No. SC19-1532
Lower Tribunal No. 16-1986-CF-011599-AXXXMA

IN THE

Supreme Court of Florida

JOHN FREEMAN,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Tatiana Salvador
Judge of the Circuit Court

APPELLANT'S INTITIAL BRIEF

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PRELIMINARY STATEMENT

This is Mr. Freeman's appeal of the circuit court's order denying his successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The following will be utilized to cite to the record:

"R1." – Epps record on direct appeal (SC60-71756);

"R2." – Collier record on direct appeal (SC60-73299);

"PCR1." – Collier first postconviction record on appeal (SC60-89199);

Appeal of summary denial of claims.

"PCR2." – Collier second postconviction record on appeal (SC01-2007);

Appeal after evidentiary hearing on claims.

"PCR3." – Collier third postconviction record on appeal (SC19-1532).

This appeal.

Any additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Freeman respectfully requests oral argument to meaningfully address this appeal. Oral argument will aid the Court in its resolution.

Mr. Freeman is intellectually disabled. He has not been afforded the opportunity for a hearing and adequate review of his intellectual disability at any point since, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court precluded the imposition of the death penalty on intellectually disabled

defendants. Mr. Freeman raised the issue of his intellectual disability to the extent permitted by existing case law at the time of his trial (pre-*Atkins*), but due to Florida's unconstitutional IQ cutoff of 70 was not able to litigate this to the extent currently mandated by the Eighth Amendment. He raised his claim post-*Hall v. Florida*, 134 S. Ct. 1986 (2014), but again no hearing has been allowed. The circuit court did not find that Mr. Freeman's evidence is not credible. Instead, the circuit court improperly imposed a procedural bar.

Due to this improper summary denial, Mr. Freeman was curtailed in his efforts to thoroughly litigate his intellectual disability. As this Court should be fully informed before ruling in this case, Mr. Freeman respectfully requests oral argument pursuant to Fla. R. App. P. 9.320.

STANDARD OF REVIEW

Where the circuit court denies postconviction relief without an evidentiary hearing, this Court should accept the defendant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, the Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Howell v. State*, 109 So. 3d 763, 777 (Fla. 2013). Procedural bar findings are reviewed *de novo*.

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Fourth Judicial Circuit in Duval County, Florida entered the judgments of conviction and sentences under consideration.

On November 11, 1986, Mr. Freeman was arrested and charged with burglary and the aggravated battery of Leonard Collier (hereinafter referred to as the "Collier case") which occurred that same day. (R2. 1-4). On December 4, 1986, Mr. Freeman was indicted for burglary and the first-degree murder of Mr. Collier. (R2. 12-14).

On November 26, 1986, and while still in custody from his arrest in the Collier case, Mr. Freeman was charged with burglary and the murder of Alvin Epps (hereinafter referred to as the "Epps case") which occurred on October 20, 1986. (R1. 1-2). On, April 23, 1987, Mr. Freeman was indicted for burglary, armed robbery, and the first-degree murder of Mr. Epps. (R1. 143-45).

The Epps case went to trial first, and on October 9, 1987, Mr. Freeman was found guilty of first-degree felony murder, burglary with an assault, and robbery with a deadly weapon. (R1. 399-401). After a penalty phase, the jury recommended a life sentence on October 13, 1987. (R1. 441). However, on December 11, 1987, the trial court overrode the jury and imposed a sentence of death. (R1. 568). On direct appeal, this Court affirmed Mr. Freeman's convictions, but vacated the

sentence of death and remanded to the trial court for the imposition of a life sentence. *Freeman v. State*, 547 So. 2d 125 (Fla. 1989).

While the Epps case was pending on direct appeal, and while Mr. Freeman's death sentence for the Epps case was still intact, the state moved forward with the trial of the Collier case. Mr. Freeman was found guilty of first-degree felony murder and burglary with assault on September 15, 1988. (R2. 182-83). The "advisory" jury recommended a sentence of death by a vote of 9 to 3 on September 16, 1988. (R2. 216). The court, not the jury, made the findings of fact required to impose a death sentence under Florida law. On November 2, 1988, the trial court sentenced Mr. Freeman to death (R2. 252-56).[1] On direct appeal, this Court affirmed Mr. Freeman's convictions and sentence of death for the Collier case. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).[2] The United States Supreme Court denied certiorari on June 28, 1991. *Freeman v. Florida*, 501 U.S. 1259 (1991).

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[1] In its sentencing order, the trial court found three aggravating circumstances: (1) Freeman had previously been convicted of the crimes of first-degree murder, armed robbery, and burglary to a dwelling with an assault, all of which had been committed just three weeks before the killing of Collier; (2) the murder occurred while Freeman was committing a burglary to a dwelling; and (3) the murder was committed for pecuniary gain. The judge found the second and third aggravating factors merged into one. Although the judge did not find any statutory mitigators, he found the following nonstatutory mitigation: (1) Freeman was of low intelligence; (2) he had been abused by his stepfather; (3) he possessed some artistic ability; and (4) he enjoyed playing with children. (R2. 257-60).

[2] Issues raised on direct appeal: (1) the prosecutor erred in presenting Ms. Epps' testimony at the penalty phase, and the trial court erred in denying the motion for a

A death warrant was signed by then-Governor Lawton Chiles on March 12, 1992. (SC60-73299). On April 7, 1992, Mr. Freeman filed a Petition for Extraordinary Relief and for a Writ of Habeas Corpus, containing a single claim in reference to the penalty phase jury instructions, as well as a request for stay of execution. (SC60-79651). On April 10, 1992, this Court granted a stay of execution, giving Mr. Freeman an opportunity to file a motion for postconviction relief with the trial court. (SC60-79651).

Mr. Freeman thereafter proceeded in postconviction as to the Collier case only.[3] He filed his initial Rule 3.850 motion for postconviction relief on June 29, 1992, and then filed an amended Rule 3.850 motion on October 26, 1994. (PCR1. 12-147; 178-318).[4] On July 29, 1996, the circuit court summarily denied all claims

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mistrial based on Ms. Epps' testimony; (2) the prosecutor made several improper comments during closing argument during the penalty phase proceeding; (3) the jury instruction on the aggravating factor of especially heinous, atrocious, and cruel was unconstitutionally vague; (4) the death penalty was proportionally unwarranted in this case; and (5) his sentence must be vacated and remanded if his prior conviction is reversed.

[3] Since Mr. Freeman received a life sentence in the Epps case, he was not appointed postconviction counsel in that case and did not file any motions for postconviction relief in that case.

[4] Mr. Freeman's initial Rule 3.850 motion, as well as his amended motion, included the following claims for relief: (1) access to files and records in possession of state agencies have been withheld in violation of Chapter 119.01, Fla. Stat.; (2) critical, exculpatory evidence was not presented to the jury during the guilt phase of his trial; (3) IAC penalty phase; (4) the sentencing jury was not provided with adequate instructions explaining the aggravating circumstances; (5) he was sentenced to death

without an evidentiary hearing. (PCR1. 424-34). Mr. Freeman filed an appeal of the summary denial of his claims.[5] He also filed an Amended Petition for Writ of Habeas Corpus on November 2, 1998.[6] The appeal of his claims was affirmed in part, and

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in reliance upon improper automatic aggravating factors; (6) the prosecutor made inflammatory and improper comments, which rendered the death sentence fundamentally unfair and unreliable; (7) his death sentence was based upon an unconstitutionally obtained prior conviction; (8) the penalty phase jury instructions shifted the burden to him to prove that life was the appropriate punishment; (9) he received ineffective assistance of counsel during the guilt phase of the Epps trial, and the State failed to disclose critical exculpatory evidence related to the Epps murder; (10) the State's decision to seek the death penalty in his cases was based upon racial considerations; and (11) cumulative error made his conviction and death sentence unconstitutional.

[5] Mr. Freeman raised the following issues in his appeal of the circuit court's summary denial of his Rule 3.850 motion: (1) the jury was not presented with critical exculpatory evidence during the guilt phase; (2) defense counsel was ineffective during the penalty phase; (3) his sentencing jury did not receive proper instructions on the aggravating circumstances of murder in the course of a felony, pecuniary gain, and heinous, atrocious, and cruel; (4) he was sentenced to death in reliance upon improper automatic aggravating factors; (5) the prosecutor made inflammatory and improper comments, which rendered the death sentence fundamentally unfair and unreliable; (6) his death sentence was based upon an unconstitutionally obtained prior conviction; (7) the penalty phase jury instructions shifted the burden to him to prove that life was the appropriate punishment; (8) he received ineffective assistance of counsel during the guilt phase of the Epps trial, and the State failed to disclose critical exculpatory evidence related to the Epps murder; (9) the State's decision to seek the death penalty in his cases was based upon racial considerations; (10) cumulative error made his conviction and death sentence unconstitutional; and (11) portions of the record were not attached, making the order unconstitutional.

[6] Mr. Freeman raised the following issues in his amended petition for writ of habeas corpus: (1) the trial court erred in denying motion for mistrial and counsel was ineffective for failing to raise the issue on direct appeal; (2) the trial court reversibly erred when re-instructing the jury on guilt phase instructions and counsel was ineffective for failing to raise the issue on direct appeal; (3) appellate counsel was

remanded for an evidentiary hearing on claims of ineffective assistance of counsel. Additionally, the petition for habeas relief was denied by this Court in its consolidated opinion. *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000).

After an evidentiary hearing, the circuit court entered an order denying relief on July 24, 2001. (PCR2. 155-67). On appeal, this Court affirmed the circuit court's denial of postconviction relief. *Freeman v. State*, 858 So. 2d 319 (Fla. 2003).[7] The United States Supreme Court denied certiorari on April 26, 2004. *Freeman v. Florida*, 541 U.S. 1010 (2004).

On December 29, 2004, Mr. Freeman filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. The

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ineffective for failing to argue numerous pretrial motions raised by defense counsel during the guilt phase; (4) appellate counsel was ineffective for failing to raise many of the numerous pretrial motions, objections and requests for mistrials raised by defense counsel during the penalty phase; (5) appellate counsel was ineffective for failing to argue the trial court erred in refusing to grant a continuance prior to the penalty phase; (6) the sentencing jury did not receive instructions adequately explaining aggravating circumstances; (7) he was sentenced to death in reliance upon automatic aggravating factors; (8) the prosecutor's inflammatory and improper comments and arguments during the penalty phase 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) appellate counsel was ineffective for failing to assure that the record on appeal was complete.

[7] Mr. Freeman raised the following two issues on appeal: (1) whether trial counsel was ineffective in the guilt phase for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty; and (2) whether trial counsel was ineffective in the penalty phase for failing to present evidence in mitigation.

district court denied the petition. *Freeman v. McDonough*, No. 3:03–CV–668–J–32 (M.D. Fla. 2006). Subsequently, the United States Court of Appeals for the Eleventh Circuit concluded that the district court properly denied Mr. Freeman's petition for habeas relief. *Freeman v. Atty. Gen.*, 536 F.3d 1225 (11th Cir. 2008). The United States Supreme Court denied certiorari on January 12, 2009. *Freeman v. McCollum*, 555 U.S. 1110 (2009).

On June 16, 2009, Mr. Freeman filed a motion for postconviction DNA testing pursuant to Fla. R. Crim. P. 3.853, requesting that the court order examination of hair samples collected during the investigation of the Epps murder. In this motion, Mr. Freeman argued that such DNA testing would exonerate him of the Epps murder and mitigate the sentence imposed in the instant case by eliminating one of the only two aggravating circumstances found in his case. (PCR3. 19-242). The court denied this motion as being facially insufficient. (PCR3. 293-95). Mr. Freeman then filed an amended Rule 3.853 motion on September 17, 2010. (PCR3. 323-546). This amended motion was stricken from the record pursuant to the State's motion due to the fact that the DNA testing was sought on evidence in Mr. Freeman's other case, which was not a capital case. (PCR3. 553-61; 561-65).

Later, on March 19, 2013, Mr. Freeman filed a successive Rule 3.851 motion, based upon claims of ineffective assistance of postconviction counsel for failing to

investigate mitigation and DNA evidence. (PCR3. 566-84).[8] This motion was denied by the court on July 30, 2013. (PCR3. 585-90).

Most recently, on October 19, 2017, Mr. Freeman filed a second successive Rule 3.851 motion for postconviction relief, primarily based upon the United States Supreme Court decisions in *Hurst v. Florida* and *Hall v. Florida*.[9] (PCR3. 626-45). A successive amended Rule 3.851 motion was filed on January 19, 2018. (PCR3. 697-734).[10] The circuit court initially granted an evidentiary hearing on the claim involving Mr. Freeman's intellectual disability, but later vacated the order and summarily denied Mr. Freeman's amended successive motion for postconviction relief. (PCR3. 761-64; 909-14). Mr. Freeman files this appeal challenging the summary denial of his claims.

SUMMARY OF THE ARGUMENT

Mr. Freeman appeals herein the circuit court's order summarily denying his successive motion for postconviction relief filed pursuant to Fla. R. Crim. P. 3.851, originally filed on October 20, 2017, and amended on January 18, 2018. Mr.

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[8] This motion is entitled "Defendant's Fourth Successive Motion to Vacate…" although it appears to actually be Mr. Freeman's *first* successive motion to vacate.

[9] *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

[10] The postconviction court granted the State's motion to strike the successive motion filed on October 19, 2017, because the Assistant Attorney General claimed to have not received it via the e-portal. This resulted in the filing of the amended motion by Mr. Freeman on January 19, 2018.

Freeman's successive postconviction motion raised two claims. Claim One argued that Mr. Freeman's death sentence is unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Claim Two of Mr. Freeman's postconviction motion argued that Mr. Freeman's death sentence is unconstitutional under the Eighth Amendment in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Walls v. State*, 213 So. 3d 340 (2016).

With respect to his first claim, Mr. Freeman argues his death sentence violates the Sixth Amendment under *Hurst v. Florida*, and he is entitled to the retroactive application of *Hurst v. Florida* under the fundamental fairness doctrine. The *Hurst* error in Mr. Freeman's case is not harmless because his death sentence was not recommended by a unanimous jury. Mr. Freeman also argues his death sentence violates the Eighth Amendment because the Court is treating Mr. Freeman differently than Mosley and depriving him of the benefit of *Hurst v. Florida*, based solely on when his conviction and sentence became final.

With respect to his second claim, Mr. Freeman argues that the circuit court erred in finding his intellectual disability claim time-barred based on this Court's rulings in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), without addressing his important constitutional arguments, and without making any fact-specific inquiry

or holding an evidentiary hearing on the timeliness of his filing. Because Mr. Freeman's claim is a categorical bar to his execution, and thus not waivable, and additionally because the circuit court's ruling relied on cases that were wrongly decided or factually distinguishable from Mr. Freeman's case, this Court should reverse the circuit court's ruling and remand for an evidentiary hearing in this case.

ISSUE 1:
APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*

Mr. Freeman was sentenced to death pursuant to an unconstitutional capital sentencing scheme. In denying this claim, the circuit court cited to this Court's opinion in *Asay v. State* and denied relief because Mr. Freeman's death sentence was final prior to the issuance of the United States Supreme Court's June 24, 2002, opinion of *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So. 3d 1 (Fla. 2016). While recognizing this Court's precedent, Mr. Freeman submits that *Asay* was wrongly decided and that he is entitled to relief.

Hurst v. Florida, 136 S. Ct. 616, 617 (2016) held, "Florida's capital sentencing scheme violates the Sixth Amendment …" On remand, this Court held in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that *Hurst v. Florida* means:

> that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose

> death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, So. 3d at 57. The Sixth Amendment right enunciated in *Hurst v. Florida* and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. This Court also noted that, even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id*. at 57-58.

A. The *Hurst* error in Mr. Freeman's case is not harmless.

In *Hurst v. State*, this Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." 202 So. 3d at 68. The State must also show beyond a reasonable doubt that no properly instructed juror would have dispensed mercy to Mr. Freeman by voting for a life sentence. All of these considerations must be factored into any evaluation of the reliability of Mr.

Freeman's death sentence and the likely outcome if a re-sentencing were conducted in conformity with Florida's new capital sentencing procedure.

Mr. Freeman's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered non-unanimous, generalized recommendation that the judge sentence Mr. Freeman to death. The record does not reveal whether Mr. Freeman's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators outweighed the mitigation. But the record *is* clear that Mr. Freeman's jurors were not unanimous as to whether the death penalty should even be recommended to the court.

Mr. Freeman's pre-*Hurst* jury recommended the death penalty by a vote of 9 to 3. This Court's precedent makes clear that *Hurst* errors are not harmless where the defendant's pre-*Hurst* jury recommended death by a non-unanimous vote. *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("[I]n cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless."). This Court has declined to apply the harmless error doctrine in every case where the jury's recommendation was not unanimous, and this Court should give defendants whose convictions became final pre-*Ring* the same consideration.

B. Mr. Freeman is entitled to the retroactive application of *Hurst v. Florida* under a fundamental fairness analysis

Hurst v. Florida was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court determined that *Hurst v. Florida* constituted a change in Florida law that was to be applied retroactively to Mosley and required the Court to grant postconviction relief, vacate Mosley's death sentence and remand for a re-sentencing.

Here, the fundamental fairness doctrine demands that the *Hurst* decisions be applied retroactively in Mr. Freeman's case. This Court has applied the fundamental fairness doctrine in other contexts, *see, e.g., James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and the *Mosley* Court applied the doctrine in the *Hurst* context, *see* 209 So. 3d 1248, 1274 (Fla. 2016). Justice Lewis endorsed this preservation approach in *Hitchcock v. State*. *See* 226 So. 3d 216, 218 (Fla. 2017) (Lewis, J., concurring) (stating that the Court should "simply entertain *Hurst* claims for those defendants who properly presented and preserved the substance of the issue, even before *Ring* arrived."). This Court should reconsider its precedent and apply the fundamental fairness doctrine to find *Hurst* retroactive to Mr. Freeman.

In assessing fundamental fairness, the *Mosley* Court explained that an important inquiry is whether the defendant unsuccessfully attempted to raise a challenge to Florida's capital sentencing scheme before *Hurst v. Florida* and *Hurst*

v. State were decided. *See id*. at 1275. If Mr. Mosley had raised such a challenge, the Court reasoned, it would be fundamentally unfair to prohibit him from seeking postconviction relief under *Hurst*, given that he had accurately anticipated the fatal defects in Florida's capital sentencing scheme even before they were recognized in the *Hurst* decisions. *See id*. The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State's interest in finality of death sentences. *Id*. ("In this instance . . . the interests of finality must yield to fundamental fairness.").

Here, as in *Mosley*, the *Hurst* decisions are retroactive under the fundamental fairness doctrine. Although Mr. Freeman's direct appeal was pre-*Ring*, he attempted to challenge Florida's unconstitutional capital sentencing statute in prior proceedings, even challenging Florida's capital sentencing scheme under *Ring* in a certiorari petition filed in 2009. *Freeman v. McCollum*, 129 S. Ct. 921 (2009). Under *Mosley*, this provides a sufficient basis to apply the *Hurst* decisions retroactively to Mr. Freeman. *See Mosley*, 209 So. 3d at 1276 n.13.

C. A "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Mr. Freeman

In denying this claim, the circuit court again concluded that Mr. Freeman was not entitled to relief based upon this Court's holding in *Asay* because it is uncontested that his sentence was final before *Ring* was decided. Recognizing this precedent, Mr. Freeman contends that *Asay* was wrongly decided, and that failing to

apply *Hurst v. Florida* to his death sentence violates the Eighth Amendment. The retroactivity of *Hurst* arises at the intersection of two principles that have become central fixtures of the United States Supreme Court's jurisprudence over the past four and a half decades.

The first principle, emanating from *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), is that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" (*id*. at 428). Succinctly put, this principle "insist[s] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The Eighth Amendment's concern against capriciousness in capital cases refines the older, settled precept that Equal Protection of the Laws is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a uniquely harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The second principle, originating in *Linkletter v. Walker*, 381 U.S. 618 (1965), and later refined in *Teague v. Lane*, 489 U.S. 288 (1989), recognizes the pragmatic necessity for the Court to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. This need has driven acceptance

of various rules of nonretroactivity, all of which necessarily accept the level of arbitrariness that is inherent in the drawing of temporal lines.

The Court has struck a balance between the two principles by honoring the second even when its application results in the execution of an inmate whose death sentence became final before the date of an authoritative ruling establishing that the procedures used in his or her case were constitutionally defective. *E.g.*, *Beard v. Banks*, 542 U.S. 406 (2004). If nothing more were involved here, that balance would be decisive. But this Court's post-*Hurst* retroactivity rulings do involve more. They inaugurate a kind and degree of capriciousness that far exceeds the level justified by normal nonretroactivity jurisprudence.

To see why this is so, one needs only consider the ways in which Florida's pre-*Ring* condemned inmates do and do not differ from their post-*Ring* peers:

What the two cohorts have in common is that both were sentenced to die under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial – a procedure finally invalidated in *Hurst* although it had been thought constitutionally unassailable under decisions of the United States Supreme Court stretching back a third of a century.

The ways in which the two cohorts differ are more complex. Notably:

(A) Inmates whose death sentences became final before June 24, 2002 have been on Death Row longer than their post-*Ring* counterparts. They have

demonstrated over a longer time that they are capable of adjusting to that environment and continuing to live without endangering any valid interest of the State.

(B) Inmates whose death sentences became final before June 24, 2002 have undergone the suffering chronicled in, *e.g.*, Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), and most recently by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts. "This Court, speaking of a period of four weeks, not 40 years, once said that a prisoner's uncertainty before execution is 'one of the most horrible feelings to which he can be subjected.'" *Id.* at 470. "At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 462 (1999) (Justice Breyer, dissenting from the denial of certiorari). Justice Breyer has concluded that protracted death-row incarceration alone is a matter of significant constitutional concern. The concern can only be intensified when a rule of nonretroactivity categorically denies relief to a class of inmates *because* they have endured for sixteen and a half years or more awaiting execution.

(C) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence – or even a capital prosecution – under the conventions of decency prevailing today. In the generation since *Ring* was decided, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. Thus, we can be sure that a significant number of cases which terminated in a death verdict before *Ring* would not be thought death-worthy by 2019 standards. We cannot say which specific cases would or would not; but it is plain generically – and even more plain in cases where the jury was starkly divided in its penalty recommendation, as it was (9 to 3) in Mr. Freeman's case – that some inmates condemned to die before *Ring* would receive less than capital sentences today.

A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of capital mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century. Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161 (2018). It is fair to say that capital sentencing trials conducted since 2000, when this Court put the legal

community on notice regarding the vital importance of developing mitigating evidence, have been far more likely to present a full picture of relevant sentencing information than pre-2000 trials. The explicit requirement that a mitigation specialist be included in capital defense teams was added to the ABA Guidelines in 2003. Since that time, the collection and presentation of mitigating evidence in capital cases has been increasingly professionalized.

(D) Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have received those sentences in trials involving problematic factfinding. The past two decades have witnessed a broad-spectrum recognition of the unreliability of numerous kinds of evidence – flawed forensic-science theories and practices, hazardous eyewitness identification testimony, and so forth – that was accepted without question in pre-*Ring* capital trials. Doubts that would cloud today's capital prosecutions and cause today's prosecutors and juries to hesitate to seek or impose a death sentence were unrecognized in the pre-*Ring* era. Evidence which led to confident convictions and hence to unhesitating death sentences a couple of decades ago would have substantially less convincing power to prosecutors and juries today. Concededly, penalty retrials in the older cases would also pose greater difficulties for the prosecution because of the greater likelihood of evidence loss over time. But the prosecution's case for death in a penalty trial seldom depends on the kinds of

evidentiary detail that are required to achieve conviction at the guilt-stage trial; transcript material from the guilt-stage trial will remain available to the prosecutors in all cases in which they opt to seek a death sentence through a penalty retrial; it is a commonplace of capital sentencing practice everywhere that prosecutors often rest their case for death entirely or almost entirely on their guilt-phase evidence, leaving the penalty trial as a *locus* primarily for defense mitigation. And even if a prosecutor does opt to seek a penalty retrial and fails to obtain a new death sentence, the bottom-line consequence is that the inmate will continue to be incarcerated for life. That is a substantially less troubling outcome than the prospect of outright acquittals in guilt-or-innocence retrials involving years-old evidence that concerned the Court in *Linkletter* and *Teague*.

Taken together, considerations (A) through (D) make it plain that the peculiar form of nonretroactivity presented by the *Mosley-Asay* divide produces a level of lethal arbitrariness and inequality that runs far beyond anything involved in standard-fare *Linkletter* or *Teague* rulings. Its denial of relief in precisely the class of cases in which relief makes the most sense is altogether perverse. Nothing in this Court's *Asay* or *Mosley* opinions provides a single plausible – or even coherent – justification for such an anomalous outcome.[11] To the contrary, those opinions

[11] A comparison of this Court's reasoning in *Mosley* and *Asay* is puzzling:

(1) In *Mosley*, the court articulates two state-law tests for retroactivity: a "fundamental fairness" test deriving from *James v. State*, 615 So. 2d 668 (Fla. 1993); and a three-factor test deriving from *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The relationship between the two tests is not clear: at one point the *Mosley* opinion appears to treat *Witt* as refining the *James* test (*Witt* "involves a more in-depth consideration of how to analyze when fairness must yield to finality based on changes in the law" [209 So. 3d at 1276]), but at another point it says that "[t]his Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty" (209 So. 3d at 1274 - 1275). What *is* clear is that this Court found *Hurst* retroactive under *James* (*id*. at 1275) independently of its alternative finding of retroactivity under *Witt* (*id*. at 1276 - 1283). But, baffingly, the same court's *Asay* opinion makes no reference at all to the *James* test: *James* is not discussed or even cited, and its omission is unexplained.

(2) Florida's *Witt* test closely resembles the United States Supreme Court's pre-*Teague* formula in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967). It considers three factors. In discussing the first factor, "Purpose of the New Rule" (209 So. 3d at 1277), the *Mosley* court concludes that it "weighs heavily in favor of retroactive application" (209 So. 3d at 1278). The *Asay* opinion, discussing the same factor – and describing the "purpose" of *Hurst* no differently than does the *Mosley* opinion – concludes rather more modestly that this factor "weighs in favor of applying *Hurst v. Florida* retroactively" (210 So. 3d at 10).

(3) The second *Witt* factor is "Reliance on the Old Rule" (*Mosley*, 209 So. 3d at 1278). Analyzing this factor in *Mosley*, this Court says it "weighs in favor of granting retroactive relief to the point of the issuance of *Ring*" (209 So. 3d at 1281) "[b]ecause Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002" (209 So. 3d at 1280). In *Asay*, the second *Witt* factor "weighs heavily against retroactive application of *Hurst v. Florida* to this pre-*Ring* case" (210 So. 3d at 12) because "this Court's reliance on the old rule has spanned decades' worth of capital cases, with 386 inmates currently residing on death row and 92 executions carried out since 1976" (*id*.). Notably: (a) The figure "386" includes *both* the *Mosley* and the *Asay* cohorts. Thus, this Court invokes as a reliance concern in *Asay* the 151 cases in which it held retroactive relief appropriate in *Mosley*, plus another 94 cases in which it would deny retroactive relief on harmless-error grounds (see note 15 *infra*). And (b) The *Asay* court mentions in an introductory historical passage that it had rejected a *Ring* claim – the same claim that prevailed in *Hurst v.*

display the kind of self-contradictory, contrived reasoning which the United States Supreme Court ordinarily views as the telltale run-up to an unreasonable result.

Mr. Freeman's request that this Court recede from its prior precedent is a timely request, because this Court is currently considering whether it should recede from its retroactivity analysis established in *Asay* and *Mosley*. On April 24, 2019, this Court ordered full briefing on this issue in *Owen v. State*, No. SC 18-810. This Court should recede from the partial retroactivity analysis established in *Asay* and *Mosley* and grant relief to all Florida death row prisoners sentenced under Florida's unconstitutional sentencing scheme, regardless of when their sentence became final.

Florida – in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). But it omits any discussion of *Bottoson* in its reliance analysis and thus does not explain why Florida prosecutors and courts were less entitled to rely on the constitutionality of Florida's unchanged statutory sentencing scheme after *Ring* (and *Bottoson*) than before.

(4) The third *Witt* factor is "Effect on the Administration of Justice" (*Mosley*, 209 So. 3d at 1281). In its analysis of this factor, the *Mosley* court says that "[h]olding *Hurst* retroactive to when the United States Supreme Court decided *Ring* would not destroy the stability of the law, nor would it render punishments uncertain and ineffectual" (209 So. 3d at 1281): "[H]olding *Hurst* retroactive would only affect the sentences of capital defendants. Further, in addition to the fact that convictions will not be disturbed, not every defendant to whom *Hurst* applies will ultimately receive relief." (209 So. 3d at 1282.) The *Asay* court, in contrast, concludes that the "Effect" factor "weighs heavily against applying *Hurst v. Florida* retroactively to Asay." (210 So. 3d at 13.) It says nothing about the considerations that "convictions will not be disturbed" and that "not every defendant . . . will ultimately receive relief" since some defendants waived jury trial and others will be unable to establish that *Hurst* error was prejudicial (*see Mosley*, 209 So. 3d at 1282).

ISSUE 2:

THE CIRCUIT COURT'S RULING THAT MR. FREEMAN WAS TIME-BARRED FROM THE CATEGORICAL EXEMPTION FROM EXECUTING THE INTELLECTUALLY DISABLED VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS

A. Background of Mr. Freeman's claim in the context of Florida's intellectual disability history and jurisprudence

Mr. Freeman was convicted of first-degree murder in Duval County Circuit Court in 1986. In his pre-*Atkins* mitigation investigation, he was evaluated by psychologist Dr. Legum, a clinical psychologist, who tested Mr. Freeman and determined he had a below average IQ and performed at a fourth-grade achievement level. *Freeman v. State*, 761 So. 2d at 1060.

On June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Although the Supreme Court was explicit in *Atkins* about the prohibition on execution of the intellectually disabled, the Supreme Court's decision "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall*, 572 U.S. at 719 (quoting *Atkins*, 536 U.S. at 317). Because *Atkins* left to states how to implement the constitutional restriction, and thus how to define how to raise a meritorious *Atkins*-based claim, litigants in Florida were constrained by Florida's statutory definition of intellectual disability in pursuing their claims.

At that time, Florida's statutory definition of intellectual disability in Fla. Stat. § 921.137 required that an individual's IQ score be "two or more standard deviations from the mean score on a standardized intelligence test," to qualify him as intellectually disabled. *See Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (interpreting the "clear" language of the 2001 statute). Two standard deviations from the mean is an IQ score of 70. *See Hall*, 572 U.S. at 711 ("The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points.") (quoting Fla. Stat. § 921.137(1)). Thus, as this Court later confirmed in *Cherry*, 959 So. 2d at 712, a plain reading of the statute between its enactment in 2001, and *Cherry*'s formal holding in 2007, still required individuals asserting an intellectual disability claim to have an IQ score of 70 or below.

In 2004, this Court promulgated Fla. R. Crim. P. 3.203. *See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Mem) (Fla. 2004) (hereinafter "*Amendments*"). With respect to timeliness, in its initial iteration, Rule 3.203(d)(4)(C) provided:

> If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C).

After the promulgation of Rule 3.203, and the expiration of the time frame in subsection (d)(4)(C), Mr. Freeman's postconviction counsel did not file an intellectual disability claim because Mr. Freeman's IQ was not 70 or below, and counsel's "hands were tied by Florida's approach to intellectual disability in the period of time between *Atkins* and *Hall*." (PCR3. 757, 759).

In 2014, the United States Supreme Court decided *Hall v. Florida*, which invalidated Florida's bright-line IQ score cutoff of 70 and found Florida's statutory scheme for the determination of intellectual disability unconstitutional. *See Hall*, 572 U.S. at 724. Thereafter, on October 20, 2016, this Court decided *Walls v. State*, 213 So. 3d 340. In *Walls,* this Court noted that "[p]rior to the decision in *Hall*, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled." *Walls*, 213 So. 3d at 345. As a result, the *Walls* Court held that under state law, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Id*. at 346. Nowhere in the *Walls* opinion did the Court condition the retroactive application of *Hall* to individuals who had previously raised an intellectual disability claim.

Mr. Freeman filed a successive Rule 3.851 motion on October 20, 2017, within one year after this Court's decision in *Walls*. In January of 2018, Mr. Freeman filed the reports of Dr. Barry Crown, a neuropsychologist, and Dr. Jethro Toomer, a forensic psychologist, both of whom concluded that Mr. Freeman can be properly diagnosed as an intellectually disabled person: he has significantly subaverage intellectual functioning, has deficits in adaptive functioning, and the origin of his deficits was pre-age 18. (PCR3. 653-61).

Dr. Crown tested Mr. Freeman with the current "Gold Standard" individually-administered full scale testing instrument: the Weschler Adult Intelligence Scales, IV edition. Mr. Freeman's intellectual functioning testing highlighted his significantly subaverage intellectual functioning, with a full scale sore of 72. (PCR3. 661). This score is within the current range of impaired intellectual functioning and supports a finding of intellectual disability. Cf. *Hall*; *Walls* (scores of 75 or below are within the range of impairment). Dr. Crown concluded that Mr. Freeman's IQ score, in conjunction with his adaptive deficits and pre-18 onset support the diagnosis of intellectual disability and found that Mr. Freeman is an intellectually disabled person. (PCR3. 661).

Dr. Jethro Toomer specifically assessed Mr. Freeman's history of adaptive functioning deficits. Under the current diagnostic approach, adaptive deficits are categorized under three broad domains: conceptual, social, and practical. A deficit

within only one of these domains is sufficient for the diagnosis. While Dr. Toomer concluded that Mr. Freeman had deficits in all three domains, Dr. Toomer found that Mr. Freeman's conceptual deficits were the most prominent. (PCR3. 655).

Within the conceptual domain, Dr. Toomer found that Mr. Freeman's adaptive deficits include a pattern of concrete thinking; lack of abstract reasoning; problems with literacy and communication; difficulty understanding and applying concepts; problems with thought, self-direction, and independent planning; and difficulty recognizing consequences. (PCR3. 655-56). These conceptual deficits overlap with deficits in the social and practical domains. In school, he sat in the corner of the classroom and did not learn. *Id.* Even as an adult, his capacity for independent, fully functioning adult living was limited. For example, Mr. Freeman could not maintain a bank account or credit card, did not vote or participate in community functions or use community resources, did not own property, and did menial, easy to follow and rote work. (PCR3. 657). Dr. Toomer concluded that Mr. Freeman has adaptive deficits which had a pre-18 onset, and these factors in conjunction with the IQ test results support the diagnosis. (PCR3. 658-59). Thus, Dr. Toomer concluded that Mr. Freeman is an intellectually disabled person.

Mr. Freeman's history of adaptive deficits is detailed in the proffered affidavits of David Sorrells, Wayne Watson and Douglas Freeman. (PCR3. 726-34).

Mr. Freeman also proffered the declarations of his previous postconviction attorneys, Harry Brody and Frank Tassone. Although his attorneys thought Mr. Freeman was an impaired individual, they "could not in good faith pursue and raise an *Atkins* intellectual disability claim in Mr. Freeman's case because his IQ is not 70 or below, regardless of his history of adaptive deficits and the fact that his disability began in his childhood." (PCR3. 757, 759).

Mr. Freeman also proffered the testimony of Dr. Gordon Taub through a signed declaration. (PCR. 751-54). Dr. Taub is a forensic psychologist with expertise in intelligence and the assessment of adaptive deficits. (PCR. 751). Dr. Taub's declaration addressed how the psychological and scientific community addresses multiple IQ scores in the context of determining significant subaverage intellectual functioning and refutes the State's suggestion that multiple IQ scores over decades of a defendant's life should be averaged. (PCR3. 751-54).

B. The circuit court's procedural ruling

The circuit court, in its written order denying Mr. Freeman's Rule 3.851 motion, found that Mr. Freeman's motion was time-barred because he failed to file an intellectual disability claim within 60 days of the promulgation of Fla. R. Crim. P. 3.203 (2004), and under this Court's rulings in *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (2018), and *Bowles v. State*, 276 So. 3d 791 (Fla. 2019).

C. Intellectually disabled individuals are categorically ineligible for execution under the Eighth Amendment, and such claims cannot be summarily barred by state procedural rules

With respect to this argument of timeliness of Mr. Freeman's motion, the circuit court relied on this Court's jurisprudence in *Bowles*, *Harvey*, *Blanco* and *Rodriguez*. This Court's jurisprudence violates the Eighth Amendment and ignores the United States Supreme Court's clear prohibition on executing the intellectually disabled. This categorical prohibition emanates from the Eighth Amendment because to execute the intellectually disabled "violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

The Supreme Court's post-*Atkins* jurisprudence affirms this categorical ban time and time again, analogizing the execution of the intellectually disabled to the executions of juveniles (and citing to *Roper v. Simmons*, 543 U.S. 551 (2005) in doing so). For example, in 2014, in *Hall v. Florida*, the Court stated:

> The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. *Ibid*. No person may be sentenced to death for a crime committed as a juvenile. *Roper*, *supra*, at 572, []. And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U.S., 321 [].

Hall, 572 U.S. at 708. In 2017 in *Moore v. Texas* the Court clearly stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 554-64 (2005)) (emphasis in original).

This Court should reconsider its previous jurisprudence time-barring intellectual disability claims because the United States Supreme Court has never held that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver, procedural bar or default. This Court should also reconsider *Bowles*, *Harvey*, *Blanco*, and *Rodriguez* because those decisions violate Mr. Freeman's rights to due process and create an unacceptable risk under the Eighth Amendment because they foreclose any opportunity for Mr. Freeman to receive a hearing on the merits of his intellectual disability claim.

States are required to implement the constitutional restriction in *Atkins* in compliance with the Eighth Amendment. *Hall*, 572 U.S. at 718. They are not free to create rules, or in this case, procedural bars, that risk the execution of an intellectually disabled person. The Supreme Court clearly stated that "[i]n *Atkins v. Virginia*, we held that the Constitution 'restrict[s] … the State's power to take the life of' *any* intellectually disabled individual," not individuals who meet an arbitrary, later-created procedural requirement. *Moore*, 137 S. Ct. at 1048 (citation omitted) (emphasis in original). The execution of the intellectually disabled is inherently risked when they are left without a forum for a merits review of their claims.

Notwithstanding any waiver or provision of Florida law, the Eighth Amendment requires that persons "facing the most severe sanction . . . have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S.

at 724; *see also Walls*, 213 So. 3d at 348 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). Thus, to the extent that *Rodriguez*, *Blanco*, *Harvey*, and *Bowles* foreclose individuals like Mr. Freeman from obtaining even *review* of their intellectual disability claims in Florida courts, this violates the Supreme Court's prescription in *Atkins* cases, which requires such individuals to at least have an "opportunity to present evidence of [their] intellectual disability." *Hall*, 572 U.S. at 724 ("Freddie Lee Hall may or may not be intellectually disabled, but *the law requires that he have the opportunity* to present evidence of his intellectual disability [.]") (emphasis added); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (explaining that the holding of *Hall* was "that it was unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an I.Q. above 70.") (internal citation omitted).

Individuals who are categorically ineligible for execution, like Mr. Freeman, cannot be left by states without a forum to at least receive a single merits review of such claims. Such holdings contravene *Atkins*, *Hall*, and progeny because they "create[] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S. at 704, in violation of the Eighth Amendment. With its

holdings in *Rodriguez*, *Blanco*, *Harvey*, and *Bowles*, this Court has created an arbitrary procedural impediment requiring individuals to have previously filed a frivolous claim before they can have their intellectual disability claim reviewed on the merits or seek the benefit of *Hall* (available to Florida litigants after *Walls*). Thus, this Court's application in cases like Mr. Freeman's violates the Eighth Amendment.

D. This Court's procedural bar violates the Supremacy Clause in light of *Montgomery v. Louisiana*

In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court established a framework for the retroactive application of new watershed procedure rules and substantive rules of constitutional law. Under *Teague*, courts must retroactively apply new substantive rules of constitutional law. Rules that prohibit a certain category of punishment for a class of defendants because of their status or offense are substantive in nature. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). In *Montgomery v. Louisiana*, the United States Supreme Court held "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. 718 (2016). In *Montgomery*, the Supreme Court found that the source of the substantive/procedural watershed categories was the Constitution, not the federal habeas statute. For that reason, *Montgomery* held states cannot deny retroactive effect to rules that are substantive/watershed procedural because that would violate the Supremacy Clause.

In *Atkins v. Virginia*, the United States Supreme Court issued a new substantive rule of constitutional law and held that the Eighth Amendment's prohibition against cruel and unusual punishments deprives States of the authority to impose the death penalty on intellectually disabled individuals. *Atkins* prohibited a specific sentence—a death sentence—from being imposed on a particular class of defendants—intellectually disabled individuals. A sentence imposed in violation of *Atkins* is not just erroneous, but contrary to law and, as a result, void. *See Seibold*, 100 U.S. at 376. A Florida court "has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery*, 136 S. Ct. at 731.

Although *Hall* followed *Atkins*, and implicated the same constitutional prohibition on the execution of the intellectually disabled, *Hall* too announced a new substantive rule. Whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016). *Atkins* altered the class of individuals that the law could punish by prohibiting the execution of the

intellectually disabled, even though *Atkins* itself contained procedural components. *See Montgomery*, 136 S. Ct. at 735. But "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones." *Id*.

Hall likewise announced a substantive rule because it expanded that class of individuals who could not be executed – the intellectually disabled – to individuals who had IQ scores falling in a broader range than previously recognized. *See, e.g., Walls*, 213 So. 3d at 346 ("We find that *Hall* . . . places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals *within a broader range of IQ scores than before*.") (emphasis added). Although *Hall,* like *Atkins*, contains procedural components – for example, the mechanics of the proper application of the SEM in the interpretation of IQ scores for the diagnosis of intellectual disability – these procedural components are not an impediment to *Hall*'s classification as a substantive constitutional rule, requiring application by the States by virtue of the Supremacy Clause.

For example, *Miller v. Alabama*, 567 U.S. 460 (2012), held that the Eighth Amendment forbids mandatory life without parole sentences for juvenile homicide offenders and thereby announced a new substantive constitutional rule, though the Court's decision in *Miller* contained procedural components. These procedural components – such as requiring a hearing in which a sentencer considers a juvenile offender's youth and attendant characteristics before determining that life without

parole is a proportionate sentence – were not an impediment to the Court's ruling that *Miller* announced a substantive constitutional rule, they simply described a process by which courts could "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735.

Similarly to *Miller*, *Hall* announced a new substantive constitutional rule when it prohibited a certain type of punishment on a category of offenders that had previously been excluded from the constitutional restriction announced in *Atkins*. And the procedural components delineated in *Hall*, which required the recognition of the SEM in the determination of IQ scores consistent with the medical community's standards, were designed to give effect to the new rule protecting the expanded class, in the same way that *Miller*'s procedural components were giving effect to the constitutional rule therein. *Miller* and *Hall* both have procedural components designed to give effect to "a substantive change in the law" by requiring that States "must [] attend[] by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Montgomery*, 136 S. Ct. at 735. *Hall* established a procedure that enabled defendants within five points of two standard deviations to present additional evidence of intellectual disability at an evidentiary hearing.

Florida is violating the Supremacy Clause by refusing to give effect to *Hall* for individuals in that expanded category. Those individuals, such as Mr. Freeman, have no opportunity to present evidence that they are within the expanded category because Florida courts summarily deny their claims regardless of the merits based on the procedural impediment of having previously complied with the time rules in the 2004 version of Fla. R. Crim. P. 3.203. This is in spite of this Court's opinion in *Walls.* While this Court claims *Walls*, and thus *Hall,* is to have retroactive effect, in reality this retroactive effect is only partially applied. While states are free to create their own retroactivity schemes, in doing so states cannot violate federal law in doing so; in other words, states may only provide the same or broader relief for constitutional violations than federal law requires, *see, e.g., Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), but they do not have the authority to limit relief to below that which the constitution requires. States may set the proverbial ceiling for relief, but they cannot set the floor below that which the constitution requires. That is what Florida's partial retroactivity scheme does; it frustrates the ability of those in the expanded *Hall* category, like Mr. Freeman, to get any meaningful review of their claims. This violates the Supremacy Clause in light of *Montgomery*.

E. Florida's procedural bar undermining *Hall* violates fundamental fairness

In her statement respecting the denial of certiorari in *Bowles v, Florida,* Justice Sotomayor commented on this Court's holding in *Walls* that *Hall* was retroactive:

> With one hand, the Florida Supreme Court recognized that such intellectually disabled prisoners sentenced before *Hall* have a right to challenge their executions on collateral review. With the other hand, however, the Florida Supreme Court has turned away prisoners seeking to vindicate this retroactive constitutional rule for the first time, by requiring them to have brought their *Hall* claims in 2004—a full decade before *Hall* itself was decided. This Kafkaesque procedural rule is at odds with another Florida rule requiring counsel raising an intellectual-disability claim to have a 'good faith' basis to believe that a death sentenced client is intellectually disabled (presumably under the limited definition of intellectual disability that Florida had then imposed. Fla. R. Crim. P. 3.203(d)(4)(A) (Supp. 2004).

Bowles v. Florida, 2019 WL 3977767 (Mem) (Aug. 22, 2019) (internal citations omitted).

According to the Merriam-Webster Dictionary, the term "Kafkaesque" refers to a situation "having a nightmarishly complex, bizarre, or illogical quality."[12] The term comes from the work of writer Franz Kafka, which is "characterized by nightmarish settings in which characters are crushed by nonsensical blind authority." *Id*. Justice Sotomayor's comment aptly describes Florida's procedural bar which requires intellectually disabled defendants to have filed a frivolous and meritless claim nearly fifteen years ago – before they were on notice that they were potentially in a class of persons that could be entitled to *Atkins*-based relief – in order to get the retroactive benefit of *Hall* guaranteed by *Walls*. This Court's procedural bar violates the principles of fundamental fairness articulated by this Court in *James v. State*, 615

[12] *See* https://www.merriam-webster.com/dictionary/Kafkaesque

So. 2d 668, 669 (Fla. 1993) and is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of due process and equal protection.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Supreme Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. The Supreme Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined the Supreme Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create classes of condemned prisoners.

This Court's procedural bar has crafted a class of condemned prisoners made up of intellectually disabled defendants with IQ scores higher than 70 who failed to

file a frivolous *Atkins* claim in 2004. Regardless of whether *Hall* is retroactive under federal law, Florida has chosen to make it retroactive under state law. States are allowed to do this under *Danforth*, but when they do, those rules have to comply with due process. Florida cannot with one hand give retroactivity and with the other hand take it away with an arbitrary rule that does not comply with due process. Here, that is exactly what this Court has done.

F. Mr. Freeman is entitled to an evidentiary hearing on the merits of his intellectual disability claim.

Mr. Freeman is entitled to an evidentiary hearing on the merits of his intellectual disability claim. "When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the [trial] court must look at the entire record." *Kelley v. State*, 3 So. 3d 770, 973 (Fla. 2009) (quoting *Wright v. State*, 995 So. 2d 324, 328 (Fla. 2008)) (internal quotations omitted). "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant's] allegations as true to the extent they are not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008).

Mr. Freeman proffered substantial evidence that he is intellectually disabled, including the reports of two experts, Dr. Jethro Toomer and Dr. Barry Crown, diagnosing him with intellectual disability, as well as the sworn declarations of lay witnesses from Mr. Freeman's childhood through his adulthood detailing his lifelong history of adaptive deficits. Mr. Freeman also proffered the report of a third expert,

Dr. Gordon Taub, opining that the State's hypothesized formula for combining and averaging full-scale IQ scores obtained over many years on different tests to obtain an overall average of Mr. Freeman's full-scale IQ scores is not supported by any recognized professional publications or manuals. (PCR3. 752). Moreover, Mr. Freeman presented the sworn statements of his previous postconviction attorneys, Harry Brody and Frank Tassone, both of whom acknowledge they believed Mr. Freeman was an impaired person but "could not in good faith pursue and raise an *Atkins* intellectual disability claim in Mr. Freeman's case because his IQ [was] not 70 or below, regardless of his history of adaptive deficits and the fact that his disability began in his childhood." (PCR3. 757, 759).

In "turn[ing] to the record" in this case, this Court should find that "[Mr. Freeman] has presented sufficient evidence to establish that he meets the statutory definition of intellectual disability." *Hall*, 201 So. 3d at 635. Just as in *Hall*, "[t]he record evidence in his case overwhelmingly supports the conclusion that '[Mr. Freeman] has been [intellectually disabled] his entire life." *Hall v. State*, 201 So. 3d 628, 638 (Fla. 2016) (quoting *Hall v. State*, 109 So. 3d 704, 712-14 (Fla. 2012) (Pariente, J., concurring) (first alteration added)).

Mr. Freeman has never had a hearing on his *Atkins*/*Hall* claim and the circuit court's incorrect application of a procedural bar should not preclude Mr. Freeman's

constitutional and due process rights. This Court should remand to the circuit court to allow Mr. Freeman to present his evidence at an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Freeman requests that this Court remand his case to the circuit court for imposition of a life sentence, or in the alternative, direct an evidentiary hearing in the circuit court, and any other relief deemed appropriate by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Initial Brief has been furnished via electronic service to Charmaine Millsaps, Assistant Attorney General, on this 24th day of December, 2019.

s/ *Stacy R. Biggart*
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Appellant's Initial Brief was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

s/ *Stacy R. Biggart*
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