonable reliance on existing precedent, the exclusionary rule does not apply). A criminal defendant may also have a reliance interest in existing substantive law. Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rogers v. Tennessee*, 532 U.S. 451 (2001) (explaining that *Bouie* restricts retroactive application of judicial interpretations of criminal statutes to those interpretations that are unexpected and indefensible by reference to precedent). But one of the main limitations on a criminal defendant claiming reliance on existing law is that the reliance must be justifiable reliance. As Justice Scalia explained in a concurring opinion, which was critical to the holding of that decision, one of the main goals of stare decisis is “preserving justifiable expectations,” and that goal was “not much at risk” because those that relied on the existing precedent to tell the truth to Congress or the courts, instead of lying, “have no claim on our solicitude.” *Hubbard v. United States*, 514 U.S. 695, 717 (1995) (Scalia, J., concurring).

decisions either. Neither *Ring v. Arizona* nor *Hurst* serve as “guides to lawful behavior.” While capital defendants, who were granted *Hurst* relief due to *Mosley*, in cases where a new judgment and sentence of life has been entered, arguably have a reliance interest, under the reasoning of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108-09 (2003), which provides that when a court enters findings sufficient to establish a “legal entitlement to the life sentence,” double jeopardy bars any retrial of the appropriateness of the death penalty, capital defendants in the remaining cases, where no new judgment and sentence has been entered, do not. The true core of the doctrine of stare decisis, justifiable reliance, does not apply to those remaining capital defendants. Because there are no reliance interests at stake in the remaining cases, stare decisis is not a valid basis for refusing to recede from *Mosley*.

This Court should recede from *Mosley* even under a *Witt* analysis.

***James* and preservation**

Opposing counsel relies on fundamental fairness; the case *James v. State*, 615 So.2d 668 (Fla. 1993); and Justice Lewis’ preservation approach to retroactivity in his concurring opinions, to argue that *Hurst v. State* should be applied retroactively to all capital cases. IB at 14; *Hitchcock v. State*, 226 So.3d 216, 218 (Fla. 2017) (Lewis, J., concurring) (advocating that defendants who “properly preserved” a right-to-jury-findings challenge prior to *Ring* should be entitled to *Hurst* relief based on the “preservation approach” of *James*), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Asay v. State*, 210 So.3d 1, 30 (Fla. 2016) (Lewis, J., concurring); *see also Gaskin v. State*, 218 So.3d 399, 402-03 (Fla. 2017) (Pariente, J., dissenting) (advocating a *James* exception to *Mosley* for those defendants who “asserted, presented, and preserved” a right-to-jury-findings challenge before *Ring v. Arizona*). Justice Lewis’ position was defendants “who

properly preserved” the substance of a *Ring v. Arizona* challenge at trial and on **direct appeal** prior to that decision should be entitled to have their constitutional challenges heard. *Hitchcock*, 226 So.3d at 218 (Lewis, J., concurring) (emphasis added); *Asay*, 210 So.3d at 30-31 (Lewis, J., concurring); *see also Asay*, 210 So.3d at n.21 (Lewis, J., concurring) (citing Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 232 (1998)).

First, even under *James* preservation approach, Freeman would not be entitled to retroactive benefit of *Hurst*. Justice Lewis’ view was that capital defendants who preserved a Sixth Amendment right-to-a-jury-trial claim in the direct appeal should get retroactive benefit of *Hurst v. State*. *Hitchcock*, 226 So.3d at 218 (Lewis, J., concurring). But Freeman did not preserve a Sixth Amendment right-to-a-jury-trial claim in his direct appeal. *Freeman v. State*, 761 So.2d 1055, 1060 (Fla. 2000) (listing the issues raised in the direct appeal). So, even using Justice Lewis’ test for retroactivity, Freeman is not entitled to any *Hurst* relief. *Asay*, 210 So.3d at 30 (Fla. 2016) (Lewis, J., concurring) (explaining that because *Asay* did not raise a Sixth Amendment challenge in the direct appeal, “I agree that he is not entitled to relief.”); *Hitchcock*, 226 So.3d at 218-19 (Lewis, J., concurring) (stating that capital defendants, “like *Hitchcock*, who did not properly preserve their constitutional challenges — through trial and direct appeal — forfeited them.”) (emphasis in original). So, *James* does not help Freeman.

Opposing counsel insists that Freeman did preserve the claim by raising a *Ring v. Arizona* claim in his petition for writ of certiorari filed in the United States Supreme Court from the Eleventh Circuit’s denial of federal habeas relief in 2008. IB at 15 citing *Freeman v. McCollum*, 555 U.S. 1110 (2009) (No. 08-7018). But no such claim was raised as a separate issue in that petition. The sole issue raised in the petition was the reverse-*McCleskey* claim. *Freeman v. Att’y Gen.*, 536 F.3d

1225, 1231 (11th Cir. 2008) (referring to the claim as a “reverse *McCleskey* claim” citing *Freeman*, 858 So.2d at 323). No *Ring v. Arizona* claim was raised in the petition in *Freeman v. McCollum*. Furthermore, no *Ring v. Arizona* claim was raised in, or ruled upon, by the Eleventh Circuit. Instead, Freeman raised an equal protection claim, an Eighth Amendment claim, and a Sixth Amendment right-to-effective-counsel claim based on the prosecutor seeking a death sentence in the Eleventh Circuit, not a *Ring v. Arizona* claim, and that was the sole issue addressed by the Eleventh Circuit. *Freeman v. Att’y. Gen.*, 536 F.3d 1225, 1232-33 (11th Cir. 2008).¹⁴ The *Ring v. Arizona* claim was not properly raised in federal habeas review, much less properly preserved in state court as required by *James*. Even if a *Ring v. Arizona* claim had actually been raised in the petition, one cannot raise a claim for the first time in the United States Supreme Court, much less raise a claim six years after *Ring v. Arizona* was decided, and have the claim be considered properly preserved under *James*. Any Sixth Amendment right-to-a-jury-trial claim had to be raised in the **direct appeal** in the initial brief filed in 1989 in this Court under Justice Lewis’ reasoning and it was not. A Sixth Amendment right-to-a-jury-trial claim cannot be properly preserved by raising a *Ring v. Arizona* claim in petition for writ of certiorari, filed decades later, in 2008. The issue was not preserved as required by *James*. *James* simply does not apply to Freeman because he did not preserve this claim.

Second, this Court should not follow *James* at all. Justice Lewis complained that typical retroactivity tests, such as *Teague* and *Witt*, depend on a date which

¹⁴ No certificate of appealability (COA) was granted by either the federal district court or the Eleventh Circuit on a *Ring v. Arizona* claim. The federal district court only granted a COA on the claim that the State’s consideration of Freeman’s race in the decision to seek the death penalty violated his rights under the Sixth, Eighth and Fourteenth Amendments. *Freeman v. Att’y Gen.*, 536 F.3d 1225, 1230 (11th Cir. 2008).

he considered to be “arbitrary.” *Asay*, 210 So.3d at 31 (Lewis, J., concurring) (stating that there is no salient difference between June 23 and June 24, 2002 — the days before and after *Ring v. Arizona* was decided and drawing the line at that date is “arbitrary”). But using the date of finality is not arbitrary. Finality is typically based on the age of the case and the age of the case is a perfectly proper dividing line due to the problems of retrying older cases. *Johnson v. State*, 904 So.2d 400, 411 (Fla. 2005) (noting that the new penalty phases required if *Ring v. Arizona* was applied retroactively, would be “problematic” due to the age of the case because reassembling witnesses and evidence decades after the crime “would be extremely difficult” rendering the new penalty phases “less complete” as well as “less” accurate and reliable than original penalty phase). Furthermore, *James* and the preservation approach depends on the quality of direct appeal defense counsel. A capital defendant with a lawyer who foresaw the *Hurst* decisions will get relief but the capital defendant with a lawyer who did foresee the *Hurst* decisions will not get relief, which seems much more “arbitrary” than the objective fact of the age of the case.

This Court should recede from *James* altogether. In addition to *James* being in direct conflict with the standard retroactivity test of *Witt*, *James* confuses preservation with retroactivity. The purpose of the preservation requirement is to bring an error to the trial court’s attention in time to cure the error to prevent having to have a retrial and to prevent sandbagging. *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003) (explaining the principles under the requirement of a contemporaneous objection which affords the trial court an opportunity to possibly redress a claimed error and it also prevents counsel from allowing errors to go unchallenged and then later using the error to a client’s tactical advantage). Retroactivity analysis, on the other hand, is designed to identify those very few new cases that are so important that a new trial or new penalty phase is

warranted based on the new case. The two concepts have precious little in common, so it makes little sense to use one as a test for the other.

And, using preservation as a test for retroactivity totally ignores the importance of finality in any proper retroactivity analysis. As both the United States Supreme Court and this Court have observed, finality is the overriding concern in retroactivity analysis but *James* totally ignores finality.¹⁵ Proper retroactivity analysis should depend on the sheer importance of the change in the law and the age of the case reflecting the importance of finality which is exactly what *Teague* does. The “preservation approach” to retroactivity ignores the age of the case in its analysis whereas *Griffith* and *Teague* do not. What the commentators cited by Justice Lewis who believe that current retroactivity tests do not afford as much relief as they think is desirable do not understand is that *Griffith* and *Teague* are a complementary set of cases, as explained above. Preservation simply is not a proper test for retroactivity.¹⁶

¹⁵ *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting) (observing that the majority in applying *James*, forsakes and jettisons any thought of the State’s interest in finality despite how weighty that interest and noting *James* “totally disregarded the State’s strong interest in finality in the postconviction context”); *Teague*, 489 U.S. at 309 (explaining that without finality, “the criminal law is deprived of much of its deterrent effect”); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (stating that the finality concerns in retroactivity apply equally in the capital sentencing context); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity, on remand from the United States Supreme Court’s decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), because the main concern in retroactivity analysis “is the finality of convictions”).

¹⁶ Those commentators also ignore the “deeply problematic” aspect of a “preservation approach” to retroactivity, highlighted by Justice Canady, which is that both defense trial and appellate counsel would ignore all precedent, no matter how long standing in time or well established by number of cases that precedent was, and raise every possible issue. *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting). Indeed, one commentator advocating for the “preservation approach” criticized even the older federal test for retroactivity as being undesirable because

James is a true outlier. No court employs a “preservation approach” to retroactivity. While a few commentators advocate such an approach, all federal courts follow *Teague* and most state courts do as well. And the few state courts that do not use *Teague*, use the older federal test of *Stovall/Linkletter*, as this Court does in *Witt*. No state court routinely follows a pure “preservation approach” to retroactivity. Justice Lewis cites a law review in his concurring opinion but does not cite any caselaw from any court employing a preservation approach. *Asay*, 210 So.3d at 31 & n.21 (Lewis, J., concurring) (citing Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 232 (1998), but not caselaw). For all these reasons, this Court should not follow *James* or the preservation approach to retroactivity.

While the *Mosley* Court invoked *James*, it did not actually follow the *James* “preservation approach” to retroactivity. Instead, the *Mosley* Court created a new approach to retroactivity of partial retroactivity using *Witt*. The *Mosley* Court seems to have actually adopted an “atonement approach” to retroactivity seeking to atone for the Florida legislature’s “inaction” in not revising the state’s death penalty statute in the wake of *Ring v. Arizona* and the United States Supreme Court’s “delay” in overruling *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin*

it “discouraged litigation” which is an open admission that a “preservation approach” to retroactivity would encourage litigation and result in vastly more retrials. Yin, *A Better Mousetrap*, 25 AM. J. CRIM. L. at 236 (quoting Professor Mishkin). Kitchen-sink appellate briefs, raising scores and scores of issues in the face of controlling precedent against them, would be the inevitable result. Indeed, appellate counsel would likely be viewed as ineffective for not filing such briefs and would be trained to do just that. Proper retroactivity analysis should depend on the importance of the change in the law and the age of the case reflecting the importance of finality in most retroactivity tests, not on defense appellate counsel’s actions.

v. Florida, 490 U.S. 638 (1989). See *Mosley*, 209 So.3d at 1274, 1280 & 1283. The “atonement approach” makes little sense in light of the United States Supreme Court’s repeated admonitions to lower courts to follow existing precedent until they themselves overrule it. *Evans v. Sec’y, Fla. Dep’t of Corr.*, 699 F.3d 1249, 1257-63 (11th Cir. 2012) (refusing to overrule *Spaziano* and *Hildwin* because the Supreme Court “has told us, over and over again” to leave “to that Court the prerogative of overruling its own decisions” citing numerous cases). Nor does it make much sense for one court to atone for the actions of another court. But the main problem with the “atonement approach” to retroactivity, aside from its incoherence, is that it ignores the importance of finality in any proper retroactivity analysis.

But regardless of which retroactivity test is used, *Teague* or *Mosley*, or even *James*, Freeman is not entitled to any *Hurst* relief. Under either *Teague* or *Mosley*, *Hurst* does not apply to Freeman because his death sentence was final in 1991. And under *James*, Freeman is still not entitled to any *Hurst* relief because he did not preserve this claim in his direct appeal. As the trial court properly concluded, *Hurst* does not apply retroactively to Freeman.

Harmless error

Freeman asserts that the *Hurst v. State* error was not harmless in his case because his jury’s recommendation of death was not unanimous. IB at 12; *Freeman*, 761 So.2d at 1060 (noting the jury’s nine to three death recommendation). The State agrees under this Court’s precedent of *Davis v. State*, 207 So.3d 142 (Fla. 2016), a *Hurst v. State* error is not harmless unless the jury’s

recommendation was unanimous.¹⁷ But that precedent only applies to cases where *Hurst v. State* applies retroactively. Because *Hurst v. State* does not apply at all to this case, the issue of harmlessness is never reached. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1338 (11th Cir. 2019) (explaining that when a *Hurst* claim is *Teague*-barred, the “secondary question” of whether any such error was harmless is a “prohibited and pointless exercise”); *cf. Knight*, 936 F.3d at 1333 (explaining that if a claim is *Teague*-barred, “we do not reach its merits”). All legal analysis simply stops once the determination of non-retroactivity is made. The harmfulness of the *Hurst* error is a *non-sequitur* in this case because *Hurst* does not apply retroactively to Freeman.

Accordingly, the trial court properly summarily denied the *Hurst* claim on non-retroactivity grounds.

¹⁷ See, e.g., *Crain v. State*, 246 So.3d 206, 209-10 (Fla. 2018) (noting that this Court has “consistently” held that “*Hurst* errors are harmless in cases where the jury unanimously recommended death” and rejecting four arguments that *Davis* did not apply to the particular case), *cert. denied*, *Crain v. Florida*, 139 S.Ct. 947 (2019); *Tanzi v. State*, 251 So.3d 805, 806 (Fla. 2018) (finding a *Hurst* error harmless due to the unanimous jury recommendation of death quoting *Davis* and rejecting an argument that the error was not harmless because the jury was not given a mercy instruction), *cert. denied*, *Tanzi v. Florida*, 139 S.Ct. 478 (2018); *but cf. Reynolds v. State*, 251 So.3d 811, 816 (Fla. 2018) (stating that a unanimous recommendation of death is not sufficient alone for the *Hurst* error to be harmless and looking to other factors such as the jury instructions including a mercy instruction, the aggravators and mitigators, and the facts of the case but finding the error harmless), *cert. denied*, *Reynolds v. Florida*, 139 S.Ct. 27 (2018); and *Allen v. State*, 261 So.3d 1255, 1288-89 (Fla. 2019) (same).

ISSUE II

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INTELLECTUAL DISABILITY AS UNTIMELY? (Restated)

Freeman asserts that the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). But the trial court properly denied the claim without conducting an evidentiary hearing because the claim is both untimely and meritless. As the trial court properly concluded, the claim is untimely under this Court's controlling precedent of *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767 (Aug. 22, 2019); *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019); and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *cert. denied*, *Harvey v. Florida*, 140 S.Ct. 117 (2019). This Court has repeatedly held that intellectual disability claims brought by capital defendants who were sentenced to death before *Atkins*, must have been raised in 2004, as required by the rule of court governing intellectual disability claims to be timely. Fla. R. Crim. P. 3.203. But Freeman did not raise this claim until 2017. The claim is over 12 years late.

Alternatively, the claim of intellectual disability is meritless. Florida's statutes and caselaw requires a capital defendant establish three criteria to establish intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen by clear and convincing evidence. A defendant must establish all three prongs and the failure to meet any one of the prong means the defendant is not intellectually disabled under both the statute and this Court's recent caselaw.

But Freeman fails the first prong; his intellectual functioning is not significantly subaverage. Freeman's three IQ scores are 83, 84, and 72.

Considering all three IQ scores collectively, Freeman's IQ is between 77.5 and 79.6. Freeman's general intellectual functioning is **not** significantly subaverage. Freeman is not intellectually disabled.

The United States Supreme Court's decision in *Hall v. Florida*, which mandates an evidentiary hearing be held in certain cases, does not apply to a capital defendant, such as Freeman, whose IQ is above 75. No evidentiary hearing was required under *Hall v. Florida*. Thus, the trial court properly summarily denied the intellectual disability claim.

Standard of review

The standard of review of a summarily denied postconviction claim is *de novo*. *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019) (explaining a postconviction court's decision regarding whether to grant an evidentiary hearing is a pure question of law and is reviewed *de novo* citing *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013)), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767 (Aug. 22, 2019) (No. 19-5617)); *Jimenez v. State*, 265 So.3d 462, 474 (Fla. 2018) (explaining that because "a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review" citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

A trial court cannot err as a matter of law, if the trial court follows controlling Florida Supreme Court precedent, as the postconviction court did in this case. *Mann*, 112 So.3d at 1162 (explaining that because the claims "raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief"). The trial court found that the claim was untimely

following this Court's decisions in *Blanco*, *Harvey*, and *Bowles*. Therefore, there necessarily was no legal error under the *de novo* standard of review.

The trial court's ruling

The trial court summarily denied the intellectual disability claim as well. . . . (2019 ROA at 910-913). The trial court observed that this Court adopted a rule of criminal procedure governing claims of intellectual disability in capital cases in 2004. (2019 ROA at 910 citing Fla. R. Crim. P. 3.203; and *Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004)). The trial court explained under that rule any claim of intellectual disability in a capital case had to be filed within 60 days of the adoption of the rule on October 1, 2004, and that, if the claim was not filed by that time, the claim was waived. (2019 ROA at 910).

The trial court then noted that Freeman first raised this claim of intellectual disability on October 19, 2017. (2019 ROA at 910). The trial court then noted that it has issued an order to show cause why the claim should not be summarily denied as untimely. The trial court then addressed the three arguments made by the defense in response to the order to show cause as to why the claim was timely, despite not being filed until 2017. (2019 ROA at 910-912).

The trial court rejected the first argument that the claim could not be raised until the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016), made *Hall v. Florida* retroactively applicable to Freeman. (2019 ROA at 910-11). The trial court rejected this argument citing *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), and *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016).

The trial court also rejected the second argument that the decision in *Walls* provided good cause under rule 3.203(f). (2019 ROA at 911-12). The trial court

rejected this argument again citing *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), and *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019). The trial court quoted this Court’s conclusion in *Bowles* that “the record conclusively” shows that Freeman’s “intellectual disability claim is untimely” under the Florida Supreme Court’s precedent. *Id.* at 911-12 (quoting *Bowles*, 276 So.3d at 794).

The trial court additionally rejected the argument that intellectual disability claims cannot be forfeited as time barred under due process and the Eighth Amendment. (2019 ROA at 912-13). The trial court rejected this argument based on the controlling precedent of *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019). The trial court noted that it was not free to ignore precedent from the Florida Supreme Court. *Id.* at 912 (citing *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976)).¹⁸ The trial court also observed that when there is controlling Florida Supreme Court precedent disposing of a claim, the trial court should summarily deny the postconviction claim. *Id.* at 913 (citing *Mann v. State*, 112 So.3d 1158, 1162-63 (Fla. 2013)). For these reasons, the trial court summarily denied the intellectual disability claim.

Untimely

The claim is untimely under this Court’s controlling precedent. *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019) (applying the time bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim for the first time in the wake of *Hall v. Florida*), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767

¹⁸ This Court in *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976), explained where “an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court’s ruling when considering similar issues, even though the court might believe that the law should be otherwise.”

(Aug. 22, 2019); *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019); *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018) (affirming a trial court's summary denial of an intellectual disability claim as untimely because it was raised for the first time in 2016 citing *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016), and rejecting an assertion that the motion was timely based on restarting the clock from the date of the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016)), *cert. denied*, *Harvey v. Florida*, 140 S.Ct. 117 (2019). *Bowles*, *Blanco*, and *Harvey* were unanimous opinions from this Court on the issue of timeliness. No Justice of the Florida Supreme Court dissented in any of these three published opinions regarding timeliness. Freeman's intellectual disability claim is untimely under *Bowles*, *Blanco*, *Harvey*, and *Rodriguez*.

This Court has repeatedly held that intellectual disability claims brought by capital defendants who were sentenced to death before *Atkins v. Virginia*, 536 U.S. 304 (2002), must have been raised in 2004 to be timely, as required by the rule of court governing intellectual disability claims. Fla. R. Crim. P. 3.203. But Freeman did not raise an intellectual disability claim after the rule of court governing claims of intellectual disability was adopted in 2004 in the wake of *Atkins*. See *Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004) (explaining the history of the prohibition on executing intellectually disabled capital defendants and reasons for adopting rule 3.203). Under the new rule adopted in 2004, any capital defendant whose initial postconviction appeal had already been affirmed by this Court, could file a successive postconviction motion raising an *Atkins* intellectual disability claim within 60 days of the effective date of rule 3.203. *Amendments*, 875 So.2d

at 571.¹⁹ Freeman's initial postconviction appeal was affirmed by this Court in 2003, which was before the effective date of the new rule. *Freeman v. State*, 858 So.2d 319 (Fla. 2003) (No. SC01-2007). So, under rule 3.203(d)(4)(F), Freeman had until Tuesday, November 30, 2004, to timely file any intellectual disability claim in state court.²⁰

But Freeman did not file a successive postconviction motion raising an *Atkins* intellectual disability claim in 2004. Freeman did not raise this intellectual disability claim until 2017. The claim is over 12 years late.

¹⁹ Rule 3.203(d)(4)(F), provided:

If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

Amendments to Fla. Rules of Crim. Procedure & Fla. Rules of Appellate Procedure, 875 So.2d 563, 571 (Fla. 2004).

²⁰ Freeman's federal habeas petition was not filed until December 29, 2004, which was approximately a month after the deadline to timely file any intellectual disability claim in state court. But filing both a successive postconviction motion raising an intellectual disability claim in state court and a federal habeas petition also raising an intellectual disability claim in federal court would not have been a problem. Freeman could have filed a successive postconviction motion raising the *Atkins* claim in state court and sought a stay of his federal habeas petition in federal court until the completion of his *Atkins* litigation in state court under *Rhines v. Weber*, 544 U.S. 269 (2005). *Rhines* stays are quite commonly sought by capital habeas petitioners who have pending state litigations and routinely granted by Florida federal district courts. *Thompson v. Sec'y, Fla. Dep't of Corr.*, 425 F.3d 1364 (11th Cir. 2005) (remanding a capital habeas case to a Florida district court to consider whether a stay under *Rhines* to exhaust a claim in state court was warranted).

Any intellectual disability claim that was not raised by 2004 was waived under rule 3.203(f). The rule governing “Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty” contains a waiver provision. Rule 3.203(f) provided: “A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.” Freeman’s intellectual disability claim was forfeited under this waiver provision.

Furthermore, this Court has rejected both *Hall v. Florida*, 572 U.S. 701 (2014), and *Walls v. State*, 213 So.3d 340 (Fla. 2016), as a basis for a finding of good cause under the waiver provision of rule 3.203(f). *Bowles*, 276 So.3d at 794 (concluding that good cause was not established under rule 3.203(f), for failing to raise the intellectual disability claim in 2004 as required by the rule based on the argument that *Hall v. Florida* was not decided until 2014 citing *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016)). Freeman’s intellectual disability claim was waived under rule 3.203(f), regardless of the subsequent decisions in *Hall v. Florida* or *Walls*.

Nor does the argument that Freeman had to wait until *Walls v. State*, 213 So.3d 340 (Fla. 2016), which held *Hall v. Florida* was retroactive, to file an intellectual disability claim make any sense. Nothing prevented Freeman from filing his intellectual disability claim in the wake of *Hall v. Florida* in 2014. He did not have to wait three more years, until 2017, to file this claim. Indeed, nothing prevented Freeman from filing this claim in 2004 as required by the rule and then making the argument that his IQ scores should be adjusted for the statistical error of measurement (SEM), just like Hall, himself, did in *Hall v. Florida*. Freeman could have done in 2004 exactly what he did in 2017.

Opposing counsel asserts that any claim based on a categorical prohibition, such as the prohibition on executing the intellectually disabled, cannot be waived,

procedurally barred, or defaulted and that any such claims must be considered on the merits. IB. at 31. Opposing counsel's position is that intellectual disability claims, due to their fundamental importance, cannot ever be rejected by a court as untimely. But the United States Supreme Court disagrees. The High Court has held that even a claim of actual factual innocence may be rejected based on delay in bringing the claim of innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Additionally, the United States Supreme Court recently observed that claims in capital cases that are raised "in a dilatory fashion," as this intellectual disability claim was, should be dismissed. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories."). If an actual innocence claim may be rejected due to unexplained delay, as in *Perkins*, or dismissed altogether due to being pursued in a dilatory fashion, as in *Bucklew*, then an intellectual disability claim certainly can be time barred.

Furthermore, the argument that an intellectual disability claim, due to its importance, cannot be forfeited is the exact argument that was made to this Court and the United States Supreme Court in *Bowles*. Defendants, including capital defendants, waive fundamental and important rights, such as the right to a jury trial, routinely. This intellectual disability claim can be, and is, time barred.

The trial court properly summarily denied the claim as untimely following this Court's controlling precedent.

Reconsidering prior rulings

While the original postconviction judge assigned to the successive postconviction motion granted an evidentiary hearing on the intellectual disability claim mainly to explore the propriety of considering IQ scores collectively, the

successor judge reconsidered that ruling in light of subsequent caselaw from the Florida Supreme Court regarding the timeliness of such claims and summarily denied the claim following that controlling precedent.

Judges have had the power to reconsider their prior rulings since common law. *Commonwealth v. Haskell*, 784 N.E.2d 625 (Mass. 2003) (explaining a judge’s power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law). As one Massachusetts appellate court observed, judges “are not condemned to abstain from entertaining second thoughts that may be better ones” *Commonwealth v. Downs*, 579 N.E.2d 679, 681 (Mass. App. Ct. 1991). Florida courts endorsed this view as well. *Campos v. Campos*, 230 So.3d 553, 556 (Fla. 1st DCA 2017) (explaining that a court’s interlocutory orders are subject to reconsideration *sua sponte* including completely reversing the initial ruling citing *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998)); *Silvestrone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998) (recognizing inherent authority of trial judges to reconsider interlocutory orders).²¹ Furthermore, a successor judge may reconsider the prior ruling of a predecessor judge. *Campos v. Campos*, 230 So.3d 553, 556 (Fla. 1st DCA 2017) (“After a case is assigned to a different judge, a successor judge has the inherent authority to reconsider prior interlocutory orders” citing two second district cases); *Hull & Co., Inc. v. Thomas*, 834 So.2d

²¹ See also *LoBello v. State Farm Fla. Ins. Co.*, 152 So.3d 595, 600 (Fla. 2d DCA 2014) (stating that it is “well established that a trial court may reconsider and modify interlocutory orders at any time until final judgment is entered” quoting *Oliver v. Stone*, 940 So.2d 526, 529 (Fla. 2d DCA 2006)); see also *Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) (noting the inherent power of the trial court to reconsider, while the court has jurisdiction of the case and upon appropriate motion or objection by either counsel, a ruling previously made on a motion to suppress); *Cledenord v. State*, 247 So.3d 545, 548 (Fla. 4th DCA 2018) (noting that a trial court “has the inherent power to reconsider, while the court has jurisdiction of the case and upon appropriate motion or objection by either counsel, a ruling previously made on a motion to suppress” citing *Savoie*).

904, 906 (Fla. 4th DCA 2003) (explaining that “prior to final judgment, a successor judge has the power to vacate or modify a predecessor's interlocutory rulings” citing other district courts' cases).

A trial court's authority to reconsider its prior rulings is especially apt when a trial court reconsiders its prior ruling in light of new legal developments from a higher appellate court. Here, the successor judge reconsidered the prior ruling granting an evidentiary hearing in light of the Florida Supreme Court's decisions in *Blanco*, *Harvey*, and *Bowles* affirming summary denials of intellectual disability claims on untimeliness grounds. None of those cases had been decided when the predecessor judge had originally granted the evidentiary hearing in this case. All three cases were controlling precedent regarding the timeliness issue to the successor judge.²² A successor judge should not be bound by a previous judge's

²² There is some dispute regarding whether a judge may *sua sponte* reconsider the rulings of the prior judge or whether any reconsideration must be based on a party's motion. *Williams v. State*, 160 So.3d 541, 544 (Fla. 4th DCA 2015) (holding a successor judge may only reconsider a prior judge's ruling if a party makes an appropriate motion or objection “lest the trial court torpedo its role as an impartial arbiter”). While the State does not agree that the trial court's power to reconsider its rulings is dependent on the parties because the rationale for that power is judicial efficiency, that issue does not arise in this case because the State made an appropriate motion and an objection. The State, not the trial court, raised the timeliness issue and brought the new Florida Supreme Court caselaw to the trial court's attention. The State urged the trial court to reconsider its ruling granting an evidentiary hearing in its response to the motion to continue the evidentiary hearing filed several weeks before the trial court issued the order to show cause regarding the timeliness issue. The State argued in response to the motion to continue that the intellectual disability claim was untimely citing this Court's then recent decision in *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), as support. The State then in its response to the order to show cause again raised the timeliness issue arguing the intellectual disability claim was untimely citing both *Blanco* and *Harvey*. And then after the order to show cause, the State filed a motion to summarily deny the intellectual disability claim as untimely explaining that a trial court in the Fourth Judicial Circuit had just recently entered an order summarily denying a similar intellectual disability claim as

ruling granting an evidentiary hearing when the controlling precedent from the state's highest court is that the claim should be summarily denied.

Moreover, it would be an enormous waste of both the bench and bars' time, as well as taxpayer money, to have an evidentiary hearing on a claim just to have the trial court ultimately deny the claim solely on the timeliness grounds. The evidentiary hearing was granted in large part to explore the State's assertion that IQ scores should be considered collectively. But the evidentiary hearing would have also explored all three prongs of the test for intellectual disability in detail, including the time-consuming and fact-intensive second prong of adaptive functioning. Such an evidentiary hearing would involved numerous experts as well as lay witnesses. The defense had submitted an affidavit from Dr. Toomer; a report from Dr. Crown; and a declaration from Dr. Taub. The defense, no doubt, would have presented all three mental health experts at the evidentiary hearing. The State would have presented its mental health expert, Dr. Pritchard. as well. And the State was planned on presenting a mathematician to support its assertion that IQ scores should be considered collectively, just like any other measured

untimely in the active death warrant case of Gary Ray Bowles. The State asserted that the evidentiary hearing should be postponed until the Florida Supreme Court ruled in the warrant case of *Bowles*. And then the State immediately supplemented with this Court's decision in *Bowles*, which had affirmed the summary denial of an intellectual disability claim on timeliness grounds, in the trial court in this case. The State informed the trial court in this case of three controlling Florida Supreme Court published opinions holding that intellectual disability claims, like the one being raised by Freeman, were untimely and urged the trial court to summarily deny the claim before the trial court cancelled the evidentiary hearing and summarily denied the claim. So, here, the State repeatedly invoked the trial court's inherent authority to reconsider its prior ruling in its responses and by motion as well as by filing notices of supplemental authority. So, the trial court did not *sua sponte* raise the timeliness issue; rather, the State raised the issue based on new controlling Florida Supreme Court caselaw.

phenomena. The evidentiary hearing not only would have been a battle of the experts with the State paying for all of those experts but the experts' testimony would have involved complicated math regarding using a "composite" score versus using a mean or median which would have been a matter of first impression to any trial court.²³ The State is not aware of any case addressing this particular issue in the country. The trial court would have had to deal with the issue without any guidance from any other court. In the end, the trial court would likely have simply denied the intellectual disability claim after the evidentiary hearing on timeliness grounds in the interest of efficiency and simplicity. And, even if the trial court had taken the time to address the mathematical issue in the alternative in its final order, this Court may very well have simply affirmed on the

²³ *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in *The Oxford Handbook of Child Psychological Assessment*, 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013) Schneider has a formula for determining the "composite" score. The defense expert, Dr. Taub, however, did not use a "composite" score. Instead, he advocated not combining the scores at all. The declaration by Gordon Taub, Ph.D. asserted that there was no professional support in the psychological community for considering IQ scores collectively. So, the trial court would have to have decided among three options. One option seems to be standard procedure in the psychological community which is only considering the IQ scores individually but that option is not supported by caselaw or normal mathematical principles. The second option is considering IQ scores collectively using Schneider's formula for determining the "composite" score, which is supported by the *Hall* majority. And the third option is considering IQ scores collectively using a mean or median which is standard practice in the mathematical community and is supported by the dissent in *Hall v. Florida* and the more recent dissent in *Moore v. Texas*, 137 S.Ct. 1039 (2017). See *Moore*, 137 S.Ct. at 1054 & 1055 (Roberts, C. J., dissenting) (explaining that while medical clinicians, not judges, determine clinical standards, judges, not clinicians, determine Eighth Amendment law and concluding based on IQ scores of 74 and 78 that Moore failed the first prong of the test of intellectual disability because he did not have significantly subaverage intellectual functioning, despite the testimony regarding the medical consensus).

timeliness grounds and not reached the merits, as this Court has done in *Blanco*, *Harvey*, and *Bowles*. Any evidentiary hearing would not be worth the candle and the successor judge was certainly entitled to recognize this and simply follow this Court's controlling precedent regarding untimeliness instead.

The successor judge properly reconsidered the predecessor judge's order granting an evidentiary hearing in light of this Court new precedent. The successor judge properly cancelled the evidentiary hearing and properly summarily denied the claim.

Merits

Alternatively, the intellectual disability claim is meritless. Freeman's IQ is between 77.5 and 79.6 which is above the 75 cut-off established by the United States Supreme Court in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S.Ct. 1039 (2017). No evidentiary hearing was required.

IQ scores and testimony regarding intellectual ability in the existing record

At the penalty phase, Dr. Louis Legum, a forensic psychologist, testified as a **defense** mental health expert witness. (T. Vol. XXXIX 1643). Dr. Legum evaluated Freeman on July 7, 1987. (T. Vol. XXXIX 1645, 1646). Dr. Legum testified that Freeman had an IQ of 83 which is at the very low end of average intellectual capability. (T. Vol. XXXIX 1648, 1650). Dr. Legum testified that Freeman was not mentally retarded but was definitely below average. (T. Vol. XXXIX 1648, 1658). Freeman, however, performed poorly on achievement tests in school. The tests showed a fourth grade level achievement. *See Freeman v. State*, 761 So.2d 1055, 1060 (Fla. 2000) (noting a clinical psychologist testified that Freeman had a below average IQ and a fourth grade achievement level). Dr. Legum testified that in

Freeman's educational history there was no comprehensive psychoeducational assessment performed to establish learning disabilities. (T. Vol. XXXIX 1651).

At the state postconviction evidentiary hearing held on July 16-17, 2001, Dr. James Larson, a psychologist, testified as a **defense** mental health expert. (EH 114). In 1992, postconviction counsel Harry Brody had contacted him to perform an evaluation of Freeman. (EH 120). A neuropsychologist with his firm, Dr. Haggerott, performed a battery of tests on Freeman including the traditional intelligence tests. (EH 120). Specifically, she administered the Wechsler Adult Intelligence Scale Revised (WAIS-R) to Freeman in 1992. (EH 138). It was the same type of IQ test Dr. Legum had administered four years earlier. (EH 138). Dr. Haggerott wrote a report. (EH 120). Her results showed an IQ of 84 which is in the "low average range." (EH 124). Dr. Larson testified that Freeman's academic achievement was actually lower than expected based on his measured IQ. (EH 124). Dr. Larson testified that discrepancy between IQ scores and academic achievement is "typically used to diagnose a learning disability." (EH 125). Dr. Haggerott diagnosed Freeman with "mild neuropsychological impairments" and a "developmental disorder" which Dr. Larson testified amounts to a "learning disability." (EH 125). Dr. Larson reviewed school records which showed difficulty academically as well as socially. (EH 124-125). The school records were consistent with his firm's testing. (EH 127). While the cause of Freeman's impairments was unknown, Dr. Larson believed the source of Freeman's impairments could be the head injuries from being hit with a car as a child and a later bicycle accident, as well as his substance abuse. (EH 128, 130-131). Dr. Larson additionally reviewed Dr. Legum's testimony at the 1988 penalty phase. (EH 136). Dr. Larson noted the "striking consistent" results of Dr. Haggerott's IQ tests with Dr. Legum's IQ tests. (EH 136). Dr. Larson testified that consistency was important because it shows "reliability" and "validity." (EH 136). When "you

have repeated measures done on the same instruments over a period of time and get the same results,” it increases the “confidence in the accuracy of those results.” (EH 136). The two results fell within the standard error of measurement and were “essentially” the same for “all practical purposes.” (EH 137).

Trial counsel, Assistant Public Defender Patrick McGuinness, also testified at the postconviction evidentiary hearing. Trial counsel testified that he obtained the defendant’s juvenile records and his school records. (EH 307, 343). Trial counsel testified that he supplied Dr. Legum with these records. (EH 327, 329). Some of the comments contained in the school records attributed the defendant’s poor performance to being lazy. (EH 343-344). Post conviction counsel introduced a packet containing various records at the evidentiary hearing, including school records, as Defense Exhibit No. 5. (EH 294-295). Tab 9 of Defense Exhibit No. 5 are Freeman’s Duval County school records. His fourth grade teacher reported that “he does not try to do any work at all.” His sixth grade teacher reported that he was “uncooperative” and “lazy” and that he refused to attend special classes. But she reported that she had “very good cooperation from John’s father.” His eighth grade teacher reported that he was absent “constantly.”

In the 2017 successive postconviction motion, Freeman attached a report from Dr. Barry Crown reporting a full score of 72 on the Wechsler Adult Intelligence Scale (WAIS-IV) IQ test performed on October 4, 2017. So, the three IQ scores in the record are an 83, an 84, and a 72.

Florida’s statutory definition of intellectual disability

Florida has a statutory definition of intellectual disability for capital cases. The “[i]mposition of the death sentence upon an intellectually disabled defendant prohibited” statute, section 921.137(1), Florida Statute (2018), provides:

As used in this section, the term “intellectually disabled” or “intellectual disability” means 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 the 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 Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

See also Fla. R. Crim. P. 3.203(b). Florida's statutory definition of intellectual disability parallels the clinical definition of intellectual disability.²⁴ Under the statute, a capital defendant must show that he is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2018); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) (“a defendant must make this showing by clear and convincing evidence” citing § 921.137(4), Fla. Stat.), *cert. denied*, *Wright v. Florida*, 139 S.Ct. 2671 (2019) (No. 18-8653).

Under both the statute and Florida Supreme Court precedent, a defendant must establish three prongs to show intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). The Florida Supreme Court has explained that, if a defendant fails to prove any one of these three prongs, “the defendant will not be found to be intellectually disabled.” *Quince v. State*, 241 So.3d 58, 62 (Fla.

²⁴ Florida's statutory definition of intellectual disability was derived from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which was a standard clinical definition in 2001 when the statute prohibiting the imposition of the death penalty on intellectually disabled defendants was first adopted by the Florida legislature, before *Atkins* had even been decided. *Atkins*, 536 U.S. at 308, n.3 (reciting the definition of intellectual disability in the DSM-IV published in 2000); § 921.137(1), Fla. Stat. (2001).

2018) (six-Justice majority) (citing cases); *see also Wright*, 256 So.3d at 778-79 (Labarga, J., concurring) (emphasizing that a trial court is not required to consider other prongs of the test for intellectual disability when the defendant fails other prong); *Wright*, 256 So.3d at 779-80 (Lawson, J., concurring) (observing that the “statute contains a three-prong test for intellectual disability” and if “the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled” and noting that Wright failed to prove the first prong and for this reason alone, Wright does not qualify as intellectually disabled under Florida law). The Florida Supreme Court has explained that a defendant must meet all three prongs of the test for intellectual disability and if he cannot, it is proper to summarily deny the intellectual disability claim. *Quince*, 241 So.3d at 62. The Florida Supreme Court has also rejected an argument that a trial court was required to make findings as to all three prongs. *Quince*, 241 So.3d at 62.

The three pronged intellectual disability test

Freeman must establish that he has: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen by clear and convincing evidence. The State will address each of the three prongs in turn. But, because Freeman fails the first prong, he necessarily fails to establish that he is intellectually disabled.

Significant subaverage intellectual functioning

The first prong is significant subaverage intellectual functioning. Freeman's current intellectual functioning is not “significantly subaverage.” When multiple IQ scores are present, they should be considered collectively. *Hall*, 572 U.S. at 714 (stating that the “analysis of multiple IQ scores jointly is a complicated endeavor”

citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in *The Oxford Handbook of Child Psychological Assessment*, 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013)); *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the “well-accepted view is that multiple consistent scores establish a much higher degree of confidence”). In general, higher IQ scores are more reliable than lower scores. A. Frances, *Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM-5*, 31 (rev. ed. 2013) (explaining that there are many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it); *Forensic Psychology* 56 (“Although one cannot do better on an IQ test than one is capable of doing, one can certainly do worse.”).

Schneider has a formula for determining the “composite” score. Schneider, *Principles of Assessment of Aptitude and Achievement*, in *The Oxford Handbook of Child Psychological Assessment*, at 289-91. The author acknowledges that an average is a “rough approximation of a composite score,” but he advocates the use of a “composite” score in cases of low and high scorers. *Id.* at 290. But the author does not explain why using the median instead of the “composite” score does not accomplish the same goal in the case of low scorers. Opposing counsel, instead of using the composite score, however, simply ignores the prior IQ scores of 83 and 84 but that is not mathematically sound. Neither the majority nor the dissent in *Hall v. Florida* took the position that prior IQ scores were simply to be ignored, much less that prior IQ scores from **defense** experts can simply be ignored. *Hall v. Florida*, 572 U.S. at 714 (recommending the use of “composite” scoring); *Hall*, 572 U.S. at 742 & n.13 (Alito, J., dissenting) (noting the “well-accepted view is that multiple consistent scores establish a much higher degree of confidence”).

The State acknowledges that the psychological community often does not consider IQ scores collectively but they do not explain why or how that practice

can be squared with standard mathematical practices. It is standard mathematical practice when measuring the same underlying phenomena, such as IQ scores, to consider all valid scores collectively, by means of averages or medians. The basic holding of *Hall v. Florida* was that the standard error of measurement (SEM) must be used because it is standard mathematical practice to do so. *Hall v. Florida*, 572 U.S. at 712-13 (explaining that IQ scores are “imprecise” and the “SEM reflects the reality” that an individual’s intellectual functioning cannot be reduced to a single numerical score but rather is “best understood as a range of scores on either side of the recorded score.”). The capital defense bar may not invoke mathematical principles when it suits them and then ignore mathematical principles and rely instead on unexplained and unsound clinical practice when it does not. Surely, standard mathematical practice trumps standard psychological practice when dealing with numbers. And it is mathematicians, not psychologists, that are the real experts in the area of numbers. IQ scores should be considered collectively as is standard mathematical practice.

Freeman’s three IQ scores are 83, 84, and 72. The mean of Freeman’s three IQ scores of 83, 84, and 72, is 79.6. The median of the three scores is 77.5. Alternatively, using the bands of 78 to 88; 79 to 89; and 67 to 77 and considering the three bands together, no one number falls within all three bands but 78 is the center of the bands. The median is the lowest number at 77.5. The average is the highest number at 79.6. And the mid-band number is 78. Considered collectively, Freeman’s IQ is between 77.5 and 79.6. And all three of the collective scores, 77.5, 78, and 79.6 are above the 75 cut-off range established in *Hall v. Florida*.

Freeman does not have significant subaverage intellectual functioning. And his failure on the first prong of the test for intellectual disability means he fails the

test for intellectual disability. *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017) (affirming a postconviction court’s summary denial of a *Hall* intellectual disability claim based solely on the first prong), *cert. denied*, *Zack v. Florida*, 138 S.Ct. 2653 (2018). Freeman fails the first prong. Because Freeman fails the first prong, he necessarily fails to establish that he is intellectually disabled, much less by clear and convincing evidence. Freeman is not intellectually disabled.

Adaptive functioning

The second prong is significant deficits in adaptive functioning. Deficits in adaptive functioning are concurrent deficits in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Atkins*, 536 U.S. at 308, n.3 (quoting Am. Ass’n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992)); *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (stating that a capital defendant must show “significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety” citing *Rodriguez v. State*, 919 So.2d 1252, 1266, n.8 (Fla. 2005) (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 41 (4th ed. 2000)). It is currently defined as deficits in one of three broad categories or “domains”: conceptual, social, and practical. *Wright v. State*, 256 So.3d 766, 773 (Fla. 2018) (citing DSM-5), *cert. denied*, *Wright v. Florida*, 139 S.Ct. 2671 (2019).

Onset as a minor

The third prong is onset of the condition prior to age 18. As the Pennsylvania Supreme Court has explained, the onset prong is often the most reliable evidence of intellectual disability because it is normally generated at a time when there is no incentive to slant the evidence. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014) (noting capital defendants have a “powerful incentive to malingering and to slant evidence” after *Atkins*, making the third prong crucial). This prong is often both the most objective and most reliable evidence of intellectual functioning.

From Dr. Larson’s testimony at the evidentiary hearing in the initial postconviction proceedings which he based on Freeman’s school and juvenile records, Freeman was not intellectually disabled as a child. Freeman underperformed in school. While Freeman was assigned to special classes, this was based on his lack of effort and a possible learning disability, not from any formal intellectual disability as a child.

***Hall v. Florida* does not apply**

In *Hall v. Florida*, 572 U.S. 701 (2014), the United States Supreme Court held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant establishing a strict IQ test score cut-off of 70 was unconstitutional because the rigid rule created “an unacceptable risk that persons with intellectual disability will be executed.” *Id.* at 704. Instead of applying the strict cut-off when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. And, when a defendant’s IQ test score falls within the SEM, the defendant must be allowed to present additional evidence of intellectual disability, including

testimony regarding adaptive deficits. *Id.* at 723. *Hall* involved IQ scores of 71, 72, 73, and 80, all of which, but one score, was within the SEM.

But *Hall v. Florida* does not apply to any defendant whose full scale IQ score is above 75. As the United States Supreme Court clarified in *Moore v. Texas*, 137 S.Ct. 1039 (2017), it is only capital defendants whose IQ score is 75 or below that are entitled to an evidentiary hearing to explore the other two prongs. The *Moore* Court wrote that “*Hall* instructs that, where an IQ score is **close to**, but above, 70, courts must account for the test’s standard error of measurement.” *Id.* at 1049 (emphasis added). The High Court in *Moore* explained that “in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls **within** the clinically established range for intellectual-functioning deficits.” *Id.* at 1050 (emphasis added). The *Moore* majority explained that “**because** the lower end of Moore’s score range falls **at or below** 70,” the Texas courts “had to move on to consider Moore’s adaptive functioning.” *Id.* at 1049 (emphasis added). As is clear from the *Moore* decision, a defendant whose IQ is above 75 is not entitled to an evidentiary hearing under *Hall v. Florida*. As this Court has explained, it is only “when a defendant establishes an IQ score range — adjusted for the SEM — at or below 70,” that “a court must move on to consider the defendant’s adaptive functioning.” *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) (citing *Moore*, 137 S.Ct. at 1049), *cert. denied*, *Wright v. Florida*, 139 S.Ct. 2671 (2019) (No. 18-8653). *Hall v. Florida* does not apply at all to a defendant whose collective IQ score is above 75.

The mean of Freeman’s three IQ scores of 83, 84, and 72, is 79.6. The median of the three scores is 77.5. Neither the mean nor the median is 75 or below. Both the mean and the median are above the cut-off of 75 established in *Hall*. Alternatively, using the bands of 78 to 88; 79 to 89; and 67 to 77 and considering

the three bands together, no one number falls within all three bands but 78 is the center of the bands. The mid-band number of 78 is also above the cut-off of 75 established in *Hall*. The median is the lowest number at 77.5. The average is the highest number at 79.6. And the band number is 78. Considered collectively, Freeman's IQ is between 77.5 and 79.6, which is not **at or below** 70.

Freeman's collective IQ is between 77.5 and 79.6, which is above the 75 cut-off established in *Hall*. *Hall* does not apply to Freeman and he is not entitled to an evidentiary hearing under it. The trial court did not violate the Supreme Court's decision in *Hall* or this Court's decision in *Wright* by refusing to conduct an evidentiary hearing. The trial court properly summarily denied the intellectual disability claim.

The Flynn Effect

None of the IQ scores should be adjusted by the Flynn Effect. This Court has rejected use of the Flynn Effect. *Quince v. State*, 241 So.3d 58, 60-62 (Fla. 2018) (quoting the expert testimony at the evidentiary hearing and concluding that *Hall v. Florida* does not require that IQ scores be adjusted for the Flynn Effect citing numerous federal circuit court cases), *cert. denied*, *Quince v. Florida*, 139 S.Ct. 202 (2018) (No. 18-5018). The majority of state supreme courts and federal circuit courts, including the Eleventh Circuit, also reject use of the Flynn Effect.²⁵ As

²⁵ *Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017) (noting that neither *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), nor *Hall v. Florida* requires that IQ scores be adjusted for the Flynn Effect and observing that neither case even mentions the concept), *cert. denied*, *Black v. Mays*, 138 S.Ct. 2603 (2018) (No. 17-8275); *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015) (noting it is not common practice to adjust IQ scores for the Flynn Effect); *Smith v. Duckworth*, 824 F.3d 1233, 1244-46 (10th Cir. 2016) (following the Circuit's existing precedent of *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), and rejecting use of the Flynn Effect noting that *Hall v. Florida* says "nothing" about the Flynn Effect and

the Eleventh Circuit observed in *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 638 (11th Cir. 2016), far from mandating numerically specific Flynn Effect reductions, the DSM-V does “little more than acknowledge the possibility that the Flynn Effect is a ‘factor’ that ‘may’ impact an individual’s IQ score.” *Ledford*, 818 F.3d at 638. The Eleventh Circuit additionally noted, while the DSM-V states that the Flynn Effect may affect intelligence scores, it “does not provide any guidance as to how a clinician should actually apply the Flynn Effect, let alone mandate any 0.3 point-per-year reduction for IQ scores obtained from tests with outdated norms.” *Id.*

Current studies posit that the IQ scores of the population is declining, not increasing, as the Flynn Effect would have it. Ole Rogeberg & Bernt Bratsberg, *Proceedings of the National Academy of Sciences* (June 2018). And, regardless of its scientific validity or acceptance within the medical community, the Flynn Effect, which posits that the population is becoming smarter over time, is fundamentally inconsistent with the entire rationale of *Atkins* itself. The entire reasoning of the *Atkins* Court was that intellectually disabled defendants are not fully responsible due to their mental impairments but if everyone is becoming smarter, then that reasoning is undercut. *Hall v. Florida*, 572 U.S. at 709 (explaining those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence

observing that scientific and legal acceptance of this theory is “mixed”), *cert. denied*, *Smith v. Royal*, 137 S.Ct. 1333 (2017) (No. 16-7393); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 635-40 (11th Cir. 2016) (holding a district court is not required to apply the Flynn Effect because the medical community has not reached a consensus regarding the concept and noting some of the experts had testified that the Flynn Effect is not scientifically sound and not used in clinical practice), *cert. denied*, *Ledford v. Sellers*, 137 S.Ct. 1432 (2017) (No. 16-6444); *but see Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005).

rationale and that diminished capacity lessens the moral culpability and hence the retributive value of the punishment citing *Atkins*, 536 U.S. at 319-20). None of Freeman's three IQ scores should be adjusted to account for the Flynn Effect.

The intellectual disability claim is both untimely and meritless. Accordingly, this Court should affirm the trial court's summary denial of this claim and of the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the summary denial of the successive motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to STACY BIGGART, Assistant Capital Collateral Regional Counsel - North, 175 Salem Court, Tallahassee, FL 32301; phone: (850) 487-0922; email: Stacy.Biggart@ccrc-north.org and DAWN B. MACREADY, Assistant Capital Collateral Regional Counsel - North, 175 Salem Court, Tallahassee, FL 32301; phone: (850) 487-0922; email: Dawn.Macready@ccrc-north.org this 13th day of January, 2020.

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