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 REPLY BRIEF

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REPLY TO ISSUE 1: APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *HURST*

I. The State's cursory response to Mr. Freeman's constitutional arguments regarding the *Ring* cutoff should be rejected.

The State fails to substantively engage most of Mr. Freeman's federal retroactivity arguments regarding the *Ring* cutoff. The State fails to address Mr. Freeman's claim that the *Ring*-based cutoff violates the Eighth Amendment prohibition against arbitrary and capricious capital sentencing. (IB. 16-23). In its answer brief, the State invokes the holding of this Court in *Asay v. State* (AB. 15-16), but does not defend the rule itself or substantively engage at all with Mr. Freeman's arguments that *Asay* violates the federal constitution. All the State says regarding *Asay* is that it is this Court's precedent that establishes that "*Hurst v. State* does not apply to any capital case that was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided." (AB. 16). Freeman concedes that the *Ring* cutoff for retroactivity established in *Asay* is this Court's precedent. Mr. Freeman's arguments that *Asay*'s retroactivity rule is invalid because, among other things, it conflicts with the federal constitution is fully developed in his initial brief. (IB. 15-23). The State does not engage with those arguments and has therefore abandoned any arguments on those issues. *Cf. Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011)

("[A]n issue not raised in an initial brief is deemed abandoned"). Mr. Freeman maintains that this Court's partial retroactivity scheme established in *Asay* and *Mosley* violate the United States Constitution.

As Mr. Freeman emphasized, the effect of this Court's *Ring*-based cutoff is to grant or deny *Hurst* relief based on when a defendant's sentence became final relative to a years-old Supreme Court precedent, thereby carving Florida's death row into two groups that have nothing to do with individual culpability or the *Hurst* error that infected every death sentence in Florida. As Mr. Freeman argued in his initial brief, the *Ring* cutoff injects into Florida's death penalty jurisprudence a level of arbitrariness and capriciousness, as well as a denial of equal protection and due process, that is not present in typical circumstances where retroactivity is withheld based on pragmatic necessity to evolve constitutional protections prospectively without undue cost to the finality of preexisting judgments. A retroactivity cutoff at *Ring* inaugurates a kind and degree of capriciousness—granting relief in newer cases while denying relief in older cases, even though the constitutional error was the same for both groups—that far exceeds the level justified by normal non-retroactivity jurisprudence.

One need only consider how Florida's pre-*Ring* inmates do and do not differ from their post-*Ring* peers to see the Eighth Amendment infirmities in

Florida's scheme. The two groups were both sentenced under a procedure that allowed death sentences to be predicated upon factual findings not tested by a jury trial. But inmates whose death sentences became final before *Ring* have been on death row longer than their post-*Ring* counterparts and 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. Pre-*Ring* inmates also have undergone the prolonged suffering chronicled by Justice Breyer, dissenting from the denial of certiorari in *Sireci v. Florida*, 137 S. Ct. 470 (2016), longer than their post-*Ring* counterparts.

Pre-*Ring* inmates also are more likely than their post-*Ring* counterparts to have been sent to death row 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*, prosecutors and juries have been increasingly unlikely to seek and impose death sentences. A significant number of cases which terminated in a death verdict before *Ring* are cases where a death sentence would not be imposed, or even pursued, in the modern era. And pre-*Ring* inmates are more likely to have received death sentences in trials involving problematic factfinding: the past two decades have witnesses 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 cause today's prosecutors, juries, and judges to hesitate to seek or impose a death sentence are unrecognized in the pre-*Ring* era. Evidence that led to confident convictions and unhesitating death sentences decades ago would have substantially less convincing power to prosecutors, juries, and judges today.

Taken together, these considerations highlight that a *Ring*-based retroactivity cutoff involves a level of caprice that exceeds that tolerated by standard-fare retroactivity rules. A *Ring* cutoff's denial of relief is precisely the class of cases in which relief makes the most sense is irremediably perverse and inconsistent with the Eighth and Fourteenth Amendments. The proper remedy at this point is for the Court to extend *Hurst* retroactivity to all capital cases in Florida, including Mr. Freeman's.

With respect to the State's arguments that Mr. Freeman never previously challenged *Ring* in a petition for a writ of certiorari (AB. 31), and therefore is not entitled to retroactivity as a matter of fairness because he anticipated the holding of *Hurst* long before it was decided, that contention is incorrect. Mr. Freeman's citation in his initial brief was also incorrect. Mr. Freeman squarely challenged *Ring* in his petition for writ of certiorari filed February 20, 2004, in *Freeman v. McCollum*, 2004 WL 329339 (2004).

II. This Court should reject the State's requests to use Mr. Freeman's case to overrule Florida's decades-old state-law retroactivity and fundamental fairness doctrines and its own 2016 decision in *Mosley*

While not addressing the substance of Mr. Freeman's arguments, the State's answer brief on Mr. Freeman's *Hurst* claim consists mostly of inappropriate requests for this Court to take extreme measures such as overrule its longstanding state-law retroactivity doctrine and instead adopt the federal standard articulated in *Teague v. Lane* (AB. 16-23), recede from *Mosley v. State* (AB. 24-30), and recede from *James v. State* and fundamental fairness (AB. 30-36). These arguments go far beyond the scope of Mr. Freeman's appeal. The primary *Hurst* issue in this case is whether the circuit court's application of this Court's partial retroactivity scheme based on the date of *Ring* violates Mr. Freeman's federal constitutional rights. The Court should not decide in this appeal whether Florida's retroactivity doctrine itself should be re-visited, or whether defendants who have already been granted *Hurst* relief under *Mosley* should have their resentencings cancelled.

Troublingly, the State's requests to shove aside decades-old precedent use language that mirrors this Court's recent orders and opinions that discuss "receding" from settled law and disregarding stare decisis. *See, e.g.*, *Owen v. State*, No. SC18-819; *State v. Poole*, No. SC18-245. This Court should reject

the State's arguments and base its decision on the issues presented in Mr. Freeman's case, not the State's sweeping wish-list of overruling precedent.

III. To the extent that *Poole*, which was decided after the parties in this case filed their initial briefs, and/or *Owen*, which has not yet been decided, impact Mr. Freeman's *Hurst* claim, this Court should allow the parties to file supplemental briefs regarding those cases.

After Mr. Freeman and the State filed their briefs in this appeal, but prior to the filing of this reply brief, this Court decided *State v. Poole*, No. SC18-245, which has thrown Florida's *Hurst* law into chaos just over three years from the precedent this Court established, and Florida's death row litigants relied upon, in *Hurst v. State*. Also looming is this Court's decision in *Owen v. State*, No. SC18-819, which this Court has strongly indicated will overrule *Mosley* and prevent *Hurst* from applying retroactively to any death row prisoner in Florida who was sentenced under the old unconstitutional scheme. Given the gravity and complexity of the *Poole* and *Owen* cases on Mr. Freeman's *Hurst* claim, the parties should have an opportunity to address those decisions, and raise any state or federal constitutional challenges, before this Court decides Mr. Freeman's case.[1] Mr. Freeman suggests that the Court

[1] Indeed, there is significant reason to believe that applying *Poole* to Mr. Freeman's case would at a minimum violate his federal constitutional rights. *See, e.g.*, *Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The Eighth Amendment–which requires the State to insure that the death penalty is reliably inflicted only on the most morally culpable subset of those criminals who commit the most serious homicides (*see, e.g., Roper v. Simmons,* 543 U.S. 551, 568,

hold this case until *Owen* is decided, and thereafter allow the parties in this appeal to submit supplemental briefing on *Poole*, *Owen*, and related issues.

REPLY TO 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

I. The State's arguments regarding timeliness are incorrect.

In his initial brief in this Court, Mr. Freeman made three distinct constitutional arguments about the validity of the State's procedural bar allowing Florida's courts to refuse merits consideration of certain intellectual disability claims. First, Mr. Freeman argued that intellectual disabled individuals are categorically ineligible for execution under the Eighth Amendment and such claims cannot be summarily barred by state procedural rules. (IB. 30-33). Second, Mr. Freeman argued that this Court's procedural bar violates the Supremacy Clause in light of *Montgomery v. Louisiana.* (IB. 33-37). Third, Mr. Freeman argued that Florida's procedural bar undermining *Hall v. Florida* violates fundamental fairness. (IB. 37-40). The State's arguments on these points are either cursory, legally inaccurate, or waived.

(2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980))–is far more demanding than this Court's decision in *Poole* allows for. *Poole* also gives an unconstitutionally exiguous reading to the Sixth Amendment and cannot be reconciled with the commands of the Fourteenth Amendment. Mr. Freeman and the State should be permitted to address these issues in full in supplemental briefing.

A. The State misunderstands Mr. Freeman's argument that the Eighth Amendment prohibits the execution of the intellectually disabled and cannot be waived or defaulted.

With regard to Mr. Freeman's first timeliness argument, the State seems to argue that the United States Supreme Court would agree that the execution of some intellectually disabled individuals is permissible because, in the State's view, the Court has even approved of the execution of the factually innocent based on procedural rules. *See* Answer Brief (AB) at 44-45 ("Opposing counsel asserts that any claim based on a categorical prohibition, such as the prohibition on executing the intellectually disabled, cannot be waived . . . 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 . . ."). These assertions misunderstand and mischaracterize Mr. Freeman's argument as well as the Supreme Court's precedent with regard to intellectual disability claims.

The State's insistence on the constitutionality of executing the factually innocent is concerning for a number of reasons, but of relevance here it is important to note that it misstates the United States Supreme Court's precedent on this issue. Significantly, the Supreme Court has never answered the question of whether a it is permissible to execute the factually innocent, or whether a freestanding claim of actual innocence exists in habeas proceedings. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas

relief based on a freestanding claim of actual innocence."); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."). That the Court in *McQuiggin* found that a showing of actual innocence could serve as a procedural "gateway" for litigants who have filed untimely federal habeas petitions—a narrow issue—does not mean, as the State argues, that the Court finds it constitutionally permissible to execute the factually innocent or that dilatoriness justifies the execution of the factually innocent. The State's claim that the Constitution permits executing innocent people is deeply disturbing and not rooted in Supreme Court jurisprudence.

The State fails to recognize that legally intellectual disability claims are not like claims of factual innocence. Unlike actual innocence claims, the Court has been clear on the issue of executing the intellectually disabled: it is unconstitutional. *See Atkins*, 536 U.S. at 320; *Hall v. Florida*, 572 U.S. 701, 708 (2014); *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015); *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017). This categorical rule originates from the Eighth Amendment, and concerns "the characteristics of the offender" that make such persons ineligible for execution. *Graham v. Florida*, 560 U.S. 48, 60 (2010).

The State's attempts to analogize factual innocence with intellectual disability is ill-fitting—and with good reason. There is one appropriate analogy here, as the Supreme Court has clearly stated the Eighth Amendment only prohibits the

execution of two types of offenders: juveniles and the intellectually disabled. *Id*. at 61. For individuals who were juveniles at the time of their offense, their *age*, an immutable and indisputable characteristic of said offender, renders them ineligible for execution. So too are the intellectually disabled ineligible for execution—intellectual disability is a lifelong and incurable characteristic. As Mr. Freeman argued in his initial brief, *see* IB at 30, the Supreme Court continually cites *Roper v. Simmons*, 543 U.S. 551 (2005), which first held the execution of juveniles to be unconstitutional, in its *Atkins* jurisprudence. The State completely ignores this corollary, in favor of a convoluted argument about factual innocence, because it logically results in the conclusion that Mr. Freeman has been arguing all along: intellectual disability is a categorical bar to execution that cannot be waived or defaulted, just as is juvenile status at the time of a capital offense. Courts cannot refuse to consider the merits of an intellectual disability claim any more than courts may refuse to consider whether an individual had reached the age of eighteen at the time of a capital offense.

B. The State ignores Mr. Freeman's arguments for why Fla. R. Crim. P. 3.203(d)(4)(F) is unfair under the Eighth Amendment and violates his due process rights.

In its answer brief, the State explains what Fla. R. Crim. P. 3.203(d)(4)(F) is, and illustrates how Mr. Freeman did not comply with it. (AB. 41-43). In doing so, the State fails to engage any of Mr. Freeman's arguments for why the rule is unfair

in violation of the Eighth Amendment and Due Process Clause. This point is sufficiently developed in Mr. Freeman's initial brief. (IB. 37-40).

Rather than addressing the unfairness and arbitrariness concerns discussed in his initial brief, the State dismisses Mr. Freeman's argument by simply asserting that this Court has rejected his argument *Bowles*. But Mr. Freeman acknowledged *Bowles* and argues that it was wrongly decided (IB. 37-38) and should be revisited by this Court, especially in light of the clear fairness and arbitrariness concerns articulated by Justice Sotomayor:

> 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).

Bowles v. Florida, -- S. Ct. --, 204 L. Ed. 2d 1181 (2019) (Sotomayor, J., respecting denial of certiorari) (internal citations omitted). And unlike *Bowles*, the record in this case contains affidavits of counsel specifically confirming the impediment to bringing a good faith intellectual disability claim for a client who had a disqualifying IQ score during the pre-*Hall* legal landscape.

In any event, this Court can and should reconsider its prior acceptance of this "Kafkaesque" rule. Although *Bowles* rejected a similar challenge to Rule 3.203(d)(4)(F), this Court is free to overrule an earlier decision where it concludes that the decision was incorrect, regardless of traditional *stare decisis* considerations. *See State v. Poole,* SC18-245, 2020 WL 370302, at *15 (Fla. Jan. 23, 2020) (explaining that this Court may reconsider incorrect decisions, without constraint of *stare decisis*, because *stare decisis* inquiries are "malleable and do not lend themselves to objective, consistent, and predictable application" and "encourage us to think more like a legislature than a court" and function as "excuses to justify a court's unwillingness to examine a precedent's correctness on the merits.").

C. The State has waived any arguments related to *Montgomery v. Louisiana* and Justice Sotomayor's statement respecting the denial of certiorari in *Bowles v. Florida.*

In Section II(D) of his initial brief, Mr. Freeman clearly and prominently briefed his argument that this Court's procedural bar violates the Supremacy Clause in light of *Montgomery v. Louisiana*. (IB. 33-37). In Section II(E), Mr. Freeman also briefed his claim that Florida's procedural bar undermining *Hall* relief to death row inmates violates fundamental fairness. Mr. Freeman specifically discussed Justice Sotomayor's statement respecting the denial of certiorari in *Bowles v. Florida* that this Court has placed defendants and capital defense lawyers in the Kafkaesque-position of having to raise frivolous and meritless claims in order to avoid a

procedural bar decades down the road. (IB. 37-40). 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).

The State's only reference to this argument is to claim, but make no substantive argument to support, that Mr. Freeman did not need to wait for *Hall* and *Walls* to assert his intellectual disability claim under Rule 3.203(d)(4)(F) in 2004. (AB. 44). The State completely ignores Mr. Freeman's arguments, and has thereby waived any argument in response to Mr. Freeman's claims.

II. The State's arguments that Mr. Freeman is not entitled to an evidentiary hearing are legally and factually inaccurate.

A. Contrary to the State's mischaracterization, Mr. Freeman's factual proffer establishes that he can meet all three prongs of intellectual disability at an evidentiary hearing.

Importantly, the circuit court's order in this case did not discuss or make any findings of fact concerning the merits of Mr. Freeman's intellectual disability claim. Although Mr. Freeman is intellectually disabled and his claim is meritorious, the merits of his claim are not before this Court on appeal. However, because the State has devoted substantial space in their brief to the merits of this claim, Mr. Freeman

responds to clarify both the merits of his intellectual disability claim as well as the relevant legal standard for an evidentiary hearing, which the State's arguments muddle.

To be clear, Mr. Freeman's challenge to the circuit court's procedural bar ruling is not academic: he has a strong intellectual disability claim that, if heard on the merits, would establish his entitlement to relief. Mr. Freeman proffered to the circuit court strong evidence of his intellectual disability on each of the three prongs required for such a diagnosis.

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).

The State's bare assertion that Mr. Freeman's intellectual disability is conclusively refuted by the record—a record which has never had the benefit of testimony from any expert who has evaluated Mr. Freeman for intellectual

disability—is not supported by the reality of this case. Further, the State's arguments against the merits of Mr. Freeman's claim, and the necessity of an evidentiary hearing, should be rejected because they are not supported by the scientific community, and because they misconstrue the relevant legal standard.

B. The State's arguments disputing the merits of Mr. Freeman's intellectual disability diagnosis are not supported by the record or medical community.

The State's arguments regarding the merits of Mr. Freeman's intellectual disability claim are speculative and premature, as Mr. Freeman has never had the opportunity to fully and fairly present evidence of his intellectual disability. The State has consistently opposed any hearing in this case, and the circuit court refused to hold a hearing, under a timeliness theory. Nevertheless, the State attempts to argue the merits of a claim that Mr. Freeman has never been allowed to present before any court. These premature arguments are worth only brief discussion here to correct several inaccuracies in the State's brief.

The State argues that Mr. Freeman's intellectual disability claim is conclusively refuted by the record because, according to the State's convoluted and baseless averaging of Mr. Freeman's test scores, Mr. 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). (AB. 50). The State's arguments are inaccurate, misleading, and refuted by Mr. Freeman's factual proffers and the medical community.

The State's suggestion that Mr. Freeman's IQ scores should be averaged, or alternatively, considered in "median," is a creation not found in resources by the medical or psychological community. The State's creative formula for the consideration of Mr. Freeman's IQ scores was rejected by the circuit court: "Neither of the State's assertions—that the most recent IQ score should be ignored as 'slant[ed]' or that the mean, median and 'center of the band[]' figured are the correct way to analyze Defendant's intellectual functioning—is supported by competent, substantial evidence." (PCR3. 761-64). While the circuit court amended its order granting an evidentiary hearing, due to application of a time bar, it did not rescind its rejection of the State's dubious IQ score formula. (PCR3. 909-14).

The State concedes that the psychological community, which is the relevant scientific community for intellectual disability claims, "often does not consider IQ scores collectively," and instead suggests that a mathematician should tell the courts how to consider multiple IQ scores because "standard mathematical practice trumps standard psychological practice when dealing with numbers." (AB. 55-56).

Despite the rejection of this theory by the circuit court and the psychological community, the State persists with its argument that Mr. Freeman's three IQ scores of 83, 84, and 72 should be considered together. The State computes a mean of 79.6,

and a median of 77.5. (AB. 56). The State alternatively suggests this Court consider that "using the bands of 78 to 88; 79 to 89; and 67 to 77" to find that 78 is the center of the bands. *Id*. The State also reveals for the first time in its answer brief that it intended to call at mathematician at the evidentiary hearing to support its assertion that IQ scores should be considered collectively, and flouts that its presentation would be a matter of first impression in any trial court. (AB. 49). The parties were several weeks away from an evidentiary hearing before the circuit court amended its order granting a hearing based on *Bowles* and the State never disclosed such an expert or his/her report. This Court should not consider the State's arguments about averaging IQ scores based on a computation formula that has been rejected by the psychological community and not based on record evidence before this Court.

Regarding adaptive deficits, Mr. Freeman proffered sworn statements from friends and family establishing that Mr. Freeman had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. (PCR3. 726-34). However, The State does not make any specific arguments about Mr. Freeman's adaptive deficits, (AB. 57), and therefore concedes that he has significant adaptive deficits in the conceptual, social and practical domains as discussed by Dr. Toomer in his declaration. (PCR3. 655-59).

Mr. Freeman has also proffered evidence that his intellectual disability manifested before the age of 18—the lay witnesses knew Mr. Freeman in his

childhood or teenage years, and Dr. Toomer also concluded that Mr. Freeman's adaptive deficits had a pre-18 onset. (PCR3. 658-59).

The State's assertion that Mr. Freeman's intellectual disability claim is conclusively refuted by the record—is not supported by the reality of the case. It is based on the State's bizarre and unsubstantiated claim that IQ scores should be considered collectively.

C. The State misstates the legal standard for evidentiary hearings on the merits.

Mr. Freeman is entitled to an evidentiary hearing on the merits of his intellectual disability claim, and the State's arguments to the contrary apply the wrong legal standard. "Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State*, 59 So. 3d 82, 96-96 (Fla. 2011) (citation omitted). In determining whether a postconviction motion may be summarily denied, courts 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, 1081 (Fla. 2008) (citing *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)).

The State mischaracterizes this standard by failing to accept Mr. Freeman's factual proffers as true, which refute the State's arguments. Further, those arguments that ignore Mr. Freeman's factual proffer and the guidance of the medical

community, like the State's bizarre mathematical formula for considering IQ scores collectively, are not record evidence, and are not conclusive. The State also argues that Mr. Freeman's claim does not warrant an evidentiary hearing because he does not meet the criteria for intellectual disability "by clear and convincing evidence." (AB. 57). But contrary to the State's suggestion, Mr. Freeman need not conclusively prove he is intellectually disabled to warrant an evidentiary hearing. He only needs to plead sufficient facts to obtain an evidentiary hearing where he may then prove his intellectual disability. Mr. Freeman has proffered sufficient facts to be entitled to an evidentiary hearing on the merits of his intellectual disability claim, notwithstanding any procedural concerns, and the State's legally inaccurage arguments should be disregarded.

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, reverse the circuit court's decisions procedurally barring his intellectual disability claim, and remand for a hearing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Reply Brief has been furnished via electronic service to Charmaine Millsaps, Assistant Attorney General, on this 29th day of January, 2020.

s/ *Stacy R. Biggart*
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CERTIFICATE OF FONT

I hereby certify that the foregoing Appellant's Reply 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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