IN THE SUPREME COURT OF FLORIDA

JOE ELTON NIXON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC20-48
L.T. No. 371984CF002324AXXXXX

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

This is the appeal of a trial court order denying the "Successive Motion Under Fla.R.Crim.P. 3.203 and 3.851." Citations will be designated as follows: references to the order are referred to by "Order," followed by the page number; and, the Initial Brief is referred to by "IB," followed by the page number.

STATEMENT OF THE FACTS

Juvenile Adjudications

"As a juvenile, Nixon was adjudicated delinquent six times in connection with various charges of shoplifting, petit larceny, grand larceny, possession or sale of stolen property, first-degree arson, possession of burglary tools, and burglary." *Nixon v. State*, 572 So.2d 1136, 1346 (Fla. 1990).

1974 Intelligence Test

An intelligence test was conducted on Appellant when he was twelve or thirteen years old, and "the test indicated an IQ full scale score of 88." *Nixon v. State*, 2 So.3d 137, 141 (Fla. 2009). Between 1974 and 2006, Appellant tested as follows: "a score of 88 in 1974 at 13 years of age, 88 in 1980 at 19 years of age, 73 in 1985 at 24 years of age, 72 and 68 in 1993 at 32 years of age, and 80 in 2006 at 45 years of age." *Nixon v. State*, No.

SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017).

Adult Convictions

"As an adult, Nixon was convicted of armed robbery in 1980, burglary of a structure in 1981, [and] attempted burglary of a dwelling in 1984…" *Nixon*, 572 So.2d at 1346. During a 1984 trial, Appellant "threatened to disrupt the courtroom." *Nixon v. State*, 932 So.2d 1009, 1020 (Fla. 2006).

1984 Arson, Robbery, Kidnapping, and Murder

On August 12, 1984, after going to church, Ms. Jeanne Bickner drove to a mall in Tallahassee, Florida to have lunch with friends. *See Nixon*, 572 So.2d at 1137. Ms. Bickner drove her orange, 1973 M.G. convertible and parked it in the lot outside the mall. *See id.* at 1143; *see also Florida v. Nixon*, 543 U.S. 175 (2004). Appellant "approached Bickner, a stranger… and asked her to help him jump-start his car." *Nixon*, 543 U.S. at 179. Ms. Bickner then gave Appellant "jumper cables from the trunk of her car." *Nixon*, 572 So.2d at 1143. At some point, Appellant asked Ms. Bickner "to take him to his uncle's house." *Id.* at 1338. Ms. Bickner agreed and "offered [Appellant] a ride…" *Nixon*, 543 U.S. at 179.

In her orange convertible M.G., Ms. Bickner drove away from the mall, accompanied by Appellant. *Nixon*, 572 So.2d at 1338. "Once on the road, [Appellant] directed Bickner to drive to a remote place; en route, he

overpowered her and stopped the car." *Nixon*, 543 U.S. at 179. While he was attempting to overpower her, Appellant "hit Brickner in the face." *Nixon*, 572 So.2d at 1338. When Ms. Bickner stopped the car after getting hit, Appellant "put her in the trunk and then drove to a secluded wooded area [in Leon County]. *Id*. at 1338, 1337. When they arrived at the secluded area, Appellant "took [Ms. Bickner] from the trunk and tied her to a tree with jumper cables." *Id.* at 1338. Ms. Bickner was "tied around the waist with jumper cables to a pine tree [and h]er left arm was tied to another pine tree." *Id*.. Appellant and Ms. Bickner then "talked about their lives." *Id.* During this conversation, Ms. Bickner pleaded for her life by "offer[ing] to give [Appellant] money, to sign her car over to him, begging for him not to kill her." *Id*. At some point, Appellant removed Ms. Bickner's underwear "because he wanted to scare her." *Id*. at 1343-44. Appellant also removed "two of Ms. Bickner's rings." *Id*. at 1338.

"Concerned that Bickner might identify him, [Appellant] decided to kill her." *Nixon*, 543 U.S. at 180. Appellant then "burned [her] personal belongings and then threw the top of the convertible into the fire." *Id*. At some point, Appellant placed "a paper bag over [Ms. Bickner's head]." *Nixon*, 572 So.2d at 1338. Then, Appellant "threw the smoldering convertible top on Ms. Bickner, setting her on fire." *Id*. Ms. Bickner "was alive at the

time she was set on fire and the fire was the cause of her death." *Id*.; *see also id*. at 1346 ("after being abducted, Ms. Bickner was tied to a tree and terrorized before being burnt alive.)" By the time the fire stopped, Ms. Bickner's "left leg and arm, and most of her hair and skin, had been burned away." *Nixon*, 543 U.S. at 179. She was "the victim of a vicious, barbaric and savage murder." *Nixon*, 572 So.2d at 1343. After setting fire to Ms. Bickner, Appellant drove off in her vehicle. *See id.* at 1338 ("Witnessed testified that on the afternoon of [the murder] they saw the orange M.G. driven by a black male, later identified as [Appellant], near the vicinity of the site where [the murder occurred].").

On August 13, 1984, "the charred body of Jeanne Bickner was found tied to a tree in a wooded area…" *Nixon*, 572 So.2d at 1337. The "charred body was in a seated position" and "was discovered by a couple riding through the woods who reported the incident to the police." *Id*. At some point, Appellant's girlfriend, Appellant's brother, and "other witnesses" saw Appellant "driving Ms. Bickner's orange M.G." *Id.* at 1338. According to the girlfriend and the brother, Appellant "admitted killing a white woman by tying her with jumper cables and burning her." *Id*. Additionally, Appellant "showed them two of Ms. Bickner's rings." *Id*. And, Appellant "later said he had pawned the rings." *Id*. "At a local pawnshop, police recovered the rings and

a receipt for them bearing [Appellant's] driver's license number; the pawnshop owner identified [Appellant] as the person who sold the rings to him." *Nixon*, 543 U.S. at 180. Also, Appellant unsuccessfully attempted to sell Ms. Bickner's car. *Id*. Subsequently, a "laboratory analyst for the Florida Department of Law Enforcement testified that [Appellant's] palm print was found on the truck lid of Ms. Bickner's M.G." *Nixon*, 572 So.2d at 1338.

On the morning of August 14, 1984, Appellant told his girlfriend and his brother "that he was going to burn the orange M.G." *Nixon*, 572 So.2d at 1338. Appellant later burned the M.G. that day "after reading in the newspaper that Bickner's body had been discovered." *Nixon*, 543 U.S. at 180. Also that day, law enforcement officials received information from the girlfriend and the brother that Appellant "had admitted [to] the killing [of Ms. Bickner], had been driving [Ms. Bickner's car prior to burning it, and had pawned two of [Ms. Bickner's rings]." *Nixon*, 572 So.2d at 1337. After receiving information that Appellant killed Ms. Bickner, "Tallahassee police arrested" Appellant. *Id.* at 1338. "After his arrest, in a taped confession which was played to the jury, [Appellant] admitted murdering Ms. Bickner." *Id*. During questioning by police, Appellant "described in graphic detail how he had kidnapped Bickner, then killed her." *Nixon*, 543 U.S. at 179.

STATEMENT OF THE CASE

Appellant's Trial

In late August of 1984, the State of Florida charged Appellant "with first-degree murder, kidnapping, robbery, and arson." *Nixon*, 572 So.2d at 1337; *see also Nixon*, 543 U.S. at 180. "Mental health professionals who examined [Appellant] prior to trial specifically noted that although [Appellant] was competent to stand trial and 'technically' capable of cooperating with this attorney, '… his lifelong history of lying and creating fantasy situations and blaming others for his problems… [will make it] extremely difficult to get his full cooperation…'" *Nixon v. State*, 857 So.2d 172, 187 (Fla. 2003) (Wells, J., dissenting), quoting trial court order following May 11, 2001 evidentiary hearing. The same attorney that represented Appellant at an earlier trial that year also represented Appellant in this case; and, the same judge who presided over the earlier case also presided over this case. *See Nixon*, 543 U.S. at 181; *see also Nixon v. Singletary*, 758 So.2d 618, 628, n.7 (Fla. 2000) (Anstead, J., specially concurring); *Nixon*, 932 So.2d at 1020.

Prior to the trial, counsel "investigated [Appellant's] background, including his criminal history background." *Nixon*, 932 So.2d at 1021. Additionally, trial counsel "met with [Appellant] and his mother, who did not tell counsel of the abuse that [Appellant presented during post-conviction

proceedings]." *Id*.

Appellant's trial "began on July 15, 1985." *Nixon*, 543 U.S. at 181. At several points during his trial, Appellant "refused to enter the courtroom" and "refused to attend the trial." *Nixon*, 572 So.2d at 1341. Appellant "was very disruptive and uncooperative at trial." *Nixon*, 758 So.2d at 625. And, Appellant was "a disruptive and uncooperative client." *Id*. at 626 (Harding, C.J., concurring). After conducting a hearing in Appellant's holding cell during which Appellant "was clad only in his underwear," the trial court "found that [Appellant] had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him." *Nixon*, 572 So.2d at 1341.

During opening statements and closing arguments, Appellant's counsel conceded guilt and sought leniency. *Nixon*, 572 So.2d at 1339. "[Appellant] voluntarily absented himself from the courtroom during this trial. Hence, he was not present when his attorney made [these statements]." *Nixon*, 758 So.2d at 620 n.3. The jury "convicted [Appellant] of the offenses charged." *Nixon*, 572 So.2d at 1338.

"At the start of the penalty phase, [trial counsel] argued to the jury that '[Appellant] is not normal organically, intellectually, emotionally or educationally or in any other way.'" *Nixon*, 543 U.S. at 183. Next, Appellant's

trial counsel "presented the testimony of eight witnesses, including [Appellant's] mother and two mental health experts, a psychiatrist and a psychologist." *Nixon*, 758 So.2d at 631 (Wells, J., dissenting). "Relatives and friends described [Appellant's] childhood emotional troubles and his erratic behavior in the days preceding the murder." *Nixon*, 543 U.S. at 184. The psychiatrist and psychologist "addressed [Appellant's] antisocial personality, his history of emotional instability and psychiatric care, his low IQ, and the possibility that at some point he suffered brain damage." *Id*. Additionally, Appellant's trial counsel "introduced substantial documentary evidence, including school, institution, and psychological reports concerning [Appellant's] life from 1972 to 1985." *Nixon*, 758 So.2d at 631 (Wells, J., dissenting). "These documents and records included records of childhood discipline, records from correctional institutions, psychiatric reports, psychological reports, and records from group treatment homes." *Nixon*, 932 So.2d at 1022. "In his closing argument, [trial counsel] emphasized [Appellant's] youth, the psychiatric evidence, and the jury's discretion to consider any mitigating circumstances." *Nixon*, 543 U.S. at 184. Also, trial counsel maintained that the death penalty "was appropriate only for 'intact human being[s],' and '[Appellant] is not one of those.'" *Id*.

After receiving the jury's death sentence recommendation, the trial

court found the following, five aggravating factors: (1) the defendant was previously convicted of another violent felony; (2) the murder was committed while the defendant was engaged in the commission of kidnapping; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel; and, (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Nixon*, 572 So.2d at 1338, n.1. The trial court found "no mitigating factors… and imposed the death penalty." *Id*. The trial court also sentenced Appellant "to consecutive terms of life imprisonment for kidnapping, fifteen years for robbery, and fifteen years for arson." *Id*. at 1345.

Appellant's Direct Appeal

Appellant raised fifteen claims on appeal, but this Court found that "only nine merit discussion." *Nixon*, 572 So.2d at 1338. With regard to Appellant's first claim, he argued that trial counsel committed "ineffective assistance per se" by conceding guilt and seeking leniency without "a record inquiry as to whether [Appellant] knowingly and voluntarily consented to this strategy." *Id.* at 1339. Appellant framed his ineffective assistance of counsel argument under *U.S. v. Cronic*, 466 U.S. 648 (1984), not *Strickland v. Washington*, 466 U.S. 668 (1984). *Id*.

On October 27, 1987, and over Appellant's objection, this Court issued

an order remanding the case "to the trial court for an evidentiary hearing to determine whether [Appellant] was informed of the strategy to concede guilt and seek leniency." *Nixon*, 572 So.2d at 1349. On October 4, 1988, this Court issued a second order, "clarifying the procedure to be followed in connection with the evidentiary hearing…" *Id*. On February 1, 1989, this Court issued a third order, further clarifying the procedure for the hearing. *See id*. Following an evidentiary hearing, the trial court made three findings: (1) trial counsel reviewed with Appellant "the defense approach to the case in general terms, including, but not limited to, the probability that [trial counsel] would concede the killing of the victim by [Appellant]"; (2) trial counsel and Appellant "had previous attorney-client relationships, both were veterans of the criminal justice system and although [Appellant] manifested no reaction, he understood what was to take place"; and, (3) Appellant "made no objection and did not protest the strategy and tactic employed at trial." *Id*. at 1340, n.3.

On November 29, 1990, this Court affirmed Appellant's "convictions and sentences." *Nixon*, 572 So.2d at 1346. With regard to Appellant's claim of ineffective assistance of trial counsel per se, the Court declined "to dispose of this claim on the present state of the record which we view as less than complete." *Id*. at 1340. However, the Court did so "without prejudice to raise

the issue in a later motion [for post-conviction relief]." *Id*. In doing so, the Court "[e]ssentially… issued an invitation to [Appellant] to raise this issue again in [a post-conviction motion]." *Nixon*, 758 So.2d at 624.

Appellant's Initial Post-Conviction Motion

On October 7, 1993, Appellant filed his initial motion for post-conviction relief. *See Nixon*, 857 So.2d at 185 (Wells, J., dissenting); *see also id.* at 173. The circuit court denied Appellant's initial post-conviction motion without an evidentiary hearing. *Nixon*, 758 So.2d at 619.

As to the claim that counsel provided ineffective assistance by conceding guilt and seeking leniency, the circuit court rejected Appellant's argument that "*Cronic* obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim." *Nixon*, 857 So.2d at 182 (Lewis, J., concurring in result). Focusing on the second prong of *Strickland*, the court found: "Defense counsel's concession of guilt did not, and could not possibly have prejudiced [Appellant] in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without concession." *Id*.

Appellant's Initial Post-Conviction Appeal

On appeal, Appellant raised seven claims relating to the circuit court's denial of his initial post-conviction motion. *See Nixon*, 758 So.2d at 619, n.1;

see also Nixon, 857 So.2d at 173, n.2. This Court only addressed Appellant's ineffective assistance of counsel claim. *See Nixon*, 758 So.2d at 620; *see also Nixon*, 857 So.2d at 175, n.5. The parties disagreed as to the applicable standard for evaluating Appellant's ineffective assistance of counsel claim: Appellant argued that *Cronic* applied, whereas the State argued that *Strickland* applied. *See Nixon*, 758 So.2d at 621; *see also Nixon*, 857 So.2d at 174. Resolving the conflict, the Court determined that "if [Appellant] can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective *per se* and *Cronic* would control." *Nixon*, 758 So.2d at 623; *see also Nixon*, 857 So.2d at 174. Additionally, the Court concluded that trial counsel's comments during opening statements and closing arguments "were the functional equivalent of a guilty plea…" *Nixon*, 758 So.2d at 624. Thus, the Court concluded that Appellant's "claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by [Appellant] of counsel's strategy." *Id*. And, the Court stated: "Silent acquiescence is not enough." *Id*.

Ultimately, this Court remanded Appellant's case "for an evidentiary hearing" on the claim of ineffective assistance of trial counsel. *Nixon*, 758 So.2d at 624. Specifically, this Court remanded for an evidentiary hearing

"on the issue of whether [Appellant] consented to defense counsel's strategy to concede guilt." *Id*. at 625; *see also Nixon*, 857 So.2d at 175. In dissent, Justice Wells opined that *Strickland*, not *Cronic*, controlled Appellant's ineffective assistance of counsel claim and that competent and substantial evidence supported the circuit court's summary denial of that claim. *See Nixon*, 758 So.2d at 629 (Wells, J., dissenting). Justice Lewis dissented without an opinion. *See id.* at 625.

Remand on Appellant's Initial Post-Conviction Motion

On May 11, 2001, the circuit court conducted an evidentiary hearing on Appellant's ineffective assistance of counsel claim. *See Nixon*, 857 So.2d at 175. Appellant's trial counsel "testified that [Appellant] provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt." *Id*. at 175-76. The circuit court "denied relief and found that [Appellant] consented to counsel's strategy." *Id*. at 175.

Appellant's Appeal of Denial of Remanded Post-Conviction Motion

On July 10, 2003, this Court reversed "the trial court's denial of postconviction relief and remanded for a new trial." *Nixon*, 857 So.2d at 176. Only considering the denial of Appellant's claim of ineffective assistance of trial counsel, the Court found:

> There is no evidence that shows that [Appellant] affirmatively, explicitly agreed with counsel's strategy. The only evidence

> presented at the evidentiary hearing was [trial counsel's] testimony, which indicated that [Appellant] neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that [Appellant] affirmatively and explicitly agreed to counsel's strategy.

Id.

Concurring in result only based on the doctrine of law of the case, Justice Lewis expressed his belief that "[a]lmost twenty years after the event, this Court is rewarding an intentionally disruptive defendant and misdirecting a fair and just determination of the issues that should be properly before the court." *Nixon*, 857 So.2d at 179 (Lewis, J., concurring in result only). With regard to the misdirection, Justice Lewis suggested that "this Court became misdirected when it held that the present case involved ineffective assistance of counsel *per se* under [*Cronic*]." *Id*. Additionally, Justice Lewis expressed his belief that "The evidence indicated that [Appellant] was competent to participate in the trial proceeding, that he was malingering, and that he was attempting to disrupt the orderly process of the trial court proceedings." *Id*. at 181. Also, Justice Lewis stated: "My review of this record demonstrates an especially aggravated circumstance where the victim had been kidnapped in her own motor vehicle from a local shopping mall, the victim had been tied between trees with motor vehicle jumper cables and the victim was actually burned alive." *Id*. In dissent joined by Justice Shaw, Justice

Wells expressed his belief that "this Court's granting to [Appellant] a new trial is legally wrong and not justified or demonstrated to be required by the majority opinion." *Id.* at 183 (Wells, J., dissenting).

U.S. Supreme Court Appeal

On December 13, 2004, the United States Supreme Court granted certiorari and reversed "the judgment of the Florida Supreme Court." *Nixon*, 543 U.S. at 187.

With regard to whether trial counsel's concession of guilt "was the functional equivalent of a guilty plea," the Court disagreed with this Court's assessment. *Nixon*, 543 U.S. at 188. The Court expressly noted that, despite trial counsel's concession, Appellant "retained the rights accorded a defendant in a criminal trial." *Id*. For example, the State was still required to establish with proof beyond a reasonable doubt "the essential elements of the crimes with which [Appellant] was charged." *Id*. And, trial counsel could cross-examine witnesses and object to evidence. *Id*. Furthermore, the concession did not hinder Appellant's "right to appeal." *Id*.

With regard to trial counsel's communications with Appellant, the Court noted that counsel "was obliged to, and in fact several times did, explain his proposed trial strategy to [Appellant]." *Nixon*, 543 U.S. at 189. Disagreeing with this Court, the Court stated "[g]iven [Appellant's] constant resistance to

answering inquiries put to him by counsel and court, [trial counsel] was not additionally required to gain express consent before conceding [Appellant's] guilt." *Id*., citing *Nixon*, 857 So.2d at 187-88 (Wells, J., dissenting).

With regard to whether *Cronic* or *Strickland* applied to Appellant's claim of ineffective assistance of counsel, the Court stated: "The Florida Supreme Court's erroneous equation of [trial counsel's] concession strategy to a guilty plea led it to apply the wrong standard in determining whether counsel's performance ranked as ineffective." *Nixon*, 543 U.S. at 189. Agreeing with Justice Lewis, the Court pronounced: "As Florida Supreme Court Justice Lewis observed, that court's majority misunderstood *Cronic* and failed to attend to the realities of defending against a capital charge." *Id*. at 189-90, citing *Nixon*, 857 So.2d at 180-83 (Lewis, J., concurring in result). The Court faulted this Court for failing to hold Appellant "to the standard prescribed in *Strickland*… which would have required [Appellant] to show that counsel's concession strategy was unreasonable." *Id*. at 189.

Back to this Court

Upon receiving the case back from the United States Supreme Court, this Court readdressed Appellant's "ineffective assistance of counsel claim on the issue of concession of guilt" and addressed "the other issues raised in [Appellant's] appeal from the denial of 3.851 relief, as well as the issues

raised in the habeas petition." *Nixon*, 932 So.2d at 1013.

This Court "affirmed the trial court's denial of postconviction relief" and denied "habeas relief." *Nixon*, 932 So.2d at 1014. As to the claim of ineffective assistance of counsel, this Court found that counsel's performance was not deficient; therefore, this Court declined to address the prejudice prong of *Strickland*. *See Nixon*, 932 So.2d at 1018. With regard to the mental retardation claim, this Court found the record "did not demonstrate that [Appellant] is mentally retarded." *Id*. at 1024. Finally, this Court stated: "To the extent that [Appellant] is eligible to pursue a claim of mental retardation under Florida Rule of Criminal Procedure 3.203, he should do so within sixty days of the release of this opinion." *Id*.

Intellectual Disability Claim

Appellant "filed a timely motion claiming his conviction and sentence of death are contrary to the reasoning and holding in *Atkins v. Virginia*, 536 U.S. 304 (2002) [because] the Eighth Amendment prohibits the execution of the mentally retarded." *Nixon*, 2 So.3d at 140. Appellant also argued that section 921.137, Florida Statutes, "as interpreted in *Cherry v. State*, 959 So.2d 702 (Fla. 2007)," violates both the United States Constitution and the Florida Constitution. *Id*.

At a "two-day evidentiary hearing," the circuit court provided the

Appellant with the opportunity to present evidence relevant to the statutory inquiry. *Nixon*, 2 So.3d at 143:

> Section 921.137(1) and rule 3.203 provide defendants with notice of the type of evidence that is relevant to the issues and that will be considered by a trial court. In addition defendants are given an opportunity to present any relevant evidence to the court. This procedure was followed in this case. After an evidentiary hearing, the trial court issued a final order that thoroughly explained its decision, finding that [Appellant] had not established that he should be excluded from the death penalty by reason of mental retardation.
>
> The trial court informed [Appellant] of his opportunity to present his case, provided an evidentiary hearing, determined [Appellant's] mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided [Appellant] with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that [Appellant] was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions.

At the hearing, Appellant "presented the expert testimony of Dr. Dennis Keyes," and the State "presented the expert testimony and report of Dr. Gregory A. Prichard." *Id.* at 140.

In his testimony, Dr. Keyes discussed all three prongs of the statutory test for intellectual disability. *See Nixon*, 2 So.3d at 140. With regard to the first prong of significantly subaverage intellectual functioning, Dr. Keyes highlighted the defendant's 1993 adult IQ score of 68. *Id*. At the time of that examination, however, "there was no valid test for malingering." *Id*. As to

the second prong of adaptive deficits and the third prong of manifestation prior to age 18, Dr. Keyes largely focused on Appellant's childhood. *See id*.:

> Dr. Keyes further concluded that there were known risks that [Appellant] was mentally retarded starting in early childhood. These known risks included: [Appellant's] mother's drinking, diet, and infrequent visits to the doctor during her pregnancy; [Appellant's] malnourishment and exposure to nicotine and pesticide during his childhood; [Appellant's] social and practical deficiencies; and [Appellant's] psychological, physical, and sexual abuse suffered at the hands of his family.
>
> Dr. Keyes also opined that there was extensive evidence of [Appellant's] difficulty with adaptive skills. He noted that [Appellant] had great difficulty in keeping up with others and learning basic information as a child. Dr. Keyes cited [Appellant's] poor communication skills, difficulty in understanding basic mathematical concepts, poor achievement test results, repetitive behavior of making the same mistakes over and over, and the reports from [Appellant's] prior teachers stating he should be placed in a special education program as evidence of [Appellant's] subaverage intellectual functioning as a child. From his testing and observations, Dr. Keyes concluded that the onset of [Appellant's] low intellectual functioning and adaptive deficits occurred before age eighteen.

Dr. Prichard focused on the first and third prongs and opined that Appellant did not meet the criteria for intellectual disability. *See Nixon*, 2 So.3d at 140-41:

> In 2006, Dr. Gregory Prichard, a clinical psychologist, examined [Appellant] for the State. To determine [Appellant's] intellectual functioning, Dr. Prichard administered the WAIS III and the Test for Memory Malingering, also known as the WRAT-3 or TOMM. As a result of these tests, Dr. Prichard found [Appellant's] full scale IQ to be 80. He found no indication [of] malingering.

> After reviewing [Appellant's] 1974 intelligence test, which was conducted when [Appellant] was twelve or thirteen years old, Dr. Prichard stated the test indicated an IQ full scale score of 88. Dr. Prichard found that there was no evidence that questioned the validity of the 1974 IQ score. Thus, Dr. Prichard opined that [Appellant] could not demonstrate onset of mental retardation before eighteen years of age. Based on his evaluations, Dr. Prichard concluded that [Appellant] is not mentally retarded. He further indicated there was no need to address the adaptive behavior issue as part of his assessment because [Appellant] IQ did not fall within the mental retardation range.

After "carefully evaluat[ing] the testimony from the two experts," the circuit court "found the testimony of Dr. Prichard more credible than that of Dr. Keyes and concluded that [Appellant] was not mentally retarded." *Nixon*, 2 So.3d at 144. And, the circuit court found that Appellant failed to establish the first prong of significantly subaverage intellectual functioning. *See id.*:

> The trial court found "Dr. Keyes' historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted testimony that [Appellant] scored 80 on a test validly administered last year." The trial court further found that Dr. Keyes' score could have resulted from [Appellant's] malingering, that [Appellant's] historical scores were consistent with Dr. Prichard's measurement of an IQ of 80, and that Dr. Keyes' approach of rescoring and averaging the current and historical scores was inappropriate and inconsistent with both the plain language of section 921.137 and this Court's precedent. Thus, the trial court determined that [Appellant] did not meet the first prong of the mental retardation determination.

Appeal of Denial of Intellectual Disability Claim

On appeal, Appellant challenged the circuit court's decision and raised

six claims of error. *Nixon*, 2 So.3d at 141. This Court affirmed "the trial court's determination that [Appellant] is not mentally retarded." *Id*.

Summary Denial of Appellant's Renewed Claim

After the United States Supreme Court decision in *Hall v. Fla.*, 572 U.S. 701 (2014), the defendant filed a renewed claim of intellectual disability. *See Nixon*, 2017 WL 462148 at *1. The defendant "presented his full range of scores, which included a 73 from 1985 and 68 from 1993." *Id*. Additionally, the record indicated a total of six IQ scores for the defendant: "a score of 88 in 1974 at 13 years of age, 88 in 1980 at 19 years of age, 73 in 1985 at 24 years of age, 72 and 68 in 1993 at 32 years of age, and 80 in 2006 at 45 years of age." *Id*., n.2. On October 9, 2015, the circuit court summarily denied the claim, finding "the significantly subaverage intellectual functioning prong dispositive of [the defendant's] intellectual disability claim based on [defendant's] current score of 80." *Id*.

Appeal of Summary Denial of Renewed claim

On appeal, this Court faulted the circuit court for failing to conduct "the more holistic, interrelated assessment" outlined in *Oats v. State*, 181 So.3d 457 (Fla. 2015). *See Nixon*, 2017 WL 462148 at *1. Because the circuit court focused on the first prong of significantly subaverage intellectual functioning, this Court determined that the lower court "did not look to all of

the record evidence of [defendant's] intellectual disability, even disregarding other non-IQ evidence that could have been relevant." *Id*. This Court reversed the circuit court's denial, finding that the defendant's claim "is legally sufficient and not conclusively refuted by the record in this case." *Id*. This Court found that the circuit court "used the wrong legal standard" because it failed to follow *Oats*. *Id*. And, this Court remanded. *Id*.

Evidentiary Hearing on Appellant's Renewed Claim

On July 30 and 31, 2018, the circuit court conducted an evidentiary hearing. *See* Order, p.1. For Appellant, Dr. Crown and Dr. Ouaou testified; for the State, Dr. Prichard testified. The court determined that "Dr. Prichard's [2006] score of 80 is credible." *Id.* at 29. Additionally, the court found that "Dr. Prichard's administration [of the test] was fully transparent and accepted by the defense expert in 2006…" *Id*. Responding to Dr. Ouaou's claim that Dr. Prichard's test suffers from upward bias in its scoring, the court found "to the extent that Dr. Prichard answered the criticisms – and he did – Dr. Ouaou's criticisms support an equal and opposite inference of [downward] bias." *Id*. The court determined "that Dr. Prichard's testimony regarding application of scoring principles is more persuasive [than Dr. Ouaou's]." *Id*. at 30. Ultimately, the circuit court concluded that "the evidence presented on behalf of [Appellant] is neither clear nor convincing." *Id*.

SUMMARY OF THE ARGUMENT

Issue I

Hall does not apply to this case. Appellant has at least one IQ score that, even without an adjustment for the SEM, falls below the statutory cutoff. And, Appellant presented evidence on all three prongs of the statutory test at the evidentiary hearing on his original claim. Therefore, *Hall* should not disturb the circuit court's original finding that Appellant failed to establish the first prong of significantly subaverage intellectual functioning. Nor should *Hall* disturb this Court's affirmance. Despite the inapplicability of *Hall*, Appellant filed a renewed claim; the circuit court summarily denied that claim; and, this Court remanded. The circuit court then conducted an evidentiary hearing on that renewed claim. After carefully considering the evidence presented, the circuit court denied Appellant's renewed claim – specifically finding that Appellant failed to establish any of the three statutory prongs. Competent, substantial evidence supports those findings.

Issue II

Appellant's death sentence became final before *Ring*; therefore, *Hurst* does not apply. Additionally, the "facts" alleged by Appellant are not elements. Also, Appellant has contemporaneous and prior violent felony convictions. Finally, any error would be harmless.

ARGUMENT

ISSUE I: DID THE CIRCUIT COURT ERR WHEN IT DENIED THE RENEWED CLAIM OF INTELLECTUAL DISABILITY? (Restated)

SUMMARY

Appellant claims that the trial court erred by placing too much emphasis on IQ scores when it denied the renewed claim of intellectual disability. *See* IB-13. In its order denying relief, however, the circuit court specifically addressed all three prongs of the statutory test – finding that Appellant failed to prove any of them with clear and convincing evidence. *See* Order, p.30. Additionally, there was no need to disturb the circuit court order that denied Appellant's original claim of intellectual disability. Back in 2009, this Court affirmed that order – one that was entered after Appellant presented evidence on all three prongs. *See Nixon*, 2 So.3d at 145.

STANDARD OF REVIEW

This Court recently articulated the applicable standard of review. *See Wright v. State*, 256 So.3d 766, 769 (Fla. 2018):

> In reviewing the circuit court's determination that [the defendant] is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011). [This Court] "[does] not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007). However, [this Court] appl[ies] a de novo standard of review to any questions of law. *Herring*, 76 So.3d at 895.

RULE

Atkins v. Virginia

On June 20, 2002, the United States Supreme Court ruled "that the execution of mentally retarded criminals" violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Atkins*, 536 U.S. at 321 (2002). The Court left it to the States to develop an appropriate framework for determining intellectual disability in criminal cases. *See Atkins* at 317, quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986).

Florida Law

In Florida, a trial court may not impose a sentence of death "upon a defendant convicted of a capital felony if it is determined… that the defendant is intellectually disabled." § 921.137(2), Fla. Stat. Florida law defines "intellectually disabled" or "intellectual disability" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat.

Courts view section 921.137(1) as incorporating a three-pronged test: "(1) significantly subaverage general intellectual functioning [(2)] existing concurrently with deficits in adaptive behavior and [(3)] manifested during the period from conception to age 18." *Wright*, 256 So.3d at 770. In order to

prove intellectual disability, a defendant must satisfy that three-prong test with clear and convincing evidence. *See* § 921.137(4), Fla. Stat.

DEVELOPMENTS IN CASELAW

Cherry v. State ("Cherry I")

On April 12, 2007, this Court decided *Cherry v. State*, 959 So.2d 702 (Fla. 2007). In that case, the defendant was administered numerous IQ tests over a span of five decades, with a low score of 68 and a high of 85. *See Cherry*, 959 So.2d at 712, n.6, abrogated by *Hall v. Fla.*, 572 U.S. 701 (2014). At the evidentiary hearing, the defendant focused on a 1992 WAIS–III test score of 72 and the "cutoff score" of 70 under section 921.137, Florida Statutes. *Id*. The defendant argued that "the standard error of plus or minus five points should be taken into account so that the actual cutoff score is 75." *Id*. at 712. Taking the standard error measurement (SEM) into account, the defendant argued that his IQ score of 72 "should actually be described as within the range of 67 to 77." *Id*. The circuit court rejected the defendant's argument, finding that section 921.137 does not account for "the +/–5 standard of error." *Id*. Relying on the express language of the statute, the circuit court determined that the Legislature set the cutoff at 70, not 75. *See id*. (quoting the circuit court's order):

> Neither Rule nor statute reference the standard error measurement or use the word "approximately". The Florida

> Department of Children and Families, in determining mental retardation for eligibility for developmental services, makes the 70 IQ score a bright-line cutoff. This Court notes, however, that the DSM–IV–TR recognizes IQ is more accurately reported as a range of scores, a position reflected in the staff analysis for (what was ultimately) Fla. Stat. § 921.137. The Legislature had mental retardation definitions from various states before it, some of which unequivocally provided that certain IQ scores created a mere presumption either for or against mental retardation; language the Legislature did not include in the Florida law. Neither did they set the cutoff at 75. This Court declines to perform a blanket change of the clearly stated IQ criteria, however, the +/–5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.

On appeal, this Court affirmed the circuit court's denial of the intellectual disability claim. *See Cherry*, 959 So.2d at 714:

> Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that [the defendant] does not meet the first prong of the mental retardation determination. [The defendant's] IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that [the defendant] is not mentally retarded should be affirmed.

Because the defendant did not establish the first prong, this Court declined to address the second or third prong. *See id*. ("Because we find that [the defendant] does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the [intellectual disability] determination.").

Hall v. Florida

On May 27, 2014, the United States Supreme Court decided *Hall v. Fla.*, 572 U.S. 701 (2014). In that case, the defendant's IQ score of 71, when adjusted for the test's SEM, included a range from 66 to 76. *Hall v. State*, 109 So.3d 704, 707 (Fla. 2012). Despite that range, the circuit court determined that the defendant "could not be considered intellectually disabled under Florida's statutory definition of the term because [the defendant's] IQ scores varied between 71 and 73 and thus did not constitute 'subaverage intelligence.'" *Oats*, 181 So.3d at 466, quoting *Hall*, 109 So.3d at 707. Affirming on appeal, this Court "declined to adopt [the defendant's] 'range of scores' argument.'" *Hall*, 109 So.3d at 707.

Disagreeing, the United States Supreme Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 572 U.S. at 723. The Court rejected Florida's approach to determining a defendant's intellectual disability because that approach failed "to take into account the standard error of measurement." *Id.* at 724. In practical terms, the Court "invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70." *Salazar v. State*, 188 So.3d 799, 812 (Fla.

2016). Presuming and SEM of +/- 5 points, *Hall* effectively raised Florida's statutory cutoff to 75. *See Hall*, 572 U.S. at 735–36 (Alito, J., dissenting) ("[A]s I understand the Court's opinion, it also holds that when IQ tests reveal an IQ between 71 and 75, defendants must be allowed to present evidence of deficits in *adaptive behavior*—that is, the *second* prong of the intellectual-disability test.") (emphases in original).

Henry v. State

On June 12, 2014, this Court decided *Henry v. State*, 141 So.3d 557 (Fla. 2014). This Court suggested that a defendant with an IQ score above 75 could still receive an evidentiary hearing if he could allege facts to support the second and third prongs. *See Henry*, 141 So.3d at 559 ("[The defendant] is not entitled to an evidentiary hearing to determine if he is intellectually disabled… Beyond [the] assertion of a single test score [of 78], he has not alleged any deficits in adaptive functioning or onset prior to age 18.").

On June 17, 2014, the Eleventh Circuit decided *In re Henry*, 757 F.3d 1151 (11th Cir. 2014) and took a more restrictive view of *Hall*. *See In re Henry*, 757 F.3d at 1162, quoting *Hall*, 572 U.S. at 722 ("*Hall* squarely holds that it is 'the Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive

functioning.'"). In doing so, the Eleventh Circuit appeared to reject this Court's more expansive view. *See In re Henry*, 757 F.3d at 1162–63:

> The Supreme Court never said that a petitioner who could only establish an IQ score of, say, 78 would be entitled anyway to make up the difference with other evidence of deficiencies. *See Hall*, 134 S.Ct. at 1996 ("Petitioner does not question the rule in States which use a bright-line cutoff at 75 or greater ... and so they are not included alongside Florida in this analysis."). The problem petitioner has under *Hall* is he can point to no IQ test yielding a score of 75 or below. Thus, building in the standard error approach explicated by the Supreme Court in *Hall* would not entitle [the petitioner] to the additional "opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning." *Hall*, 134 S.Ct. at 2001. The Supreme Court in *Hall* did not hold that a petitioner… who only has IQ test scores above 75 (here an IQ score of 78), must have an additional chance to demonstrate intellectual disability by pointing to deficiencies in adaptive skills. At the end of the day, taking into account the standard error of measurement explicated by *Hall* does not entitle [the petitioner] to the opportunity to present additional evidence of an intellectual disability.

Brumfield v. Cain

On June 18, 2015, the United States Supreme Court decided *Brumfield v. Cain*, 576 U.S. 305 (2015). In that case, a Louisiana defendant possessed an IQ score of 75, which "was squarely in the range of potential intellectual disability." *Brumfield*, 576 U.S. at 315. Nevertheless, the defendant was denied an evidentiary hearing on his intellectual disability claim. *Id*. at 317. The Court found the denial erroneous, stating: "To conclude, as the state trial court did, that [the defendant's] reported IQ score of 75 somehow

demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.") *Id*. at 316.

Oats v. State

On December 17, 2015, this Court decided *Oats v. State,* 181 So.3d 457 (Fla. 2015). The defendant's adult IQ scores fell "between 54 and 67, well within the range for an individual who has an intellectual disability." *See Oats*, 181 So.3d at 459. After an evidentiary hearing, the circuit court "denied finding [the defendant] to be intellectually disabled, on the basis that [the defendant] was unable to establish that his intellectual disability manifested before the age of 18—one of the three required prongs in Florida's statutory test for determining an intellectual disability." *Id.*, citing § 921.137, Fla. Stat (2015). In making its determination, the circuit court "relied on the lack of a full childhood IQ test, even though an initial screening test performed by [the defendant's] elementary school showed that [the defendant's] IQ was 70—a score that likewise would be within the range of IQ scores for a person who has an intellectual disability—and even though [the defendant] presented significant evidence of childhood difficulties and injuries consistent with an individual with an intellectual disability." *Id*. at 459.

This Court reversed, finding that the circuit court's order "should have addressed all three prongs of the intellectual disability test, rather than

denying the claim solely because [the defendant] allegedly did not present sufficient evidence to establish that his intellectual disability manifested before the age of 18." *Oats*, 181 So.3d at 459. This Court directed lower courts to consider all three prongs in every case – even if a defendant cannot produce an IQ score of 75 or below. *See id*. at 467, citing *Hall*, 572 U.S. at 723 ("[T]he Supreme Court has now stated that courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive."). While cautioning that the decision "should not be interpreted as establishing that this will necessarily constitute a per se reversible error," this Court suggested that a defendant need not prove all three prongs with clear and convincing evidence. *See id*. at 467-68, quoting *Hall*, 572 U.S. at 723 ("[A]s the Supreme Court has now recognized, because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs.").

Salazar v. State

On February 18, 2016, this Court decided *Salazar v. State*, 188 So.3d 799 (Fla. 2016). In that case, the defendant's IQ scores ranged from a low of 67 to a high of 72. *See Salazar*, 188 So.3d at 812. After considering all three prongs, the circuit court denied the defendant's claim. *See id*.

On appeal, this Court highlighted the need for a defendant to establish all three pongs in order to prove intellectual disability. *See Salazar*, 188 So.3d at 812, citing *Nixon*, 2 So.3d at 142 ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled."). Nonetheless, this Court reviewed the record to determine whether competent substantial evidence supported the circuit court's determinations on all three prongs. With regard to the first prong of significantly subaverage general intellectual functioning, this Court found that "competent, substantial evidence supports the conclusion that [the defendant] established the first element of an intellectual disability determination." *Salazar*, 188 So.3d at 812. As to the second prong, this Court determined that "competent, substantial evidence supports the conclusion that [the defendant] failed to demonstrate concurrent deficits in adaptive behavior." *Id*. And for the third prong, this Court found that "there is competent, substantial evidence to support the trial court's finding that [the defendant] failed to meet the third element of manifestation before age eighteen." *Id*. at 813.

Walls v. State

On October 20, 2016, this Court decided *Walls v. State*, 213 So.3d 340 (Fla. 2016). Over four decades, the defendant's IQ scores ranged from a

high of 102 at age 12 to a low of 72 at age 23. *See Walls*, 213 So. 3d at 344, n.4 ("[The defendant's] IQ scores are as follows: 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at approximately age 40."). The State argued that "the [circuit] court could summarily deny [the defendant's] motion as a matter of law because even with the new cut-off of 75, [the defendant] was required to demonstrate onset before age 18 and none of his IQ scores from before he turned 18 were below 75." *Id.* at 344. The circuit court agreed, finding that the defendant "could not demonstrate subaverage intellectual functioning that manifested prior to age 18." *Id*. at 345.

On appeal, this Court stated that *Hall* "requires courts to consider all [three] prongs of the test in tandem." *Walls*, 213 So. 3d at 346. Rejecting any notion that *Hall's* holistic assessment only applies when a defendant's SEM-adjusted IQ score falls at or below the cutoff, this Court stated: "The Supreme Court's rejection of Florida's mandatory IQ score cutoff means defendants with IQ scores that are higher than 70 must still be permitted to present evidence of all three prongs of the test for intellectual disability.") *Id*. This Court held that "all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Id*. at 346-47. This Court also held that *Hall* applies retroactively. *See id.* at 346.

In a dissent joined by Justice Polston, Justice Canady disagreed with the majority opinion. *See Walls*, 213 So.3d at 349. Echoing *In re Henry* from the Eleventh Circuit, Justice Canady disagreed with the majority's broad interpretation of *Hall*, noting that "by the reasoning of the majority, an individual with an IQ of 80, 100, 125, or 150 would nonetheless—as part of the 'holistic review' process—be entitled to present evidence of adaptive deficits to establish intellectual disability." *Id*.; *see also In re Henry*, 757 F.3d at 1162-63. According to Justice Canady, *Hall* only applies when a defendant's IQ score, when adjusted for the SEM, falls at or below the statutory cutoff. *See Walls*, 213 So.3d at 350 ("[W]hen an individual's IQ score is determined to be greater than 75—and the SEM thus has been taken into account—the holding of *Hall* has no bearing on the case."). Finally, Justice Canady disagreed with the majority's determination that *Hall* should apply retroactively. *See id.* at 353.

Thompson v. State

On November 10, 2016, this Court decided *Thompson v. State*, 208 So.3d 49 (Fla. 2016). Over six decades, the defendant's IQ test scores ranged from a low of 71 to a high of 88. *See Thompson*, 208 So.3d at 59.

Concerned that the circuit court considered the lowest score of 71 as a bar to establishing intellectual disability, this Court remanded. *Thompson*,

208 So.3d at 59-60. This Court stated that "*Hall* did not just require that courts consider the statistical error margin in determining IQ, it also changed the *manner* in which intellectual disability evidence must be considered…" *Thompson*, 208 So.3d at 59 (emphasis in original). As expressed by this Court, *Hall* means that "it is not enough that a defendant be allowed to present evidence on all three prongs of the intellectual disability test." *Id*. Instead, *Hall* requires a more rigorous "conjunctive and interrelated assessment" by the circuit court. *Id*., quoting *Hall*, 572 U.S. at 723. Ultimately, this Court concluded that "[a]lthough [the defendant] did present some evidence relating to all three prongs of the intellectual disability test, he did not receive the type of conjunctive and interrelated assessment that *Hall* requires."). *Id*.

Cherry v. State ("Cherry II")

On December 1, 2016, this Court decided *Cherry v. State*, 208 So.3d 701 (Fla. 2016). In that case, the defendant "took multiple IQ tests over the course of thirty-seven years." *Cherry*, 208 So.3d at 702. Those scores ranged from a low of 68 to a high of 86. *See Cherry*, 959 So.2d at 712, n.6, abrogated by *Hall*, 572 U.S. 701.

This Court suggested that a single score below 75 entitles a defendant to an evidentiary hearing on the second and third prongs. *See Cherry*, 208

So.3d at 702 ("Based on the new standard imposed by *Hall* and taking into account the standard error of measurement of IQ tests, we find that [the defendant] is entitled to an evidentiary hearing on the remaining prongs to establish whether he has an intellectual disability."). By only mentioning an entitlement to an evidentiary hearing on the second and third prongs, however, this Court suggested a single score below 75 automatically satisfies the first prong. *See Id.* at 702.

Franqui v. State ("Franqui I")

On January 26, 2017, this Court decided *Franqui v. State*, 211 So.3d 1026 (Fla. 2017). In one of his cases, the defendant obtained IQ test scores of 75, 76, and 83. *See Franqui*, 211 So.3d at 1031. Referencing *Cherry I*, this Court expressed a concern that the defendant "may have significantly limited his presentation because he knew that he could not meet the first prong of intellectual disability due to the fact that none of his scores on the approved tests was 70 or below. *Franqui*, 211 So.3d at 1031-32. Indeed, this Court noted that counsel "articulated the belief that reaching the second and third prongs of intellectual disability would be futile because of *Cherry*." *Id*. at 1032. This Court noted that "the circuit court may have determined that it was unnecessary to consider or discuss the second and third prongs in detail." *Id*. According to this Court, if that in fact did occur, then that meant

the defendant "did not receive the 'holistic' evaluation of his claim that he is entitled to under *Hall*." *Id*.

Wright v. State ("Wright I")

On March 16, 2017, this Court decided *Wright v. State*, 213 So.3d 881 (Fla. 2017). The defendant had numerous IQ test scores – the lowest of which was 75. *See Wright*, 213 So.3d at 897, cert. granted, judgment vacated sub nom. *Wright v. Fla.*, 138 S.Ct. 360 (2017). When adjusted for "the most favorable [SEM] range," the defendant's "scores dips just one point beneath the threshold of 70 required for a finding of significantly subaverage general intellectual functioning." *Id*. In the circuit court, the defendant presented evidence on the first prong of significantly subaverage intellectual functioning as well as the second prong of concurrent deficits in adaptive functioning. *See id.* at 896-99. After considering the evidence, the court "concluded that [the defendant] had not proven that he is intellectually disabled by clear and convincing evidence." *Id*. at 896.

With regard to the first prong, this Court found that the defendant "has not proven even by a preponderance of the evidence, and certainly not by clear and convincing evidence, that he is of subaverage intellectual functioning. *Wright*, 213 So.3d at 898. Of note, this Court stated that: "For this reason alone, [the defendant] does not qualify as intellectually disabled

under Florida law." *Id*., citing *Salazar*, 188 So.3d at 812 ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.").

With regard to the second prong, this Court determined that the defendant "cannot demonstrate by even a preponderance of the evidence that he suffers from concurrent deficits in adaptive functioning, the second prong of a finding of intellectual disability." *Wright*, 213 So.3d at 898.

Ultimately, this Court concluded that the defendant failed to establish either the first or second prong of the statutory test for intellectual disability – even under the more generous evidentiary standard claimed by the defendant. *See Wright*, 213 So.3d at 902 ("Given that [the defendant] has not even demonstrated by a preponderance of the evidence either of the first two prongs for a determination of intellectual disability, we conclude that he has not demonstrated that he belongs to that category of individuals that are categorically ineligible for execution.").

Subsequently, the United States Supreme Court vacated this Court's decision and remanded the case "for further consideration in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017)." *Wright*, 138 S.Ct. 360.

Moore v. Texas

On March 28, 2017, the United States Supreme Court decided *Moore*

v. Texas, 137 S.Ct. 1039 (2017). In that case, a Texas defendant's IQ "score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79." *Moore*, 137 S.Ct. at 1049. Because the lower end of defendant's score range fell at or below 70, the Texas court "had to move on to consider [the defendant's] adaptive functioning." *Id*. Echoing Justice Canady's dissent in *Walls* and the Eleventh Circuit's majority opinion in *In Re Henry*, the Court suggested that *Hall* only applies when a defendant's IQ score, when adjusted for the SEM, falls at or below the statutory cutoff. *See Moore*, 137 S.Ct. at 1050. ("[I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits."); *see also In re Henry*, 757 F.3d at 1162-63.

Herring v. State

On March 31, 2017, this Court decided *Herring v. State*, Case No. SC15–1562, 2017 WL 1192999 (Fla. March 31, 2017). In that case, the defendant had "IQ scores under 75 from tests administered both before and after age 18." *See Herring*, 2017 WL 1192999 at *1. This Court suggested that those scores, in and of themselves, satisfied the third prong of manifestation prior to age 18; and because this Court found that the

defendant previously satisfied the first prong of significantly subaverage intellectual functioning as well as the second prong of concurrent deficits in adaptive functioning, this Court vacated the defendant's death sentence. *See id*., citing *State v. Herring*, No. 81–1957–C (Fla. 7th Jud. Cir. 2009) (Final Order Vacating Sentence of Death):

> [The defendant] has IQ scores under 75 from tests administered both before and after age 18 and he has previously established deficits in adaptive functioning and significantly subaverage intellectual functioning. Because [the defendant] has previously established each element of the test for intellectual disability, we vacate his sentence of death and reduce his sentence to life.

Rodriguez v. State

On April 20, 2017, this Court decided *Rodriquez v. State*, 219 So.3d 751 (Fla. 2017). In that case, the defendant presented an IQ score of 64. *See Rodriguez*, 219 So.3d at 754. After the denial of a previous post-conviction claim of intellectual disability, the defendant filed a successive motion arguing that "*Hall* entitled him to further litigate his intellectual disability claim." *Id*. at 755. At a *Huff*[1] hearing, the defendant "agreed that he had presented evidence regarding all the elements of intellectual disability in prior proceedings." *Id*. Then, the circuit court "summarily denied the second successive postconviction motion, finding that [defendant's] prior

[1] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

evidentiary hearing on intellectual disability and other proceedings provided him with the full protections afforded by *Atkins* and *Hall*." *Id*.

This Court affirmed, finding that the defendant "had IQ scores below 70 such that a finding of intellectual disability was possible prior to *Hall*, and [the] defense had every opportunity to present its best case at his prior *Atkins* evidentiary hearing." *Rodriguez*, 219 So.3d at 759.

Hampton v. State

On May 4, 2017, this Court decided *Hampton v. State*, 219 So.3d 760 (Fla. 2017). In that case, four IQ tests that were administered, but "only one had an unadjusted score that fell within the standard error of measurement (i.e., below 75)." *Hampton v. State*, 219 So.3d at 778. The circuit court addressed all three prongs and denied the defendant's claim. *Id*.

On appeal, this Court suggested that *Hall* only applies if a defendant's IQ score, when adjusted for the SEM, falls at or below the statutory cutoff. *See Hampton*, 219 So.3d at 777, quoting *Hall*, 572 U.S. at 723 ("[W]hen a defendant's IQ score is 75 or below, he must be given the opportunity to present evidence of intellectual disability, 'including deficits in adaptive functioning over his lifetime.'"). This Court then examined all three prongs and affirmed the circuit court's denial of the defendant's intellectual disability claim. *See Hampton*, 219 So.3d at 779 ("Sub–Average Intellectual

Functioning… there is competent, substantial evidence to support the postconviction court's conclusion that [the defendant] did not establish significantly sub-average general intellectual functioning."); *see also id*. 780 ("Concurrent Deficits in Adaptive Functioning… we agree with the postconviction court that [the defendant] failed to meet the second prong of intellectual disability."); *id*. ("Onset Before Age Eighteen… there is competent, substantial evidence to support the postconviction court's conclusion that [the defendant] failed to establish that he suffers from intellectual disability.").

Snelgrove v. State

On May 11, 2017, this Court decided *Snelgrove v. State*, 217 So.3d 992 (Fla. 2017). In that case, the defendant "scored a 78 on the WAIS–R, a 70 on the WAIS–III, and a 75 on the Stanford–Binet 5." *Snelgrove*, 217 So.3d at 998, quoting *Snelgrove v. State*, 107 So.3d 242, 253 (Fla. 2012).

On appeal, this Court reviewed the denial of an ineffective assistance of counsel claim for the purported failure to establish intellectual disability – specifically, that counsel failed to call "a witness to establish that he has an intellectual disability that manifested before the age of 18. *See Snelgrove*, 217 So.3d at 1001. Denying the claim, this Court quoted its previous decision in *Salazar* for the proposition that: "If the defendant fails to prove

any one of these components, the defendant will not be found to be intellectually disabled." *Id*. at 1002, quoting *Salazar*, 188 So.3d at 812. Additionally, this Court considered whether the defendant was entitled to relief under *Hall*. *See Snelgrove*, 217 So.3d at 1003. Denying relief, this Court found that the defendant "was permitted [in the circuit court] to present evidence of all three prongs of the test for an intellectual disability." *Id*. at 1004. Additionally, this Court determined that the circuit court "considered each prong in tandem in determining that [the defendant] was not intellectually disabled; no single factor was considered dispositive." *Id*., citing *Walls*, 213 So.3d at 346.

Zack v. State

On June 15, 2017, this Court decided *Zack v. State*, 228 So.3d 41 (Fla. 2017). In that case, the defendant had five IQ test scores over a period of five decades, with a high of 92 at age 11 and a low of 79 at or near age 32. *See Zack*, 228 So.3d at 47. Of note, all of the defendant's test scores were above 75 with an SEM range above the statutory cutoff. *See id*.

This Court noted the language from *Oats* suggesting that a holistic assessment is required in every case involving an intellectual disability claim. *See Zack*, 228 So.3d at 46, citing *Oats*, 181 So.3d at 459 ("In a recent opinion, we found that *Hall* requires courts to consider all three prongs of

intellectual disability in tandem and that no single factor should be dispositive of the outcome."). However, this Court noted that *Hall* "states that a 'defendant must be able to present additional evidence of intellectual disability' where 'a defendant's I.Q. test score falls within the test's acknowledged and inherent margin of error.' *See Zack*, 228 So.3d at 46, quoting *Hall*, 572 U.S. at 723. And, this Court stated that "[w]hile a holistic hearing is required, defendants must still be able to meet the first prong of *Hall*." *Id*. at 47.

Additionally, this Court highlighted that "[g]enerally, the standard error of measurement is approximately five points." *Zack*, 228 So.3d at 46, citing *Hall*, 572 U.S. at 717-18. Thus, this Court stated that "an 'I.Q. score of 70 is considered to represent a band or zone of 65 to 75.'" *Id*., citing *Hall*, 572 U.S. at 718. After addressing the SEM, this Court recognized the difficulty a defendant faces if all of his IQ test scores are above 75 – but this Court still left that door open. *See Zack*, 228 So.3d at 47 ("Because [the defendant's] current score is well above 75, and there are no scores in his history below 75, it is unlikely that he would ever be able to satisfy the significantly subaverage intellectual functioning prong."). Nonetheless, this Court stated that a circuit court is not required to conduct a holistic assessment unless a defendant's IQ score, when adjusted for the SEM, falls at or below the

statutory cutoff. *See Zack*, 228 So.3d at 47 ("[The defendant] provided several I.Q. scores that were all well outside the standard error of measurement. While [the defendant] argues that *Hall* requires the trial court to consider other evidence, a defendant's scores *must first fall within the test's acknowledged and inherent margin of error*.") (emphasis added). Thus, this Court suggested that an SEM-adjusted IQ score of 70 or below is a condition precedent for the consideration of additional evidence.

Ultimately this Court affirmed the denial of the intellectual disability claim, finding that the defendant failed to establish the first prong of significantly subaverage intellectual functioning. *See Zack*, 228 So.3d at 47 ("The trial court correctly found the significantly subaverage intellectual functioning prong dispositive of [defendant's] intellectual disability claim based on [defendant's] scores prior to age 18, which were all over 75.").

Williams v. State

On June 29, 2017, this Court decided *Williams v. State*, 226 So.3d 758 (Fla. 2017). In that case, the circuit court "carefully considered and evaluated, under the applicable law at the time, each of the three prongs of the intellectual disability standard." *Williams*, 226 So.3d at 768-69. And, the circuit court "concluded [the defendant] failed to establish that he met any of the three prongs by clear and convincing evidence." *Id*. at 769.

On appeal, this Court stated: "We recently reiterated that '[i]f the defendant fails to prove any one of the[ ] components [delineated in § 921.137(1), Florida Statutes], the defendant will not be found to be intellectually disabled.'" *Williams*, 226 So.3d at 773, quoting *Salazar*, 188 So.3d at 812. In its decision, this Court focused solely "on the second prong and conclude[d] the postconviction court's finding that [the defendant] failed to demonstrate that he suffers from concurrent deficits in adaptive behavior is supported by competent, substantial evidence." *Williams*, 226 So.3d at 769. Accordingly, this Court denied relief without addressing either the first prong of significantly subaverage general intellectual functioning or the third prong of manifestation before age 18. *See Williams*, 226 So.3d at 773 ("Because competent, substantial evidence supports the postconviction court's conclusion that [the defendant] failed to establish the second prong of the intellectual disability standard, we affirm the determination that [defendant] does not qualify as intellectually disabled under Florida law.").

Glover v. State

On September 14, 2017, this Court decided *Glover v. State*, 226 So.3d 795 (Fla. 2017). The defendant presented reliable IQ scores of 80 at age 16 and 72 after the defendant reached adulthood; additionally, the defendant had two, less reliable scores of 69 as a child and 67 as an adult. *See Glover*,

226 So.3d at 809-10. At the evidentiary hearing, the State's expert witness opined that the defendant was not intellectually disabled, "citing a full-scale IQ score of 80 that [the defendant] achieved at age sixteen and school records demonstrating that [the defendant] was placed in specific learning disabled classes because he was underperforming academically rather than intellectually disabled, and attributing any deficits in adaptive functioning to [the defendant's] behavioral problems, drug use, and mental health issues." *Glover*, 226 So.3d at 809.

On appeal, the defendant highlighted lower IQ test scores as an adult and argued that "the trial court improperly considered dispositive the full-scale IQ score of 80 that he achieved at age sixteen." *Glover*, 226 So.3d at 809. As it did in *Zack*, this Court suggested that an SEM-adjusted IQ score of 70 or below is a condition precedent for the consideration of additional evidence. *See Glover*, 226 So.3d at 809 ("Although *Hall* authorizes defendants who, like [the one in this case], have IQ scores within the SEM to raise an intellectual disability claim…").

Ultimately rejecting the defendant's claim of error, this Court found that the circuit court did perform a comprehensive analysis of all three prongs. *See Glover*, 226 So.3d at 809-10:

> The record belies [the defendant's] argument that the trial court used his 80 IQ score to end the intellectual disability inquiry. In

> addition to his IQ score of 80 (that does not fall within the SEM), [the defendant] presented evidence of an adult-achieved full-scale IQ score of 72 (that does fall within the SEM), as well as two scores that, while not as reliable as the other scores according to the experts, actually fall within the range of intellectual disability—i.e., a childhood score of 69 from an achievement test used to estimate IQ and an adult-achieved score of 67 on the Wechsler Abbreviated Scale of Intelligence. In light of these scores, [the defendant] was permitted to present—and the trial court actually considered—evidence regarding deficits in his adaptive functioning in support of his argument that his alleged intellectual disability manifested before the age of eighteen.

And, this Court held that the circuit court's credibility and causation determinations did not violate *Hall*. *See Glover*, 226 So.3d at 810:

> That the trial court ultimately rejected testimony from [the defendant's] expert that the full-scale 80 IQ score is an outlier and accepted testimony from the State's expert that this score is the most reliable evidence as to whether [the defendant] demonstrated significantly subaverage general intellectual functioning prior to the age of eighteen—especially in light of school records documenting that [defendant] was underperforming academically rather than intellectually disabled—does not violate *Hall*.
>
> Additionally, the trial court's determination that [the defendant's] troublemaking and criminal activity prior to age eighteen indicate that [the defendant's] adaptive deficits were the result of behavioral or psychological issues (rather than intellectual disability) is supported by competent, substantial evidence and does not run afoul of *Hall*.

Jones v. State

On September 28, 2017, this Court decided *Jones v. State*, 231 So.3d 374 (Fla. 2017). The defendant filed a renewed intellectual disability

claim under *Hall*, arguing that the IQ scores he "presented to the trial court in 2006 fall within the tests' acknowledged and inherent margins of error." *Jones*, 231 So.3d at 376. The circuit court "summarily denied the motion…, concluding that [the defendant] is not entitled to relief under *Hall* because he had a full and complete evidentiary hearing that lasted several days, during which he presented evidence regarding all three prongs of the intellectual disability standard yet failed to establish that he met any of [them]." *Id*. at 375.

This Court agreed with the defendant that "in light of *Hall*, he would likely now meet the first prong of the intellectual disability standard—significantly subaverage general intellectual functioning." *Jones*, 231 So.3d at 376. Nonetheless, this Court affirmed the summary denial. *See id*.:

> [Defendant] is not entitled to a new hearing in order to present additional evidence of intellectual disability because he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard in 2006, and *Hall* does not change the fact that [the defendant] failed to establish that he meets the second or third prong.

Morrison v. State

On November 16, 2017, this Court decided *Morrison v. State*, 236 So.3d 204 (Fla. 2017). In that case, the circuit court identified multiple IQ scores for the defendant with a high of 79 and a low of 70. *See Morrison*, 236 So.3d at 225. With some SEM score ranges above and some below 70,

and with those scores spread out across approximately four decades, the circuit court provided the defendant with "a full opportunity to present evidence on each of the three elements of the intellectual disability standard." *Id*. After considering all of the evidence, the circuit court denied the claim on the grounds that the defendant failed to establish the third prong of manifestation before age 18. *See Id.* ("After taking into account *Hall* and considering all three prongs of the intellectual disability test in tandem, the postconviction court found that [the defendant] was not entitled to relief on his intellectual disability claim because he failed to prove the third prong.").

With little discussion, this Court affirmed "the postconviction court's denial of [the defendant's] intellectual disability claim [because the defendant] did not prove manifestation of significantly subaverage general intellectual functioning prior to age 18." *Morrison*, 236 So.3d at 225.

Quince v. State

On April 12, 2018, this Court decided *Quince v. State*, 241 So.3d 58 (Fla. 2018). In that case, the defendant presented IQ scores of 77 and 79. *Quince*, 241 So.3d at 60. Back in 2004, the defendant "filed a successive motion for postconviction relief… in which he sought to vacate his death sentence on the ground that he is intellectually disabled and therefore ineligible for the death penalty under *Atkins*…" *Id.* at 59. In 2008, the circuit

court conducted an evidentiary hearing and "heard evidence regarding all three prongs of the intellectual disability standard." *Id*. Based upon that evidence, the lower court "denied the motion based solely on [the defendant's] failure to meet the significantly subaverage general intellectual functioning prong." This Court affirmed the trial court's denial on appeal. *See Quince v. State*, 116 So.3d 1262 (Fla. 2012).

In the wake of *Hall*, the defendant "filed a renewed motion for a determination of intellectual disability." *Quince*, 241 So.3d at 60. In considering the renewed motion, the circuit court "acknowledged that although it had heard evidence regarding all three prongs of the intellectual disability standard at [the defendant's] 2008 hearing, it denied [defendant's] initial intellectual disability claim based solely on his failure to demonstrate that he meets the significantly subaverage general intellectual functioning prong." *Id*.

After rejecting the defendant's "Flynn effect" claim, this Court considered whether "the trial court erred in failing to consider all three prongs of the intellectual disability standard in tandem before denying [the defendant's] renewed intellectual disability claim." *Quince*, 241 So.3d at 62. This Court noted that the "trial court's order denying [the defendant's] renewed intellectual disability claim did not make any specific factual findings

as to whether [defendant] had established that he meets either the second or third prongs of the intellectual disability standard…" *Id*. Nevertheless, this Court concluded that "under the circumstances presented, such specific findings were unnecessary." *Id*.

This Court acknowledged that "*Hall* requires courts to consider all three prongs of intellectual disability in tandem…" *Quince*, 241 So.3d at 62. However, this Court also noted that it "recently reiterated that '[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.'" *Id*., quoting *Salazar*, 188 So.3d at 812. Additionally, this Court stated that "while *Hall* requires a holistic hearing, 'defendants must still be able to meet the first prong of [the intellectual disability standard].'" *Id*., quoting *Zack*, 228 So.3d at 47. Although it did not expressly state that an SEM-adjusted IQ score of 70 or below is a condition precedent to the consideration of additional evidence, this Court concluded that "because [the defendant] failed to meet the significantly subaverage intellectual functioning prong (*even when the SEM is taken into account*), he could not have met his burden to demonstrate that he is intellectually disabled." *Id.* at 62 (emphasis added).

Finally, this Court's conclusion that, given the lack of evidence on the first prong, circuit court findings on the second and third prongs were

"unnecessary" appears to signal a retreat from language in *Thompson* that "it is not enough that a defendant be allowed to present evidence on all three prongs of the intellectual disability test." *Quince*, 241 So.3d at 62; *Thompson*, 208 So.3d at 59. It also suggests a retreat from language in *Walls* that no single prong can be "dispositive." *Walls*, 213 So.3d at 346-47.

Wright v. State ("Wright II")

On September 27, 2018, this Court decided *Wright v. State*, 256 So.3d 766 (Fla. 2018). On remand from the United States Supreme Court, this Court reconsidered its previous decision of *Wright v. State*, 213 So.3d 881 (Fla. 2017) in light of the Court's recent decision in *Moore*. *See Wright*, 256 So.3d at 768.

In the original case, the defendant presented at least one IQ score with a "range—adjusted for the SEM—[that] fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70." *Wright*, 256 So.3d at 772. Additionally, the defendant had a score of "82 with a range of 79-86, which is well above the approximation for [intellectual disability]." *Id*. Because the defendant had at least one IQ test score with an SEM range that fell at or below the statutory cutoff of 70, the circuit court allowed the defendant to present additional evidence under *Hall*. *See id.* at 772, n.3.

Addressing *Moore*, this Court stated that "*Moore* generally embodies a

simple affirmation of the principles announced in *Hall* [because in *Moore*] the Supreme Court again stated that when a defendant establishes an IQ score range—adjusted for the SEM—'at or below 70,' then a court must 'move on to consider [the defendant's] adaptive functioning.'" *Wright*, 256 So.3d at 771, quoting *Moore*, 137 S.Ct. at 1049. Unlike the Texas Court of Criminal Appeals in *Moore*, both the circuit court and this Court in *Wright I* "properly considered all valid, SEM-adjusted scores and moved on to examine [the defendant's] adaptive functioning." *Id*. (citations omitted).

Additionally, this Court retreated from language in *Cherry II* that suggested a single score below 75 automatically satisfies the first prong. *See Cherry*, 208 So.3d at 702; *see also Wright*, 256 So.3d at 772 ("Neither *Hall* nor *Moore* requires a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range."). This Court stated that *Hall* and *Moore* simply prohibit a strict cut-off that fails to account for the SEM. *Wright*, 256 So.3d at 772. In those types of situations, the defendant must be given the opportunity to present additional evidence. *Id*. Because at least one of the defendant's IQ test scores, when adjusted for the SEM, fell at or below the statutory cut-off, both this Court and the circuit court followed the "directive" from *Hall* and *Moore* and "and properly considered all three prongs of the ID test." *Id*. Therefore, no violation of *Hall* or *Moore* occurred.

With regard to significantly subaverage intellectual functioning, this Court affirmed the circuit court's original determination that the defendant failed to establish the first prong. *See Wright*, 256 So.3d at 772:

> The evidence presented supported the postconviction court's finding that [the defendant] failed to satisfy his burden of proof on the significantly subaverage intelligence prong. This Court correctly held that finding to be supported by competent, substantial evidence.
>
> Accordingly, we need not alter our affirmance of the postconviction court's finding on the intelligence prong in light of *Moore*.

In a footnote, this Court declined to address the apparent tension in its prior decisions regarding whether the failure to prove one prong ends the intellectual disability inquiry. *See Wright*, 256 So.3d at 772, n.3:

> According to Justice Lawson's opinion, the fact that [the defendant] failed to establish this first prong ends our inquiry. Concurring in result op. at 779–80 (Lawson, J.) (citing *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016)). Whether the failure on one prong of the ID test is dispositive as a general matter may be a question in a different case. Compare *Salazar*, 188 So.3d at 812 (stating that the failure on one prong of the ID test is dispositive), with *Oats*, 181 So.3d at 467-68 (holding that the failure on one prong of the ID test is not necessarily dispositive). Yet that is not the issue in this case.

Of note, Justice Lawson noted in his concurring opinion that "*Salazar* is a unanimous per curiam decision from this Court, decided after *Hall*…" *Wright*, 256 So.3d at 780, n.12 (Lawson, J., concurring specially).

Nonetheless, this Court addressed the second prong and concluded

that the defendant failed to establish concurrently existing adaptive deficits. *See Wright*, 256 So.3d at 778:

> At the ID hearing, the parties presented all the evidence that they could muster, which resulted in an outcome adverse to [the defendant]. Because that decision was supported by competent, substantial evidence, which we thoroughly detailed, *Wright*, 213 So.3d at 899-902, we can again conclude that [the defendant] failed to prove adaptive deficits by clear and convincing evidence—a conclusion that *Moore* did not alter.

This Court did not address the third prong of manifestation prior to age 18.

Foster v. State

On December 28, 2018, this Court decided *Foster v. State*, 260 So.3d 174 (Fla. 2018). This Court referenced the "conjunctive and interrelated assessment" language from *Hall* quoted in *Walls*. *See Foster*, 260 So.3d at 179, quoting *Walls*, 213 So.3d at 345-46. In a footnote, this Court retreated from language in *Walls* suggesting "all three prongs of the intellectual disability test [must] be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Walls*, 213 So.3d at 346-47; *see Foster*, 260 So.3d at 179 n.7:

> Although this sentence in *Walls* ends with a suggestion that "no single factor can be considered dispositive," we have since clarified that, even after *Hall*, a failure to prove any one prong of the intellectual disability test is a failure to prove the claim. *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018); *Williams v. State,* 226 So.3d 758, 773 (Fla. 2017) (citing *Salazar*, 188 So.3d at 812). Thus, while an assessment of intellectual disability involves "conjunctive and interrelated" factors, *Hall*, 134 S.Ct. at

> 2001, if a defendant cannot produce an IQ score that shows significantly subaverage intellectual functioning even when the [SEM] is taken into account, the claim will fail for lack of proof of the first prong. *Quince*, 241 So.3d at 62.

Franqui v. State ("Franqui II")

On May 7, 2020, this Court decided *Franqui v. State*, 301 So.3d 152 (Fla. 2020). In that case, the circuit court "accounted for the SEM and concluded that [the defendant's] lowest IQ score was a 71." *Franqui*, 301 So.3d at 155. Even though none of the defendant's scores, when adjusted for the SEM, fell at or below the statutory cutoff, the circuit court considered additional evidence. *See id*. ("Despite finding that [the defendant] did not fall 'within the clinically established range for intellectual-functioning deficits,' the trial court considered other evidence of intellectual disability and evaluated the second and third prongs of the intellectual disability analysis.") (internal citation omitted). After evaluating "each of the three intellectual disability prongs," the circuit court denied the claim. *Id*.

On appeal, the defendant argued that "the circuit court erred in not conducting the holistic analysis of intellectual disability set forth in *Hall*." *Franqui*, 301 So.3d at 154. This Court acknowledged language from *Salazar* that the failure to establish a single prong results in the failure of the overall claim. *See id.*, quoting *Salazar*, 188 So.3d at 812 ("If the defendant fails to prove any one of these components, the defendant will not be found to be

intellectually disabled."). Nevertheless, this Court addressed all three prongs and affirmed the circuit court's denial of the claim. *See id.* at 155 ("Competent substantial evidence supports the court's conclusion [that the defendant has not shown, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100."); *see also id*. ("Competent substantial evidence supports the court's conclusion [that the defendant] failed to demonstrate adaptive deficits."); *id*. ("Competent substantial evidence supports the circuit court's conclusions as to all three prongs of the intellectual disability analysis.").

Phillips v. State

On May 21, 2020, this Court decided *Phillips v. State*, 299 So.3d 1013 (Fla. 2020). The defendant presented IQ scores of "70, 74, and 75." *Phillips*, 299 So.3d at 1017. At the evidentiary hearing, the circuit court permitted the defendant "to present evidence regarding all three prongs of the intellectual disability standard." *Id*. at 1016. After considering all of the evidence presented, the circuit court concluded that the defendant "failed to prove by clear and convincing evidence that he met any of the three prongs of the statutory intellectual disability standard (intellectual functioning, adaptive behavior, and onset before age eighteen) and therefore was not intellectually disabled." *Id*. And in 2008, this Court "upheld the circuit court's findings that

[the defendant] failed to establish that he met any of the three prongs and affirmed the denial of relief based on his claim of intellectual disability." *Id*.

In 2018, the defendant filed another post-conviction claim of intellectual disability, this time arguing that recent decisions in *Hall*, *Walls*, and *Moore* require "a court to holistically consider all three prongs of the intellectual disability standard." *Phillips*, 299 So.3d at 1016. The circuit court decided "that it would review de novo the entire record from the 2006 hearing." *Id*. at 1017. Denying relief, the circuit court made "new findings regarding the evidence presented at the 2006 evidentiary hearing." *Id*.

For the first prong of significantly subaverage intellectual functioning, the circuit court cited the defendant's IQ scores of "70, 74, and 75" as clear and convincing evidence – despite "the fact that the 2006 circuit court found that because neither of the defense experts performed a complete evaluation that tested for malingering, [the test scores] were not credible on this prong." *Id*. at 1017, n.2.

As for the third prong of manifestation of the condition before age eighteen, the circuit court also found that the defendant proved this prong with clear and convincing evidence – despite "the finding made by the 2006 circuit court (and affirmed by this Court in 2008) that [the defendant] failed to establish that he met this prong." *Phillips*, 299 So.3d at 1017, n.3.

As to the second prong, however, the circuit court found that the defendant failed to establish "concurrent deficits in adaptive behavior." *Phillips*, 299 So.3d at 1017. The defendant then appealed. *Id*.

On appeal, this Court receded from the *Walls* and its holding that *Hall* applies retroactively. *See Phillips*, 299 So.3d at 1024. In reaching its decision, this Court reaffirmed *Salazar* by stating "if a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled." *Id*.

Additionally, this Court iterated that "the holding of *Hall* was limited to a determination that it is unconstitutional for courts to refuse to allow capital defendants whose IQ scores are above 70 but within the test's standard error of measurement to present evidence of their asserted adaptive deficits." *Phillips*, 299 So.3d at 1020, citing *Hall*, 572 U.S. at 723. This Court appeared to adopt Justice Canady's dissenting view in *Walls* that *Hall* only applies when a defendant's IQ score, when adjusted for the SEM range, falls at or below the statutory cutoff of 70. Compare *id*. ("*Hall's* limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability.") with *Walls*, 213 So.3d at 350 (Canady, J., dissenting) ("[W]hen an individual's IQ score is determined to be greater than

75—and the SEM thus has been taken into account—the holding of *Hall* has no bearing on the case."). This Court described *Hall* as simply providing an "opportunity" to present additional evidence in such situations. *See Phillips*, 299 So.3d at 1020, quoting *In re Henry*, 757 F.3d at 1161 ("*Hall* merely 'created a procedural requirement that those with IQ test scores within the test's standard of error would have the *opportunity* to otherwise show intellectual disability.'") (emphasis in original).

Even though the lower court found that the defendant established the first and third prongs but failed to prove the second, this Court affirmed the decision of the circuit court because the defendant "conclusively failed to establish that he meets the first prong of the intellectual disability standard…" *Phillips*, 299 So. 3d at 1024.

ANALYSIS

***Hall* did not authorize Appellant to renew his claim**

This Court erred when it found that the retroactive application of *Hall* enabled Appellant to renew his claim of intellectual disability. *See Nixon*, 2017 WL 462148 at *1; *but see Jones*, 231 So.3d at 376. After remand in this case, this Court determined that *Hall* did not apply retroactively because that decision did not represent a change of fundamental significance. *See Phillips*, 299 So.3d at 1020:

> The conclusion "that *Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence" because it may prohibit execution of intellectually disabled persons "within a broader range of IQ scores than before," *Walls*, 213 So. 3d at 346, is therefore incorrect.

Therefore, *Hall* provided no authority for Appellant to renew his claim. *Cf*. *In re Henry*, 757 F.3d at 1159 ("[Petitioner] is not entitled to leave to file a second or successive petition because the Supreme Court has not made the new rule announced in *Hall* retroactive to cases on collateral review.").

Hall does not apply to the facts of this case

This Court erred when it found that *Hall* applies to facts of this case. In *Hall*, the defendant presented an IQ score that fell above the statutory cutoff – but when adjusted for the SEM, potentially fell below. *See Hall*, 572 U.S. at 713. Accordingly, the Court determined that the defendant should have been given an opportunity to present additional evidence. *See id.* at 723. In this case, however, Appellant presented an un-adjusted IQ score of 68 at the original evidentiary hearing. *See Nixon*, 2 So.3d at 140. Therefore, Appellant did not need to rely on an SEM adjustment in order to present evidence on the second and third prongs. Therefore, *Hall* is inapplicable. *See Rodriguez*, 219 So.3d at 759 ("[The defendant] had IQ scores below 70 such that a finding of intellectual disability was possible prior to *Hall*…").

Even if it applies, _Hall_ provides no basis for relief in this case

Even if *Hall* were to apply, there is no basis for relief as Appellant "had every opportunity to present" evidence at the original evidentiary hearing. *See Rodriguez*, 219 So.3d at 759 ("[The] defense had every opportunity to present its best case at [the defendant's] prior *Atkins* evidentiary hearing. Therefore, this case is distinguishable from cases warranting *Hall* relief."); *see also Nixon*, 2 So.3d at 143:

> Section 921.137(1) and rule 3.203 provide defendants with notice of the type of evidence that is relevant to the issues and that will be considered by a trial court. In addition defendants are given an opportunity to present any relevant evidence to the court. This procedure was followed in this case. After an evidentiary hearing, the trial court issued a final order that thoroughly explained its decision, finding that [Appellant] had not established that he should be excluded from the death penalty by reason of mental retardation.
>
> The trial court informed [Appellant] of his opportunity to present his case, provided an evidentiary hearing, determined [Appellant's] mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided [Appellant] with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that [Appellant] was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions.

As is often the case, the original hearing came down to a battle of the experts. *See generally* Hensleigh Crowell, *The Writing Is on the Wall: How the Briseno Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 Tex. L. Rev. 743, 754 (2016). Appellant "presented

the expert testimony of Dr. Dennis Keyes," and the State "presented the expert testimony and report of Dr. Gregory A. Prichard." *Nixon*, 2 So.3d at 140.

For Appellant, Dr. Keyes offered testimony on all three prongs of the statutory test. *See Nixon*, 2 So.3d at 140. With regard to the first prong of significantly subaverage intellectual functioning, Dr. Keyes highlighted the defendant's 1993 adult IQ score of 68. *Id*. As to the second prong of adaptive deficits and the third prong of manifestation prior to age 18, Dr. Keyes largely focused on Appellant's childhood. *See id*.:

> Dr. Keyes further concluded that there were known risks that [Appellant] was mentally retarded starting in early childhood. These known risks included: [Appellant's] mother's drinking, diet, and infrequent visits to the doctor during her pregnancy; [Appellant's] malnourishment and exposure to nicotine and pesticide during his childhood; [Appellant's] social and practical deficiencies; and [Appellant's] psychological, physical, and sexual abuse suffered at the hands of his family.
>
> Dr. Keyes also opined that there was extensive evidence of [Appellant's] difficulty with adaptive skills. He noted that [Appellant] had great difficulty in keeping up with others and learning basic information as a child. Dr. Keyes cited [Appellant's] poor communication skills, difficulty in understanding basic mathematical concepts, poor achievement test results, repetitive behavior of making the same mistakes over and over, and the reports from [Appellant's] prior teachers stating he should be placed in a special education program as evidence of [Appellant's] subaverage intellectual functioning as a child. From his testing and observations, Dr. Keyes concluded that the onset of [Appellant's] low intellectual functioning and adaptive deficits occurred before age eighteen.

For the State, Dr. Prichard focused on the first and third prongs and opined that Appellant did not meet the criteria for intellectual disability. *See Nixon*, 2 So.3d at 140-41:

> In 2006, Dr. Gregory Prichard, a clinical psychologist, examined [Appellant] for the State. To determine [Appellant's] intellectual functioning, Dr. Prichard administered the WAIS III and the Test for Memory Malingering, also known as the WRAT-3 or TOMM. As a result of these tests, Dr. Prichard found [Appellant's] full scale IQ to be 80. He found no indication that [Appellant] was malingering.
>
> After reviewing [Appellant's] 1974 intelligence test, which was conducted when [Appellant] was twelve or thirteen years old, Dr. Prichard stated the test indicated an IQ full scale score of 88. Dr. Prichard found that there was no evidence that questioned the validity of the 1974 IQ score. Thus, Dr. Prichard opined that [Appellant] could not demonstrate onset of mental retardation before eighteen years of age. Based on his evaluations, Dr. Prichard concluded that [Appellant] is not mentally retarded. He further indicated there was no need to address the adaptive behavior issue as part of his assessment because [Appellant] IQ did not fall within the mental retardation range.

After "carefully evaluat[ing] the testimony from the two experts," the circuit court "found the testimony of Dr. Prichard more credible than that of Dr. Keyes and concluded that [Appellant] was not mentally retarded." *Nixon*, 2 So.3d at 144. And, the court concluded that Appellant failed to establish the first prong of significantly subaverage intellectual functioning. *See id.*:

> The trial court found "Dr. Keyes' historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted

> testimony that [Appellant] scored 80 on a test validly administered last year." The trial court further found that Dr. Keyes' score could have resulted from [Appellant's] malingering, that [Appellant's] historical scores were consistent with Dr. Prichard's measurement of an IQ of 80, and that Dr. Keyes' approach of rescoring and averaging the current and historical scores was inappropriate and inconsistent with both the plain language of section 921.137 and this Court's precedent. Thus, the trial court determined that [Appellant] did not meet the first prong of the mental retardation determination.

Finding competent, substantial evidence in support of the circuit court's ruling, this Court affirmed. *See id*. ("[W]e find there is competent, substantial evidence to support the trial court's determination that [Appellant] does not meet the criteria for mental retardation.").

Because Appellant received a full evidentiary hearing during which he presented evidence on all three prongs, *Hall* has no application to this case. *See Jones*, 231 So.3d 374 at 376 ("[The defendant] is not entitled to a new hearing in order to present additional evidence of intellectual disability because he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard in 2006…"). Furthermore, the fact that the circuit court may have based its original order solely on Appellant's failure to establish the first prong remains irrelevant. *See Quince*, 241 So.3d at 62 ("The trial court's order denying his renewed intellectual disability claim did not make any specific factual findings as to whether [the defendant] had established that he meets either the

second or third prongs of the intellectual disability standard, but under the circumstances presented, such specific findings were unnecessary."); *see also Foster*, 260 So.3d at 179, n.7 ("[E]ven after *Hall*, a failure to prove any one prong of the intellectual disability test is a failure to prove the claim."); *Phillips*, 299 So.3d at 1024 ("[I]f a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, [then] he or she will not be found to be intellectually disabled.").

This Court misinterpreted *Hall*

In its previous decision, this Court misinterpreted *Hall*. Contrary to any assertion in *Thompson*, *Hall* did not change "the *manner* in which intellectual disability evidence must be considered" by the circuit court. *Thompson*, 208 So.3d at 59 (emphasis in original). Rather, *Hall* simply prevents "the State of Florida from using an IQ score of 70 as an automatic disqualification for proving that a person is in the class of people [who], on account of their intellectual disability, may not be executed if they commit murder." *Phillips*, 299 So.3d at 1020, quoting *Elmore v. Shoop*, No. 1:07-CV-776, 2019 WL 5287912, at *4 (S.D. Ohio Oct. 18, 2019).

Unrecognized in *Thompson*, there is an important distinction between affording a defendant the opportunity to present evidence relevant to all three prongs and requiring a circuit court to address all three prongs in its order –

especially in cases where the failure to establish one of the prongs is clearly fatal to the claim. *Cf. Brown v. State*, 304 So.3d 243, 257–58 (Fla. 2020), quoting *Zakrzewski v. State*, 866 So.2d 688, 692 (Fla. 2003). In cases where the IQ score, when adjusted for the SEM, falls at or below the statutory cutoff, *Hall* requires the former (opportunity), not the latter (order addressing all three prongs). *See Hall*, 572 U.S. at 723. Therefore, this Court erred when it stated in *Thompson* that "it is not enough that a defendant be allowed to present evidence on all three prongs…" *Thompson*, 208 So.3d at 59

Conformity Clause

By stating that "it is not enough that a defendant be allowed to present evidence on all three prongs," *Thompson* provided Constitutional protections greater than those required by *Hall*; in doing so, *Thompson* violated one of the Conformity Clauses in the Florida Constitution.[2] *See* art. I, § 17, Fla. Const.; *cf*. *State v. Poole*, 297 So.3d 487, 505 (Fla. 2020); *Lawrence v. State*, No. SC18-2061, 2020 WL 6325895, at *6 (Fla. Oct. 29, 2020).

Similar to pre-emption, the Conformity Clause requires that United

[2] The Florida Constitution also contains a Conformity Clause for the Fourth Amendment. *See* art. I, § 12, Fla. Const. By adopting Conformity Clauses, Florida rejected, at least with respect to the Fourth and Eighth Amendments, the view expressed by former Justice Brennan that a state constitution could provide greater protections than those afforded by the United States Constitution. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

States Supreme Court caselaw provide both the floor[3] and the ceiling for cruel and/or unusual punishment protections under state Constitutional law. *See generally Wyeth v. Levine*, 555 U.S. 555, 575 (2009), quoting 71 Fed. Reg. 3922, 3934–3935 (2006) ("In that preamble, the FDA declared that the FDCA establishes 'both a 'floor' and a 'ceiling,' so that 'FDA approval of labeling ... preempts conflicting or contrary State law.'"). With pre-emption, a superior sovereign constrains an inferior one; with a conformity clause, an inferior sovereign restrains itself. Under either framework, however, the inferior cannot provide greater protections than the superior.

Remand was unnecessary in this case

In a previous affirmance, this Court thoroughly detailed the competent, substantial evidence that supports the circuit court's original decision. *See Nixon*, 2 So.3d at 140-41; *see generally Wright*, 256 So.3d at 778, citing *Wright*, 213 So.3d at 899-901. Because *Hall* does not disturb the circuit court's original decision, the finding on the first prong still stands. *See Nixon*, 2 So.3d at 145 ("[T]he trial court determined that [Appellant] did not meet the first prong of the mental retardation determination. We affirm…"); *see also Phillips*, 299 So.3d at 1017, n.2 and n.3. Thus, remand was unnecessary.

[3] Incorporation through the Fourteenth Amendment previously provided the floor. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

Cf. Jones, 231 So.3d at 376 ("*Hall* does not change the fact that [the defendant] failed to establish that he meets the second or third prong.").

In summarily denying Appellant's renewed claim, the circuit court "found the significantly subaverage intellectual functioning prong dispositive of [Appellant's] intellectual disability claim based on [Appellant's] current score of 80." *Nixon*, 2017 WL 462148 at *1. This finding mirrors the circuit court's original finding on prong one. *See Nixon*, 2 So.3d at 145:

> The trial court found "Dr. Keyes' historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted testimony that [Appellant] scored 80 on a test validly administered last year." The trial court further found that Dr. Keyes' score could have resulted from [Appellant's] malingering, that [Appellant's] historical scores were consistent with Dr. Prichard's measurement of an IQ of 80, and that Dr. Keyes' approach of rescoring and averaging the current and historical scores was inappropriate and inconsistent with both the plain language of section 921.137 and this Court's precedent.

Nonetheless, this Court faulted the circuit court for failing to conduct "the more holistic, interrelated assessment" outlined in *Oats*. *Nixon*, 2017 WL 462148 at *1. Because the circuit court focused solely on the first prong of significantly subaverage intellectual functioning, this Court determined that the lower court "did not look to all of the record evidence of [defendant's] intellectual disability, even disregarding other non-IQ evidence that could have been relevant." *Id*. Additionally, this Court directed the lower court to

"conduct proceedings to determine whether a new evidentiary hearing is necessary." *Id.* at *2. Although the original order only found one prong dispositive, the record still contains evidence on all three prongs. *See Nixon*, 2 So.3d at 140-41. Because nothing in the original proceeding violated *Hall*, that dispositive finding on the first prong should have precluded remand in this case. *But see Rodriguez*, 219 So.3d at 758.

The circuit court carefully considered all three prongs in its new order

Despite the inapplicability of *Hall*, the circuit court conducted an evidentiary hearing, carefully considered the evidence presented, and made findings as to all three prongs of the statutory test. *See* Order, p.30:

> [1] [Appellant] failed to present clear and convincing evidence of significantly subaverage general intellectual functioning.
>
> [2] [Appellant] presented clear and convincing evidence of deficits in adaptive behavior, but failed to present clear and convincing evidence that such deficits existed concurrently with subaverage general intellectual functioning.
>
> [3] [Appellant] failed to present clear and convincing evidence of significantly subaverage general intellectual functioning manifested during the period from conception to age 18.

Thus, contrary to Appellant's claim, the record clearly shows the circuit court did not base its decision solely on IQ scores. *See* IB-13. In short, the record clearly "belies" Appellant's argument. *Glover*, 226 So.3d at 809-10.

Similar to the original evidentiary hearing, the hearing on the renewed

claim came down to a battle of the experts. For Appellant, Dr. Crown and Dr. Ouaou testified; for the State, Dr. Prichard testified. Regarding the first prong, Dr. Crown "testified that his testing yielded an IQ range from 62-72." Order, p.16. As to the second prong, Dr. Crown admitted that he "did not perform an adaptive functioning assessment"; nonetheless, Dr. Crown opined that Appellant's "deficits occurred in utero as a result of [Appellant's] mother's consumption of alcohol." *Id*.

Regarding the first and third prongs, Dr. Ouaou admitted that he "did not personally interview any of the persons who made declarations concerning [Appellant]"; nevertheless, Dr. Ouaou opined that Appellant "has significantly subaverage intellectual functioning and that it existed before age 18." Order, p.17. As to the second prong, Dr. Ouaou "testified that [Appellant] demonstrates a clear case of adaptive deficits" that Dr. Ouaoa attributed to "'risk factors' in the developmental period including fetal alcohol, pesticide exposure, and poor prenatal care." *Id*. at 19.

As to the first prong, Dr. Prichard "testified that he continues to have professional confidence" in the 2006 test with its "full-scale score of 80." Order, p.21. Regarding the second prong, Dr. Prichard admitted that he "did not perform any formal adaptive function test on [Appellant]"; but, Dr. Prichard opined that Appellant's "adaptive deficits 'were [primarily] the result

of a conduct disorder when he was younger, which is the juvenile equivalent of antisocial personality disorder.'" *Id*. at 24.

After carefully considering the evidence presented, the circuit court determined that "Dr. Prichard's [2006] score of 80 is credible." Order, p.29. Additionally, the court found that "Dr. Prichard's administration [of the test] was fully transparent and accepted by the defense expert in 2006…" *Id*. Responding to Dr. Ouaou's claim that Dr. Prichard's test suffers from upward bias in its scoring, the court found "to the extent that Dr. Prichard answered the criticisms – and he did – Dr. Ouaou's criticisms support an equal and opposite inference of [downward] bias." *Id*. The court determined "that Dr. Prichard's testimony regarding application of scoring principles is more persuasive [than Dr. Ouaou's]." *Id*. at 30. And, the circuit court concluded that "the evidence presented on behalf of [Appellant] is neither clear nor convincing." *Id*. Ultimately, competent substantial evidence clearly supports the circuit's conclusions "as to all three prongs." *Franqui*, 301 So.3d at 154.

This Court need not address the clear and convincing standard

Appellant failed to prove intellectual disability even by a preponderance of the evidence; therefore, this Court need not address the constitutionality of the clear and convincing standard. *See Quince*, 241 So.3d at 63.

ISSUE II: DID THE CIRCUIT COURT ERR WHEN IT DENIED APPELLANT'S *HURST* CLAIM? (Restated)

STANDARD OF REVIEW

De novo. *See Knight v. State*, 286 So.3d 147, 151 (Fla. 2019).

ANALYSIS

Appellant claims the circuit court improperly imposed a death sentence because a jury failed to find all of the "facts" necessary to establish a maximum sentence of death for first-degree murder. *See* IB-17, citing *Hurst v. Fla.*, 577 U.S. 92 (2016). The circuit court correctly denied relief, however, because Appellant's death sentence became final well before *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). Additionally, the "facts" cited by Appellant are not elements of the offense. *See Poole*, 297 So.3d at 505. Also, Appellant has contemporaneous and prior violent felony convictions that made him eligible to receive a sentence of death anyway. *See Id*. at 508; *see also Lott v. State*, 303 So.3d 165, 166 (Fla. 2020). Additionally, Appellant's multiple confessions would render any sentencing error harmless. *See Brown*, 304 So.3d at 277.

CONCLUSION

Based on the foregoing, Appellee, the State of Florida, respectfully requests that this Court affirm the circuit court order denying relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Counsel for Appellant, this 4th day of January, 2021.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

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