

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-48

JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant Joe Elton Nixon requests oral argument. Mr. Nixon is under sentence of death and is entitled to “a fair opportunity to show that the Constitution prohibits [his] execution.” Hall v. Florida, 572 U.S. 701, 724 (2014). Oral argument will fully develop the claims at issue in this case, on which Mr. Nixon’s life will turn, and this Court has generally granted oral argument in capital cases similarly postured. Accordingly, pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Nixon respectfully moves this Court for oral argument of his appeal.

CITATIONS TO THE RECORD

“ROA” refers to the Record on Appeal herein.

“App.” refers to the Appendix attached hereto, which has been assembled for the convenience of the Court and the parties. The materials in the Appendix were part of several Records on Appeal in this Court at earlier stages of this case. They are relevant to arguments made in this brief arising from decisions of this Court since the present Record on Appeal was compiled.

I.

STATEMENT OF THE CASE AND THE FACTS

A. Overview

Absent from the courtroom and huddled in his cell wearing little more than a blanket while his lawyer conceded his guilt to the jurors, Joe Elton Nixon was convicted and sentenced to death in 1985 on a 10-2 jury recommendation.

This appeal of a successor postconviction motion arises from the Circuit Court's "Order on Hall and Hurst Motions" dated November 21, 2019 and its denial of re-hearing thereof on December 6, 2019.

The Circuit Court denied Mr. Nixon's claim of intellectual disability under Hall v. Florida, 572 U.S. 701 (2014). It did so, notwithstanding this Court's specific directive in Nixon v. Florida, No. SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017) ("Nixon VI"), by repeating its prior legal errors and ultimately reaching a result that was as much at odds with the factual record as with the controlling legal standards of Hall.

In a single sentence, the Circuit Court also denied relief under Hurst v. Florida, 577 U.S. 92 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). It did so in a legal environment that has been substantially altered during the pendency of this appeal by State v. Poole, 297 So. 3d 487 (Fla. 2020). For that reason, Mr. Nixon by motion dated January 30, 2020 asked this Court to relinquish jurisdiction to the Circuit Court

to enable it to consider in the first instance the federal constitutional issues implicated by that ruling. Inasmuch as this Court has, by order dated November 3, 2020, denied that motion, Mr. Nixon explains below why the application to him of the Florida death penalty statute as interpreted by Poole violates his rights under the Sixth and Eighth Amendments as incorporated against the State by the Fourteenth Amendment, as well as his rights under the corresponding provisions of the Florida Constitution.

B. Procedural Background

Following a trial largely in absentia during which Mr. Nixon's attorney admitted his guilt during opening statement, and after a 10-2 advisory jury recommendation, Mr. Nixon was convicted and sentenced to death in 1985 for the murder of Jeanne Bickner of Tallahassee the previous year. This Court affirmed the conviction and sentence on direct appeal. Nixon v. State, 572 So. 2d 1336 (Fla. 1990) ("Nixon I").

Mr. Nixon subsequently filed a motion pursuant to Fla. R. Crim. P. 3.850 that raised numerous claims. The motion was summarily denied by the Leon County Circuit Court. This Court reversed and remanded for an evidentiary hearing on the dispositive issue of whether Mr. Nixon had consented to his attorney's strategy of conceding guilt. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II").

On remand, the Circuit Court ruled adversely to Mr. Nixon. He appealed to this Court, and simultaneously filed a habeas petition. See Nixon v. Singletary, No. SC01-2486, Amended Petition for Writ of Habeas Corpus (Fla. May 14, 2002), ROA 62-77. In it, he asserted a claim of intellectual disability and a claim “for preservation purposes” based on Apprendi v. New Jersey, 530 U.S. 466 (2000), in which he attacked the validity of the constricted role of juries in Florida death-sentencing even before the decision in the then-pending case of Ring v. Arizona, 536 U.S. 584 (2002), confirmed the applicability of Apprendi to capital cases.¹ After Ring was decided on June 24, 2002, the parties exchanged further briefing,² in which they agreed that the applicability of Ring to Florida would be resolved by the cases, then pending, that were eventually decided as King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).³

Without reaching the issues presented by the habeas petition, this Court reversed the Circuit Court for having erred in its ruling on the attorney strategy issue remanded to it. See Nixon v. State, 857 So. 2d 172, 175 n.6 (Fla. 2003) (“Nixon III”)

¹ See Hurst v. State, 202 So. 3d at 48-49 (noting significance of Apprendi).

² Nixon v. Moore, No. SC93912, Response to Amended Petition for Writ of Habeas Corpus (Fla. Aug. 21, 2002), ROA 78-84; Nixon v. Moore, No. SC93912, Reply to State’s Response to Appellant’s Amended Petition for Writ of Habeas Corpus (Fla. Sept. 26, 2002), ROA 85-92.

³ King and Bottoson were subsequently abrogated by Hurst v. Florida, 577 U.S. 92 (2016). See Hurst v. State, 202 So. 3d at 44.

(noting that remaining issues were being held in abeyance). The decision here was, in turn, reversed by the United States Supreme Court, which held that this Court had applied an erroneous legal standard in evaluating the ineffective assistance of counsel claim. Florida v. Nixon, 543 U.S. 175 (2004).

After remand, Mr. Nixon, in January 2005, filed a motion for oral argument respecting the issues held in abeyance,⁴ a motion that was denied on March 17, 2006.⁵ Soon afterwards, this Court issued an opinion that addressed and rejected most of Mr. Nixon's remaining claims. Nixon v. State, 932 So. 2d 1009 (Fla. 2006) ("Nixon IV"). This Court specifically addressed and rejected Mr. Nixon's Ring claim on the merits. Nixon IV, 932 So. 2d at 1024:

Nixon also argues that his death sentence is unconstitutional because it is based on facts not included in the jury's verdict of guilty to the first-degree murder charge. He relies on the decisions by the United States Supreme Court in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This Court has held that Ring is not retroactive in Florida under the test espoused in Witt v. State, 387 So. 2d 922 (Fla. 1980). See Johnson v. State, 904 So. 2d 400 (Fla.

⁴ Nixon v. Florida, No. SC01-2486, Motion for Setting of Oral Argument Date (Fla. Jan. 24, 2005), ROA 93-96.

⁵ Nixon v. Florida, No. SC92006, Order Denying Motion for Oral Argument (Fla. Mar. 17, 2006), ROA 97.

2005).¹² Thus, Ring is not applicable in this instance because Nixon's case became final more than a decade before Ring was decided.

¹² In addition, two of the aggravating factors found in this case are prior violent felony and murder during the commission of a kidnapping. As we have previously said, these aggravators take this case out of the purview of Ring. See Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003); Banks v. State, 842 So. 2d 788, 793 (Fla. 2003).

With respect to the issue of intellectual disability, which Mr. Nixon had presented in his May 14, 2002 petition for a writ of habeas corpus, this Court ruled that he should pursue it by filing a motion in the Circuit Court pursuant to Fla. R. Crim. P. 3.203 within sixty days. Id. at 1024.

Mr. Nixon followed that course. On June 19, 2006, he filed a timely motion and supporting brief pursuant to Fla. R. Crim. P. 3.203 and 3.851 (“2006 Motion”), App. 86-91), claiming that his conviction and sentence of death were violative of, *inter alia*, the reasoning and holding of Atkins v. Virginia, 536 U.S. 304 (2002).

An evidentiary hearing was held on October 23, 2006. (See Transcript of Motion Hearing (“2006 MH Tr.”), App. 92-329.) While the 2006 Motion was under submission to the Circuit Court, this Court on April 12, 2007 issued its ruling in Cherry v. State, which held that an IQ score of 70 or below was an inflexible criterion of mental retardation under the Florida statutory system. See Cherry v. State, 959 So. 2d 702, 712-13 (Fla. 2007). That same day, the State filed a notice of supplemental authority calling the Circuit Court's attention to Cherry, and in

response Mr. Nixon, on April 18, 2007, filed a motion for an order that Fla. Stat. Ann. § 921.137 as interpreted in Cherry violated the United States Constitution and the corresponding provisions of the Florida Constitution by creating an irrebuttable IQ cutoff of 70 and by excluding mental illness. On April 26, 2007, the Circuit Court issued an Order ((“2007 Order”), App. 330-406) which rejected that position and denied Mr. Nixon’s motion. See App. 354.

Mr. Nixon appealed, reiterating to this Court his argument that the Cherry rule was unconstitutional under Atkins. On January 22, 2009, this Court rejected this attack in Nixon v. State, 2 So. 3d 137 (Fla. 2009) (“Nixon V”).⁶

On May 27, 2014, the United States Supreme Court in Hall v. Florida, 572 U.S. 701 (2014) adopted the position that Mr. Nixon had previously asserted in this Court: that the strict Florida cutoff of an IQ score of 70 was an unconstitutional violation of Atkins. Id. at 704.⁷ The Court emphasized that its legal rule was an

⁶ Mr. Nixon reasserted these legal positions as Claim V of a federal habeas corpus petition he filed in the United States District Court for the Northern District of Florida on January 17, 2010. See Nixon v. Jones, No. 4:10-cv-00020-MCR-MAF (N.D. Fla.) (ECF No. 1). He supported them with a voluminous expert declaration that is part of the present record. See Expert Hearing Declaration of George W. Woods, M.D., filed in Nixon v. McNeil, No. 4:10-cv-20-MCR-CAS (N.D. Fla. Nov. 22, 2013) (“Woods Expert Decl.”), ROA 507-2357. In connection with the filing of his successive intellectual disability motion in 2015, Mr. Nixon asked the federal court to stay its proceedings and it did so. See Order Staying Proceedings (N.D. Fla. Aug. 11, 2015), App. 522.

⁷ The decision of this Court that the United States Supreme Court reversed had relied extensively upon Nixon V. See Hall v. State, 109 So. 3d 704, 707-10 (Fla. 2012).

implementation of the analytical approach that the clinical community would take in diagnosing whether a given individual was intellectually disabled. Id. at 710-14.

On May 25, 2015, Mr. Nixon filed a successive post-conviction motion (“2015 Motion”) asserting that he was intellectually disabled within the meaning of Hall. He supported it with the comprehensive affidavit of a highly qualified expert, Dr. Stephen Greenspan. Affidavit of Dr. Stephen Greenspan, Ph.D., in Support of First Successive Motion Under Fla. R. Crim. P. 3.851 (May 25, 2015) (“2015 Greenspan Aff.”), ROA 2549-4026.

However, on October 9, 2015 the Circuit Court issued an order that dismissed Mr. Nixon’s motion. See Order Denying Defendant’s Successive Post-Conviction Motion (“2015 Order”), App. 407-413.

Mr. Nixon appealed (Case No. SC15-2309). During the pendency of the appeal he made a supplemental filing dated September 26, 2016 (ROA 4117-4156) suggesting to this Court that judicial economy would be served if it were to follow the same course as in Hall v. State, 201 So. 3d 628 (Fla. 2016): determine that because the existing record supported Mr. Nixon’s intellectual disability claim, he was entitled to relief without the necessity for further evidentiary proceedings. The Court rejected that suggestion in an order dated January 27, 2017.

Instead, on February 3, 2017, this Court in Nixon VI reversed the Circuit Court’s denial of Mr. Nixon’s Hall claim, writing:

Hall recognizes that intellectual disability “is a condition, not a number.” Hall, 134 S. Ct. at 2001. In a recent opinion, this Court 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. See Oats v. State, 181 So. 3d 457, 459 (Fla. 2015). Thus, an intellectual disability claim may not be legally insufficient or positively refuted by the record even if the defendant’s IQ scores are higher than 70.

At the Huff hearing,¹ Nixon presented his full range of scores, which included a 73 from 1985 and a 72 and 68 from 1993.² *The trial court incorrectly found the significantly subaverage intellectual functioning prong dispositive of Nixon’s intellectual disability claim based on Nixon’s current score of 80. Although the court did not have the benefit of the Oats decision, it should have conducted the more holistic, interrelated assessment for which Nixon’s counsel argued at the Huff hearing. Furthermore, because of its ruling as to the subaverage intellectual functioning prong, the court here did not look to all of the record evidence of Nixon’s intellectual disability, even disregarding other non-IQ evidence that could have been relevant.*

Therefore, Nixon’s claim is legally sufficient and not conclusively refuted by the record in this case. As we noted in Walls, “all three prongs of the intellectual disability test [must] be considered in tandem.... [T]he conjunctive and interrelated nature of the test requires no single factor to be considered dispositive.” Walls, 41 Fla. L. Weekly at S469 (citing Oats, 181 So. 3d at 459). Because the postconviction court here used the wrong legal standard, under Oats, to address Nixon’s claim, Nixon’s motion cannot be deemed legally insufficient or positively refuted by the record on that basis and therefore should not have been summarily denied. We remand on this issue alone, and instruct the trial court to conduct

proceedings to determine whether a new evidentiary hearing is necessary.

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

² The record demonstrates six IQ scores for Nixon: 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.

2017 WL 462148, at *1-2 (emphasis added).

Meanwhile, on January 9, 2017, while Nixon VI was still pending, Mr. Nixon filed a second successive motion in the Circuit Court, asserting his entitlement to the benefits of Hurst v. Florida and Hurst v. State (see Second Successive Motion Under Fla. R. Crim. P. 3.851 (Fla. 2d Jud. Cir. Jan. 9, 2017), ROA 7-44). The motion was accompanied by an extended evidentiary proffer canvassing the record. See Affidavit of Dr. Stephen Greenspan, Ph.D., in Support of Second Successive Motion Under Fla. R. Crim. P. 3.851 (Jan. 6, 2017) (“2017 Greenspan Aff.”), ROA 4197-7242.

On the same day, Mr. Nixon filed a motion here pursuant to Tompkins v. State, 894 So. 2d 584, 879-60 (Fla. 2005) asking that, rather than relinquish jurisdiction over Mr. Nixon’s pending appeal, this Court direct the Circuit Court to hold his Hurst motion in abeyance. This Court adopted the suggestion, denying relinquishment in an order dated January 27, 2017. After the Nixon VI remand order issued on February 3, 2017, the Circuit Court considered Mr. Nixon’s claims under Hurst together with those under Hall.

With respect to the Hurst claims, the Circuit Court received briefs from the parties and concluded that it was precluded by the existing caselaw in this Court from granting relief. See Tr. of June 15, 2018 Case Mgmt. Conf. at 6-8 (Fla. 2d Jud. Cir.), ROA 8211-8213. Hence, as indicated above, it ultimately denied that claim in a single sentence when it issued the Hall/Hurst Order that is the subject of this appeal. See Order on Hall and Hurst Motions (Fla. 2d Jud. Cir. Nov. 21, 2019), ROA 9680-9681. Mr. Nixon challenged that ruling in a motion for rehearing filed on December 6, 2019, which the court below denied the same day. See Motion for Rehearing of Order on Hall and Hurst Motions (Fla. 2d Jud. Cir. Dec. 6, 2019) (“2019 Mtn. for Rehrng.”), ROA 9682-9687; Order Denying Rehearing (Fla. 2d Jud. Cir. Dec. 6, 2019), ROA 9688.

With respect to the Hall claims, Mr. Nixon on remand from Nixon VI reiterated his entitlement to judgment on the existing record. See Joe Elton Nixon’s Brief in Support of Granting his Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851 Without an Additional Hearing (Fla. 2d Jud. Cir. Apr. 7, 2017) (“Nixon 2017 Hrg. Mem.”), ROA 7307; Joe Elton Nixon’s Reply Brief in Support of Granting his Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851 Without an Additional Hearing (Fla. 2d Jud. Cir. May 23, 2017) (“Nixon 2017 Hrg. Rep. Mem.”), ROA 7709.

However, the Circuit Court determined following oral argument (see Tr. of Case Mgmt. Hrg. (Fla. 2d Jud. Cir. June 2, 2017), ROA 7758) that a hearing would be held on the Hall claim (Order Setting Discovery Schedule and Brief Schedule (June 7, 2017), ROA 7739-7740) because the record had been newly enhanced by an IQ score of 67 obtained by defense expert Dr. Barry Crown in the spring of 2017 using the “gold standard” WAIS-IV test instrument. (Tr. of Evid. Hrg. Vol. 1 (Fla. 2d Jud. Cir. July 30, 2018), ROA 9155, 9162, 9176, 9224, 9228.)

The parties then engaged in extensive discovery, during which Mr. Nixon provided additional confirmatory test results⁸ and a series of further school reports, eyewitness affidavits and expert reports. The State conducted no new testing; its expert testified on the basis of the IQ test which he had conducted in 2006 using the then-standard test instrument. (See Joe Elton Nixon’s Post-Hearing Memorandum in Support of His Claim of Intellectual Disability (Fla. 2d Jud. Cir. Feb. 18, 2019) (“Nix. 2019 Post-Hrg. Mem.”), ROA 9555-9557, 9559-9562; Tr. of Evid. Hrg. Vol. 3 (Fla. 2d Jud. Cir. July 31, 2018), ROA 9427.)

The hearing took place in July 2018 and the parties then filed briefs. On November 21, 2019, the Circuit Court denied the Hall claim in the “Hall/Hurst

⁸ One of these, identified but not discussed in the opinion below (see ROA 9667) was a Test of Premorbid Functioning, specifically designed to quantify innate intelligence at birth. Mr. Nixon’s predicted IQ was 71. See Tr. of Evid. Hrg. Vol. 1 (Fla. 2d Jud. Cir. July 30, 2018), ROA 9268-9269.

Order” (ROA 9651). It denied a motion for rehearing in its order of December 6, 2019 (ROA 9688). Mr. Nixon timely filed his notice of appeal from those orders on January 6, 2020 (ROA 9689).

On January 30, 2020, Mr. Nixon filed a motion in this Court asking it to relinquish (“Mtn. to Relinquish”) the case to the Circuit Court so that it could reconsider the Hurst claims in light of the post-Poole legal environment. This Court denied the motion on November 3, 2020.

II.

SUMMARY OF ARGUMENT

A. The Circuit Court Erred in Denying Mr. Nixon's Hall Claims

In 2007, the Circuit Court denied Mr. Nixon's intellectual disability claim on a basis obliterated by the United States Supreme Court in 2014. In 2015, the Circuit Court denied Mr. Nixon's intellectual disability claim on the same basis. This Court reversed in 2017. In 2019, the Circuit Court denied Mr. Nixon's disability claim on the same basis. Mr. Nixon asks this Court to reverse once more.

The legal error below was simple. The Circuit Court conflated "sub-average general intellectual functioning" with "IQ scores." Thus it failed to read the record from the perspective that "Intellectual disability is a condition, not a number." Hall, 572 U.S. at 723.

As Mr. Nixon pointed out in his post-hearing submission below (see Nix. 2019 Post-Hrg. Mem., ROA 9555-9557), the additional live evidence adduced at the hearing before the Circuit Court in 2018 was only a small fraction of the record before it for consideration, all of which was admitted without objection and none of which the State contested factually. That record included, apart from expert submissions: 23 affidavits submitted by eyewitnesses who knew Mr. Nixon literally since birth in a variety of capacities along with dozens of school records, social services reports and psychological test results compiled by independent

professionals dating back to 1972, when Mr. Nixon was 11 years old. (Sections III.A.1-3 below).

Everyone—parent, relative, friend, teacher, social worker—who ever knew Mr. Nixon described him as impaired. There is not a single report to the effect that Mr. Nixon was a typical child. On the contrary, one finds nothing but continuing expressions of concern that he was intellectually challenged, a fact that is as significant clinically as common sense would suggest. See Tr. of Evid. Hrg. Vol. 3 (Fla. 2d Jud. Cir. July 31, 2018), ROA 9477 (testimony of State’s expert, Dr. Prichard)).

The Circuit Court, however, repeating the precise legal error that led to reversal in this Court well over three years ago, determined that the evidence was to be disregarded because of the existence of IQ results outside the range of intellectual disability. That is simply not the law. The IQ results in question were specifically noted in this Court’s 2017 remand order. See Nixon VI, 2017 WL 462148, at *1 n.2.

The direction contained in that order was that the Circuit Court give Mr. Nixon the “conjunctive and interrelated assessment” mandated by Hall. Nixon VI, 2017 WL 462148, at *2. The Circuit Court quite explicitly refused, writing in the decision now under review that the above-75 IQ scores in the record meant that this was not a case “in which Hall would require resort to the interrelated and conjunctive

assessment.” (2019 Hall/Hurst Order, at 2, 8, 25-27, ROA 9652, 9658, 9675-9677).
(Section III.A.4 below)

In accordance with the suggestion Mr. Nixon made when he was last here (Supplemental Brief of Appellant, No. SC15-2309 (Sept. 26, 2017), ROA 4121) this Court should correct the error by ordering the imposition of a life sentence, just as it did in Hall v. State, 201 So. 3d 628 (Fla. 2016) and Herring v. State, No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017). (Section III.A.5 below). That disposition is appropriate because two seeming barriers to relief need not be reached.

First, although Mr. Nixon adheres to his long-standing contention that he may not be required to prove his intellectual disability by “clear and convincing evidence” (Section III.A.6 below), he has in fact done so.

Second, Mr. Nixon’s entitlement to relief is unaffected by the decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (announcing that Walls v. State, 213 So. 3d 340 (Fla. 2016) erred in holding Hall v. Florida, 572 U.S. 701 (2014) retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980)). Mr. Nixon was entitled as a matter of both state and federal law to have the Circuit Court follow the direct order this Court gave in 2017. Phillips does not apply to this case and does not purport to apply.

Moreover, uncontroversial principles of constitutional law – having nothing to do with the retroactivity of new constitutional rules of criminal procedure –

require the application of Hall v. Florida to this case. For the reasons articulated in Atkins v. Virginia, 536 U.S. 304 (2002), Mr. Nixon was entitled to relief under the United States Constitution at the time he asserted his intellectual disability claim in the Circuit Court in 2006. He was wrongly denied that relief when this Court in Cherry v. State, 959 So. 2d 702 (Fla. 2007) gave an interpretation to Florida's intellectual disability statute that he asserted at the time was unconstitutional. When the United States Supreme Court agreed in Hall in 2014, it did not hold the statute unconstitutional. It simply held that the statute was required to mean what it meant pre-Cherry. Decisions construing statutes in a way beneficial to criminal defendants are, as a matter of due process and equal protection, always applied retroactively, see Schriro v. Summerlin, 542 U.S. 348, 351 (2004); Bousley v. United States, 523 U.S. 614, 620-21 (1998). That is why this Court in a case procedurally like this one, and unlike Phillips, applied Hall in Haliburton v. Florida, 163 So. 3d 509 (Fla. 2015) without conducting a Witt analysis.

The full argument set forth below elaborates several additional independent reasons why applying Phillips to deny Mr. Nixon Hall relief would violate the United States and Florida Constitutions. (Section III.A.7 below)

B. The Circuit Court Erred in Denying Mr. Nixon's Hurst Claims

The Hurst rulings below were erroneous, just as Mr. Nixon argued there, but now logically take a back seat to the massive and unconstitutional transformation of

Florida's death penalty system since wrought by Poole. The capital sentencing scheme that case contemplates would have been unconstitutional long before Hurst v. Florida, and is certainly unconstitutional today. (Section III.B.1 below)

The Eighth Amendment requires the State to ensure that the death penalty is reliably inflicted only on the most morally culpable subset of those criminals who commit the most serious homicides (see, e.g., Roper v. Simmons, 543 U.S. 551, 568 (2005); Godfrey v. Georgia, 446 U.S. 420, 428 (1980)) as expressed in community norms and determined by procedures reflecting national standards of decency. The essentially non-existent sentencing role that Poole allocates to the jury is irremediably inconsistent with the Eighth Amendment. (Section III.B.2 below)

It is also inconsistent with the Sixth Amendment. A capital punishment system that seeks to make death eligibility flow from the fact of conviction while insulating jurors from consideration of that prospect violates the Sixth Amendment. Adams v. Texas, 448 U.S. 38, 50 (1980). Moreover, under Florida law determining whether to apply the aggravating factor of a prior conviction requires consideration of the facts surrounding the previous offense. The very rule of Hurst v. Florida is that such facts must be found by a jury. In this case, the sentencing judge's findings in support of the death sentence rested on a number of "facts" of questionable accuracy that no jury ever found explicitly or implicitly. (Section II.B.3 below)

This Court should order the imposition of a life sentence.

III.

ARGUMENT

A. The Circuit Court Erred in Denying Mr. Nixon's Hall Claims

1. *An Overwhelming and Uncontested Factual Record Demonstrates That Mr. Nixon Manifested Subaverage Intellectual Functioning Prior to the Age of 18*

a. Background: Mr. Nixon's Childhood Environment Dramatically Increased the Likelihood That He Would Develop an Intellectual Disability

A doctor seeking to determine whether a patient had malaria or instead some similar-appearing disease would reasonably ask whether the patient had recently travelled to an area where malaria was rampant.

Similarly, clinicians in the field of intellectual disability agree that there are several well-defined risk factors that make it more likely that an individual will develop that condition. See Moore v. Texas, 137 S. Ct. 1039, 1051 (2017) (“Moore I”); 2006 MH Tr. at 37:3-15, ROA 1202; 2017 Greenspan Aff. ¶¶ 11(b), 17-18, ROA 4204, 4207-4208; Supplemental Affidavit of Denis Keyes, Ph.D. (Oct. 23, 2006), Def. Exh. 2 (“Keyes Supp. Aff.”), Tab S, ROA 974-977; Power Point, entitled ‘Joe Elton Nixon,’ presented by Denis William Keyes, Ph.D. (Oct. 23, 2006,) Def. Exh. 3 (“MH Power Point”), at 10-16, ROA 7602-7608. Mr. Nixon was exposed to almost every one of these risk factors.

First, maternal alcohol use and malnutrition, especially in the first trimester of pregnancy, have long been recognized as specific risk factors for mental

retardation. 2015 Greenspan Aff. ¶¶ 8-9, ROA 2558-2559. Mr. Nixon's mother, Betty Nixon, by her own well-corroborated admissions, see Betty Nixon Aff. ¶¶ 3-4 (June 4, 2013), ROA 4812-4813, drank excessive amounts of alcohol, including beer and gin, during her pregnancy with Mr. Nixon; she was unable to attain adequate medical care or nutrition while Joe was in utero; the family was living in extreme poverty and access to food was very limited. See 2017 Greenspan Aff. ¶¶ 17, 34, ROA 4207-08, 4215-4216; Virginia Nixon Aff. ¶ 8 (Oct. 6, 1993), ROA 3024 (“We grew up poor. We didn’t have money to go to the doctor so we used home remedies to take care of ourselves. We didn’t have much food and we were always hungry.”), id. ¶ 13, ROA 3025 (“My mother and grandparents all drank a lot of gin. Mom gave up gin, but it wasn’t until long after Joe was born.”); id. ¶ 3, ROA 3022 (“Food was scarce; there was never enough to go around”); Dee Report at 2, ROA 2975 (“Betty[] Nixon admits to ingesting alcohol during her pregnancy with Joe. She was unable to obtain adequate medical care or nutrition while Joe was in utero.”); 1993 Keyes Report, Tab 3 at 2, ROA 2959 (“Mrs. Nixon has admitted to drinking alcohol, both beer and gin, during her pregnancy.”); 2006 MH Tr. 38:12-39:20, ROA 1203-1204; MH Power Point at 12, ROA 7604.

Second, Mr. Nixon's developing brain was subjected to a variety of additional chemical insults. Notably:

- As a small child, Joe was exposed to nicotine and pesticides in the tobacco fields, both well-documented dangers to developing brains. See 2017 Greenspan Aff. ¶¶ 36-37, ROA 4216-4217.
- From the time he was a small boy he was given alcohol to entertain others, and by the age of 12, was “always drunk.” See 2015 Greenspan Aff. ¶ 72, ROA 2582 (“Alcohol consumption by young children affects the developing brain and is a risk factor for ID.”).

See Virginia Nixon Aff. ¶ 6 (Oct. 6, 1993), ROA 3023-3024 (“[A]ll of us kids had to pick tobacco. I was not even 10 years old, so Joe had to be younger than 8 years old. I remember plenty of times when airplanes would be flying overhead and spraying something down. . . . [Daddy] told me that the planes were spraying the tobacco to kill bugs.”); John Nixon, Jr. Aff. ¶ 3 (Sept. 30, 1993), ROA 3013-3014 (“Joe, who was just a baby, was put on a quilt near the tobacco, and the tobacco was dusted with pesticides. A plane flew over and sprayed the dust down. . . . It blew all over us, including Joe while he lay on the quilt.”); id. ¶ 13, ROA 3017 (“I remember people giving Joey liquor even when he was real young – about 7 or 8 years old.”); Eddie Ingram Aff. ¶ 11 (Sept. 21, 1993), ROA 3086 (“I know that Joe drank when he was young. He told me about older people giving him alcohol just to watch him act crazy.”); Detention-Adjustment Unit Admission/Release Form (June 17, 1976), ROA 3631 (“The student [Joe] was huffing anti-perspirant to a condition that he was in an inebriated state unable to communicate with anyone”); 2006 MH Tr. at 40:12-41:12, ROA 1205-1206; id. at 41:6-7, ROA 1206 (“[Nixon] was huffing chemicals that could have caused brain damage as well.”); MH Power Point at 14, ROA 7606.

Third, Mr. Nixon was malnourished throughout his childhood. See Virginia Nixon Aff. ¶ 17 (Oct. 6, 1993), ROA 1069 (“Sometimes, as a punishment, my mother would withhold food from us all day.”); see also id. ¶ 8, ROA 1067 (“We didn’t have much food and we were always hungry. . . . Getting enough food was always on our minds.”); Thomas Earl Nixon Aff. ¶ 5 (Oct. 5, 1993), ROA 3224-3225 (“I have seen [Joe’s mother] deprive Joe and the other children of food for several days, as a punishment. . . . [She] got angry over nothing and would make Joe stay in the bedroom for the entire weekend.”); 2006 MH Tr. 39:7-11, ROA 1204 (Testimony of Dr. Keyes: “[M]alnutrition is the number one cause of intellectual disability in the world . . . [I]f it occurs in any situation the brain does not develop properly.”).

Fourth, many severe physical injuries to the frail bodies of children put their brains at risk of permanent damage, but some injuries are more threatening than others. “It has long been amply corroborated by the professional literature that children subject to physical abuse, especially severe physical abuse – and particularly when accompanied by psychological neglect and torment – are likely to suffer from distorted mental development that damages their later ability to function normally.” See 2015 Greenspan Aff. ¶ 41, ROA 2570.

Here:

- Mr. Nixon’s uncle admits to having sex with him “against his wishes” when he “was very young” until he was in his teens.

- Mr. Nixon was beaten and emotionally traumatized by his older brother, John.
- Mr. Nixon’s elementary school principal “used to beat Joe all the time, with a paddle and sometimes with a fan belt. He was very cruel and everyone knew he did it, but no one did anything about it. That’s just the way things were.”

James Nixon Aff. ¶ 5 (Sept. 3, 1993), ROA 3352-3353 (“I had sex with Joe when he was very young and didn’t know what it was about. When Joe was older I continued to have sex with him against his wishes. Joe cried and wanted me to leave him alone, but I continued to have sex with him throughout his childhood.”); *id.* ¶ 7, ROA 3353 (“I know of times that John beat Joe. One time I recall John came to my apartment and started attacking Joe. My apartment was virtually destroyed.”); John Nixon, Jr. Aff. ¶ 7 (Sept. 30, 1993), ROA 3015 (“Joe would get beaten at school too, and then when he got home, he’d get beat again there. Mr. Tookes, the principal of the elementary school, used to beat Joe all the time, with a paddle and sometimes with a fan belt.”); *id.* ¶ 9, ROA 3015-3016 (“Uncle James sexually abused Joe from the time he was a little boy until he was in his teens. Uncle James told me how he did Joe. . . . When Joe was in his late teens, Uncle James used to tell Joe’s girlfriends that he had ‘had’ Joe.”); Eddie Ingram Aff. ¶ 12 (Sept. 21, 1993), ROA 3087 (“Uncle James forced him to have sex from the time he was very young until he was in his teen years.”); *id.* ¶ 14, ROA 3087 (“John would lie about Joe to get him in trouble, then laugh at him. . . . John even teased Joe about their Uncle James abusing him,

and that really hurt. John got pleasure out of . . . hurting Joe in any way he could, both physically and mentally.”); Thomas Earl Nixon Aff. ¶ 8 (Oct. 5, 1993), ROA 3225-3226 (“[Joe’s uncle] was a sex fanatic who forced Joe to have sex with him. I saw [Joe’s uncle] make Joe get in bed with him when Joe was about ten years old and have sex with him. If Joe complained or resisted, [Joe’s uncle] would choke him.”); 2006 MH Tr. at 39:16-20; 41:13-22, ROA 1204, 1206; MH Power Point at 15, ROA 7607.

Mr. Nixon’s father was rarely at home to provide the necessary caretaking, parenting, and stimulation that a child requires, and when he was home he did not know any other way to control Joe besides beating him with “switches, belts, extension cords, ropes, fan belts, whatever was handy.” Eddie Ingram Aff. ¶ 13 (Sept. 21, 1993), ROA 3087 (“His father was seldom at home and when he was, he beat Joe for no reason. Joe’s father beat Joe with his fist and just about anything else that he could get his hands on.”); Thomas Earl Nixon Aff. ¶ 4 (Oct. 5, 1993), ROA 3224 (“Joe’s father, John Nixon, was never around.”); id. ¶ 6, ROA 3225 (“Joe’s mother would get mad at Joe and have her husband beat him. John Nixon would use whatever he could get into his hands. He even used a limb off a tree to beat Joe. But his favorite was an extension cord. He’d swing wild and just keep hitting him all over his body. If Joe didn’t cry, his daddy would just get madder and swing harder and harder. I have seen Joe walking around with bruises for days.”); Doris Graham

Aff. ¶ 6 (Sept. 26, 1993), ROA 3008 (“My parents never had the time to give us any of the attention we needed. That was especially hard on Joe because he had so many problems. . . . [t]he only attention we got were whippings. When our parents whipped us, they would use sticks, belts, electric cords, fanbelts; almost anything they could find. Those beatings left scars.”); Virginia Nixon Aff. ¶ 16 (Oct. 6, 1993), ROA 3025-3026 (“Joe got whipped a lot. Whenever he did poorly in school or came home with bad grades, he got beaten.”); Paul Nixon Aff. ¶ 15 (Dec. 16, 2016), ROA 6019 (“Joe took a lot of violent beatings as a child, some undeserved”); John Nixon, Jr. Aff. ¶ 7 (Sept. 30, 1993), ROA 3015 (“[Our father] would tie us up with rope and give us a real bad whipping. He would beat us with just about anything and just about anywhere he could hit us. He left bruises and welts on us.”); Marvin Carter Aff. ¶ 3 (Oct. 6, 1993), ROA 3091 (“It was common knowledge in the community that Joe’s father was mean as a snake and that there were things going on in that house that just weren’t right.”); 2006 MH Tr. at 39:21-40:11, ROA 1204-1205; MH Power Point at 13, ROA 7605; Doris Graham Aff. ¶ 10 (Sept. 26, 1993), ROA 3009 (“All my parents would do was tell Joe he had no sense, he was crazy and that he would never amount to anything.”); Virginia Nixon Aff. ¶ 20 (Oct. 6, 1993), ROA 3026 (“Mom called [Joe] stupid all the time.”); Marvin Carter Aff. ¶ 3 (Oct. 6, 1993), ROA 3091 (“[Joe] was neglected and I could tell that his parents weren’t doing right by him.”); Eddie Ingram Aff. ¶ 12 (Sept. 21, 1993), ROA 3087 (“Joe told his mother

about what was done to him [sexual abuse by his uncle], but she never did anything to stop it.”); Betty Nixon Aff. ¶¶ 3-4 (June 4, 2013), ROA 4812-4813 (admitting she knew of the sex abuse; that she punished, and allowed her husband to punish, Joe too harshly; and that she withheld food from him).

Fifth, just as parental provision of a nurturing environment promotes healthy brain growth, parental neglect does the opposite and has long been recognized as a causative factor in the development of intellectual disability. See 2015 Greenspan Aff. ¶ 30, ROA 2566.

Mr. Nixon’s parents abandoned him when he was a young child. When his parents moved to Tallahassee, Florida, they took six of their eight children with them, leaving Mr. Nixon and his brother Paul with their grandparents in Quincy, Florida. John D. Nixon, Jr. Aff. ¶ 2 (Sept. 30, 1993), ROA 3013. Mr. Nixon experienced the same emotional and physical experience from his grandfather, “Daddy,” as he experienced with his own parents. John D. Nixon, Jr. Aff. ¶ 5 (Sept. 30, 1993), ROA 3014 (“Before Joe was school age, Daddy used to put Joe and Paul outside the house at night at lock the door. He wanted to see who cried first. Daddy laughed at Joe for crying and being scared. . . . Joe hated the dark. It terrified him. . . . Daddy thought it was funny, especially when he got drunk.”). He was also sent to live with his aunt, and in various institutions. See Virginia Nixon Aff. ¶ 23 (Oct. 6, 1993), ROA 3027 (“Joe was separated from us often. He lived with my

grandparents, my aunt and was sent to several different half-way houses and boys' schools throughout the years.”). “From age 10 to 16, Joe Nixon moved 12 times between eight different residences,” disrupting not just his instructional environment and ability to form peer relationships, see 2017 Greenspan Aff. ¶ 65, ROA 4229; id. Tab 120, ROA 6192-94; Paul Nixon Aff. ¶ 22 (Dec. 16, 2016), ROA 6021, but also depriving him of sustained behavioral modelling by adults, just at the period of life when this “is most necessary to prevent developmental damage.” 2015 Greenspan Aff. ¶ 10, ROA 2559.

Finally, having mentally disturbed family members, particularly among caregivers, significantly increases a child's risk of developing intellectual disability. See 2017 Greenspan Aff. ¶ 26, ROA 4212. Several members of Mr. Nixon's family suffered from serious mental illnesses, including some of those who cared for him in childhood. See, e.g., Virginia Nixon Aff. (Oct. 6, 1993) ¶ 18, ROA 3026 (“Several other brothers were slow too, but Joe was much worse than they were.”); id. ¶ 25, ROA 3027-3028 (“Mental illness seems to run in our family; we have several relatives in the family who have been treated for serious mental illnesses. One of our aunts was institutionalized for years.”); Judith Dougherty Aff. ¶ 6 (Oct. 6, 1993), ROA 1095-1096 (“Mr. Nixon's mother, Betty Nixon, had obvious mental disabilities.”); Eddie Ingram Aff. ¶ 4 (Sept. 21, 1993), ROA 3084-85 (“[Joe's father] was real slow, just like Joe. He never talked much at all and just couldn't carry on

a conversation, . . . He was just real simple-minded.”). Mr. Nixon’s uncle, James Edward Nixon, was hospitalized multiple times for severe mental illness, including depression, bipolar disorder, schizophrenia, and suicide attempts. See James Edward Nixon Jail Records, ROA 6406-6441. Two of Mr. Nixon’s brothers, Paul and Joseph, were enrolled in special education classes in middle school due to their struggles, and Mr. Nixon’s cousin, Richard Tony Robertson, suffered severe and persistent mental illness. See Paul Nixon Aff. ¶ 11 (Dec. 16, 2016), ROA 6018; Testimony of James Meyer, forensic psychologist at 1100:3-22 (Jan. 25, 1993), in Florida v. Richard Tony Robertson, No. 91-3093 AF (Fla. 2d Jud. Cir.), ROA 7229.

b. Mr. Nixon Was a Slow Learner and Significantly Behind His Peers in Intellectual Performance as a Child

In accordance with the overwhelming probabilities of the situation, Mr. Nixon’s intellectual development was impaired from earliest childhood onwards. This was visible to lay and professional observers alike and has been confirmed by numerous generalized and specialized tests conducted over the course of many decades.⁹

⁹ As noted in footnote 8 above, the most recent test in the record addressing Mr. Nixon’s condition during the developmental period was administered in conjunction with the evidentiary hearing below. This was a Test of Premorbid Functioning, specifically designed to quantify innate intelligence at birth. Mr. Nixon’s predicted IQ was 71. See Tr. of Evid. Hrg. Vol. 1 (Fla. 2d Jud. Cir. July 30, 2018), ROA 9268-9269. Another recent specialized evaluation, conducted at Dr. Greenspan’s request in order to test the impression he formed after reviewing the record of Mr. Nixon’s deficits, see 2015 Greenspan Aff. ¶ 110, ROA 2594, confirmed that Mr. Nixon was

i. Mr. Nixon had Significant Communication Issues

For an individual to be unable to participate in everyday conversations is a key indicator of intellectual disability. See 2006 MH Tr. at 47:15-19, ROA 4866 (“[L]anguage is one of the main indicators of intelligence in this world. If you are not good in language, you’re not going to have a good social life. You are not going to have a good ability to interact with others. And it is part of the main hallmarks of mental retardation.”); 2017 Greenspan Aff. ¶ 18, ROA 4326-4327 (“Language and the ability to effectively communicate are considered to be the basis of one’s interaction and involvement with society. The fact of Mr. Nixon’s reduced language skill is very important because verbal ability is generally considered to be a stronger indication of intelligence than perceptual organization.”).

Mr. Nixon had severe difficulties in communicating beginning in childhood.

Those close to him knew he could not even carry on casual conversation:

- Joe “had such a hard time learning anything in school and he couldn't carry on a conversation about anyone. He even had trouble talking about boxing, even though he loved boxing.” John Nixon, Jr. Aff. ¶ 12 (Sept. 30, 1993), ROA 3016.
- “Joe didn't know how to put his words together well and he had a hard time putting his thoughts into words. He often said things the wrong way and I had to tell him the right words to use.” Virginia Nixon Aff. ¶ 21 (Oct. 6, 1993), ROA 3027.

born with “a severe level of brain dysfunction” resulting from Fetal Alcohol Spectrum Disorder. See Report of Dr. Julian Davies, M.D., at ¶ 19 (Aug. 10, 2015), ROA 4014-4019.

- “Joe was unable to participate in conversations with other people because he would not understand what the conversations were about. I remember he used to tilt his head from side-to-side, and spend most of the time watching and trying to figure out what people were talking about.” Eddie Ingram Aff. ¶ 8 (Sept. 21, 1993), ROA 4740.
- “He couldn’t seem to function on a social level. He had difficulty understanding things and communicating his own thoughts or expressing his own feelings. Joe just didn’t understand the simplest things.” Paul Nixon Aff. ¶ 3 (July 22, 2015), ROA 8385.
- “He had difficulty understanding things and communicating his own thoughts or expressing his own feelings. Joe always struggled to explain himself. Even when we were real little children, I was always better at constructing sentences than Joe. From the earliest years it was always a problem for him.” Paul Nixon Aff. ¶ 10 (Dec. 16, 2016), ROA 6018.
- “Even simple things were hard for Joe. He really struggled with communication. I remember when we would come home from school, people would ask the general ‘what did you do at school today?’ question to all us kids. My siblings and I would make something up so we could move on to other things. Joe was totally unable to answer the question and would get stuck. This was just who he was. He was never on the same page as others intellectually or socially.” Paul Nixon Aff. ¶ 4 (June 22, 2017), ROA 8373.

ii. Mr. Nixon Was Unable to Grasp Basic Quantitative Concepts or to Spell the Simplest Words

While growing up, Mr. Nixon was unable to grasp basic quantitative concepts or to spell at the most elementary level, another characteristic symptom of persons with sub-average intellectual functioning. See 2006 MH Tr. at 47:24-48:6, ROA 4866-4867 (“Quantitatively, mathematical concepts, Joe had great difficulty in understanding very basic things. . . . And that actually is a common thing for kids who are mentally retarded. The will get cheated quite a bit when it comes to money.

They will think that . . . ten pennies is better than one quarter.”); MH Power Point at 26-28, ROA 5472-5474; Virginia Nixon Aff. ¶ 19 (Oct. 6, 1993), ROA 4724 (“Joe didn’t know things that children his age should know. I remember that Joe used to think that having two dimes was more money than having one quarter. He thought like that for a long time – even when the kids in his class at school knew better, Joe didn’t.”); Paul Nixon Aff. ¶ 5 (June 22, 2017), ROA 8373 (“Joe struggled with his comprehension. . . . Counting money or making change were beyond him.”).

The Final School Report from the Dozier School for Boys, which was issued when Mr. Nixon was 11, describes his difficulty with spelling and the basic concept of borrowing in division:

Standardized Test Results Evaluation: In the dictated Spelling Test . . . , Jo[e] has a well[-]established characteristic of having only the initial letter correct and a pattern of the first and last letters correct. Other errors were scattered such as omitting consonants or a different form of the same word. He got as far as 'up.'

Arithmetic Fundamentals on this test is confined to simple whole number problems When the subtraction involved borrowing, Jo[e] took the smaller from the larger regardless of position. He placed numbers in the answer spaces for some other problems, but they have no relationship to the proper answers.

See Aug. 1972 Dozier School for Boys Records, at Tab 46, ROA 3582.

These test findings are classic markers of intellectual disability. 2015 Greenspan Aff. ¶ 48, ROA 2574; 2006 MH Tr. at 49:11-50:14, ROA 4868-4869

("[Mr. Nixon] had a well-established characteristic of having only the initial letter correct and the pattern of the first and last letters correct in his spelling tests. This is the kind of thing you see with kids who have moderate [to] mild mental retardation or severe learning disabilities. They hear the first sound and they hear the last sound. And they may guess at the rest, or they may just put those two letters. . . . at the age of ten . . . the most [Mr. Nixon] could spell was 'up.'"); *id.* at 50:15-51:10, ROA 4869-4870 ("[Mr. Nixon] had difficulty with borrowing, which is not unusual for kids who have learning problems, but the concept of borrowing requires, of course, taking something from the tens and putting it into the ones. When kids with mental retardation and severe learning disabilities have trouble with mathematics, especially subtraction and borrowing, they will take the lower [number] from the higher [number] no matter where that number happens to be.").

iii. Mr. Nixon Was Easily Led and Had Difficulty Learning From His Mistakes

In another manifestation of his intellectual disability, Mr. Nixon was extremely gullible from childhood onwards, and frequently taken advantage of by his siblings and peers. *See* 2017 Greenspan Aff. ¶ 56. ROA 4225 ("Persons with limited intellectual abilities and/or intellectual disability are gullible, suggestible, and likely to be subject to domination by authority figures."); 2006 MH Tr. at 44:24-45:4, ROA 3244-3245 ("People with mental retardation, gullibility is one of their most common problems. They will believe what people say to them and, that

actually, in some ways, it's part of the cloak of competence, because if you act like you believe or you understand and you agree, people will accept you for who they think you are. . . . And they may know that he is mentally retarded, and they may know that he is stupid and just use him in that sense.”); Virginia Nixon Aff. ¶ 19 (Oct. 6, 1993), ROA 4724 (“[The kids in his class at school . . . would often cheat him and take his money.”); Thomas Earl Nixon Aff. ¶ 12 (June 28, 2017), ROA 8390-8391 (“Joe would do anything you told him to do. . . . I was always really scared for Joe because I knew he could be led to do something crazy.”); Gail Igles Aff. ¶ 9 (June 23, 2017), ROA 8412 (“[Joe] would follow what other people were doing. He was unable to say no to anyone, especially his brother John and his Uncle Bo. [Joe] was afraid of John. John and [Uncle Bo] made [Joe] do their dirty work for them. . . .”); Johnnie Pearl Sanders Aff. ¶ 8 (June 23, 2017), ROA 8415-8416 (“[Joe] would do whatever he was told to do without question. He would never think of the consequences. His brothers Paul and John constantly took advantage of him because they knew he was slow and wouldn't say no to them.”); Eddie Sam Ingram Aff. ¶ 10 (June 5, 2017), ROA 8438 (“I can't think of many people who were more of a follower than [Joe]. He would do anything he was told to do. I witnessed this many times over the years.”).¹⁰

¹⁰ The so-called “armed robbery” that Mr. Nixon was convicted of committing with Mr. Ingram falls squarely into this pattern. See Eddie Ingram Aff. ¶ 17 (Sept. 21,

Mr. Nixon's difficulties in this regard were compounded, as is commonly the case with intellectually disabled people, by an inability to learn from negative experiences. "The problems caused by a mentally retarded defendant's substantial intellectual deficits are aggravated by intellectual rigidity, which is often demonstrated by an impaired ability to learn from mistakes and a pattern of persisting in behaviors even after they have proven counterproductive or unsuccessful." Supplemental Aff. of Dennis William Keyes, Tab 2-E at p.7 (Oct. 22, 2006), ROA 2765. See May 14, 1974 Letter from [Segred] Belcher [counselor at the Jack and Ruth Eckerd Foundation Camp], ROA 5179-5180 ("[Joe] can explain in words why an action is wrong, but there is little reality in the way he relates cause to effect. . . . [H]e cannot seem to learn from his mistakes . . .").

iv. Mr. Nixon was Repeatedly Identified as "Slow" by Those Around Him

Many people who were close to Mr. Nixon during his childhood saw that he was intellectually impaired, a fact that the State's expert readily agreed was of diagnostic significance. See Prichard, Evid. Hrg. Tr. 354:4-21 (July 31, 2018) (testimony of State's expert), ROA 9477.

In his father's words, "Job was always a slow child. He did not do well in school because he had learning problems. I know Job also had mental problems.

1993), ROA 4742; Declaration of Eddie Sam Ingram ¶¶ 11-12 (June 5, 2017), ROA 8438-8439 (quoted in n.19 below).

Something was wrong with his brain or mind. Job was a very weak child that way. He just did not act like other children. It was something that Job just couldn't help or control. I could look at my son and tell that something was wrong with him. He wasn't normal, and he suffered a lot for it.” John Nixon, Sr. Aff. ¶ 6 (Oct. 5, 1993), ROA 3080.

The record is replete with first-hand observations to the same effect by people who knew Mr. Nixon well:

- “I recall Joe Nixon as a young child being tormented and teased by other children because he was retarded. The children’s favorite terms for Joe were ‘dummy’ and ‘stupid.’ Joe took these insults hard; he would turn and walk away looking very dejected.” Marvin Carter Aff. ¶ 2 (Oct. 6, 1993), ROA 3091.
- “[Joe] was a simple person. He was often in his own little world. He was slow mentally. He occupied the majority of his time watching television.” Gail Igles Aff. ¶ 2 (June 23, 2017), ROA 8410.
- “Joe always wished that he was smart enough to be able to stay in school, and learn and have a normal life. Joe said he could not learn while he was in school because he could not understand what the teacher was talking about. He couldn't really even learn to read. When Joe told me about not being able to learn, my heart was broken. I always knew Joe was extremely slow and had something wrong with him. He wasn't a bad kid at all; he just couldn't learn, play or think right. He needed help—more help than I could ever have given him.” Eddie Ingram Aff. ¶ 5 (Sept. 21, 1993), ROA 4739.
- “I always felt bad for [Joe]. It was obvious he was slow.” Mattie Lou Sol Aff. ¶ 2 (June 5, 2017), ROA 8433.
- “Joe has been slow as long as I can remember. I have often wondered whether he is retarded because he had such a hard time learning

anything in school. . . .” John Nixon, Jr. Aff. ¶ 12 (Sept. 30, 1993), ROA 3016.

- “Joe was a slow child. He never seemed to reach the level he should have been on in school. He had a lot of trouble learning. Joe knew that he was slow because the kids at school used to tease him and laugh at him for being stupid. Several other brothers were slow too, but Joe was much worse than they were.” Virginia Nixon Aff. ¶ 18 (Oct. 6, 1993), ROA 3026.
- “I always thought that [Joe] was slow to catch on to things and naïve. It seems like Joe has had a mental problem all of his life.” Thomas Earl Nixon Aff. ¶ 2 (Oct. 5, 1993), ROA 3224.
- “He was not like other children his age. Joe was very slow and had a hard time learning in school. . . . Joe always seemed as if he was in another world. I used to think that he wasn’t quite right. He just wasn’t all there.” Doris Graham Aff. ¶ 14 (Sept. 26, 1993), ROA 3010.

c. Mr. Nixon’s Educational Records Confirm That His Intellectual Functioning was Far Below Normal

Educational records from the schools and institutions attended by Mr. Nixon during his childhood, including both cognitive testing and behavioral evaluations, demonstrate that Mr. Nixon was several years behind his peers in terms of his intellectual functioning.

By the age of 10, the extreme trauma, childhood depression, and cognitive dysfunction experienced by Mr. Nixon culminated in behavior requiring institutionalization, including several commitments to the notoriously abusive Arthur G. Dozier School for Boys in Marianna, Florida, where he was one of the

youngest inmates.¹¹ See 2017 Greenspan Aff. ¶¶ 64-67, ROA 4228-4230; id. ¶ 69, ROA 4231 (“Childhood institutionalization – especially in a facility guilty of brutality and warehousing – has profound effects on children and teenagers. [T]he effect . . . is akin to growing up in a combat and can induce . . . an inability to function in the everyday world.”); Crown, Evid. Hrg. Tr. 78:2-4 (July 30, 2018), ROA 9201 (Mr. Nixon’s attendance at the Dozier School for Boys “certainly becomes a risk factor [for an intellectual disability diagnosis] because [students are] not allowed free and open expression, nor are [they] allowed learning and to develop learning skills.”). See Paul Nixon Aff. ¶ 20 (Dec. 16, 2016), ROA 6020-6021 (“They hog-tied us with chains that left marks on our wrists and ankles. They continued to beat us if we disobeyed their orders. They brought us to “The Hill,” which was a special confinement area. There they forced us to sleep on brick beds. School staff forced us to fight each other in a ring, too. The staff did it for their own entertainment. If a child chose not to fight when told to do so, we were beaten anyways. Joe told me later that he, too, was forced to fight and beaten when he lost.”); Bobby M. Litig., Second Amended Complaint ¶¶ 26-102 (N.D. Fla. filed June 2, 1986) (alleging

¹¹ In order to settle a civil rights action, the State eventually signed a consent decree agreeing that the Dozier School would no longer accept boys as young as Mr. Nixon was when he first arrived there. See Bobby M., et al. v. Martinez, et al., No. TCA 83-7003 MMP (“Bobby M. Litig.”), Consent Decree at 15 (N.D. Fla. May 8, 1987), available at Univ. of Mich. L. Sch. Civ. Rts. Litig. Clearinghouse [hereinafter, “Clearinghouse”], <https://www.clearinghouse.net/chDocs/public/JI-FL-0002-0007.pdf> (last accessed Dec. 9, 2020).

abuses at Dozier including the denial of medical and psychological care, sexual assaults and violence, disciplinary methods that included hog-tying, lock-up, and physical assault, unsanitary conditions, and the use of tracking dogs), available at Clearinghouse, <https://www.clearinghouse.net/chDocs/public/JI-FL-0002-0005.pdf> (last visited Dec. 9, 2020).

But even that grossly inadequate institution was able to detect Mr. Nixon's intellectual disability, and he was recommended for and placed in special education classes. See Woods Expert Decl. ¶ 69, ROA 539; Aug. 1972 Dozier School for Boys Records, ROA 3582 (“Individual Prognosis: Jo[e] should be placed in a special education program.”); Paul Nixon Aff. ¶ 11 (Dec. 16, 2016), ROA 6018 (“In middle school I was placed in special education classes. . . . My baby brother, Joseph, was also placed in special education classes.”).

In 1973, when Joe was in the 5th grade in Volusia County Schools, by which time he had been left behind at least one grade, he received scores on two group-administered tests, identified as TOGA and OTIS. “[T]he results of both tests reflect that Joe was academically and intellectually impaired. Even after repeating a grade, he was functioning at somewhere between the 4th and 11th percentiles of fifth graders, and very possibly even lower.” 2017 Greenspan Aff. ¶ 73, ROA 4234.

On August 19, 1974, Jim Walsh, Home parent at Seminole, submitted a transfer summary concerning Joe: “Jo[e] cannot perform academically in the public

school system. He needs special remedial classes and his behavior requires a strict contingency to maintain it in the classroom.” Aug. 19, 1974 Transfer Summary, ROA 5182. See 2006 MH Tr. at 54:18-23, ROA 1218 (Dr. Keyes testifying that such a recommendation for special education is “absolutely” consistent with someone who is manifesting traits of mental retardation).

On August 22, 1975, Joe was discharged from Camp E-Ma-Chamee. A family worker, Ms. Nancy Cupit, prepared a Discharge Summary regarding Joe's camp experience. The “most important” recommendations were

- 1) Job should receive vocational training upon his return to the community and not attend the regular program,
- 2) personal involvement from parents to open the lines of communication with Job...4) he needs remediation in the 3 “R’s” but without lot of pressure.

Discharge Summary dated August 1975, ROA 5199. See Declaration of Nancy Cupit ¶¶ 6-7 (June 28, 2017), ROA 8430-8431 (“In the Discharge Summary, I wrote in August, 1975, it was recommended that upon release, Joe should not go back to a regular classroom but to vocational training. It was very unusual to recommend that for a 14 year-old unless we knew he could not succeed in school. My note that Joe needs remediation in the three “R’s” indicates that he basically could not read or write at all...Most of our kids struggled to a degree, so if I took the time to point out that Joe needed help, he would have been especially weak. He would not have been able to do the routine tasks required to function at our camp.”).

On December 4, 1975, prior to Joe's being transferred to the notorious Dozier School for Boys yet again, Robert Newkirk a state youth counselor, prepared a Pre-disposition Report:

Jo[e] has not attended the regular school program since being committed during the year of 1972....Attempts were made within the school system to place him in vocational oriented areas. *However, his IQ was such that he did not qualify* and his age disqualified him.

Pre-Disposition Report dated Dec. 4, 1975, ROA 5203-5204, App. 414-417 (emphasis added).

On December 30, 1975, and February 20, 1976, Joe took the California Achievement Test. See Official Transcript of School Record 1975-1976, ROA 5209. The test results, which were expressed as grade equivalents, show that Joe, at the age of 14, was at least 4 years behind his peers in 1975, and 5 years behind in 1976. See 2017 Greenspan Aff. ¶ 89, ROA 8514 (“[T]hese grade equivalents are consistent with the clinical recognition that for adults with ID in the higher-functioning range (which is what we are typically talking about in criminal cases), the intellectual performance of people with ID never advances beyond that of a normally developing 10 or 11 year-old child. Joe’s tremendous number of risk factors, however, impair his intellectual functioning to an even younger age level in many areas.”); 2006 MH Tr. at 56:12-16, ROA 1220 (“[Joe] . . . placed grade-wise

between the third grade and third grade and six months. . . . He was . . . therefore . . . at least four full years behind.”).

2. *Mr. Nixon was Unable to Take Care of Himself or Function in Day-to-Day Life*

Mr. Nixon from childhood onwards has been unable effectively take care of himself and perform basic daily living activities:

- “When Joe was about eleven, I taught him how to ride a bicycle. Physically, he was very capable. Mentally, he was not mature enough to ride by himself. We were always terrified he would ride his bike into traffic and hurt himself or cause an accident. We would lock Joe's bike up and not let him ride it unless one of us was around.” Paul Nixon Aff. ¶ 8 (June 22, 2017), ROA 8374.
- “The boys in the house were responsible for keeping up the yard. We had a lawnmower to cut the grass. You had to fill the lawnmower with gas and oil to operate it and the blades needed to be adjusted. This was too complicated for Joe. My brothers and I would not allow Joe to operate the lawnmower. It was far too dangerous for him. Instead, we gave him a rake and he cleaned up the debris.” Paul Nixon Aff. ¶ 7 (June 22, 2017), ROA 8373-8374.
- “[Joe] was unable to deal with even simple problems. . . . [His] shortcomings were well known to our family. We had no expectations of him doing things independently. Even when Joe was sent to the grocery store to pick up some items, he would be sent with a note for the grocer Mr. Robinson.” Paul Nixon Aff. ¶ 5 (June 22, 2017), ROA 8373.
- “To get to the grocery store from the place we lived required taking a bus. [Joe] was not able to take the bus to the store himself. He would not have remembered which bus to get on or where to get off. I recall on one occasion JoJo told me he was going to go somewhere on the bus. I encouraged him to do so. [Joe] left the house. When I saw [Joe] later, I asked him how it went. At first he lied to me and said he had gone. He later fessed up and told me he had hadn't gone because he didn't know how to get where he wanted to go and was afraid of getting

lost. . . . If he needed to get somewhere, someone would have to go with him.” Gail Igles Aff. ¶ 4 (June 23, 2017), ROA 8410-8411.

- “If Joe needed to get somewhere, he was driven in the car by someone else or accompanied on the bus. If paperwork needed to be filled out, my sisters, Doris or Virginia, would do it for him.” Paul Nixon Aff. ¶ 6 (June 22, 2017), ROA 8373.
- “Joe was a bad driver. He would just get in the car and slam the pedal down and drive crazy like he couldn’t control the car. We just drove him around, especially John.” Thomas Earl Nixon ¶ 11 (June 28, 2017), ROA 8390.
- Joe “wasn't just slow, he was totally unable to take care of himself. When he was almost full grown, he still couldn't do the basic things we all take for granted. My mother and I had to do everything for him, from fixing food to making his bed to telling him what to do and how to do it. He was able to hold a job for a[while] but all he could do was monkey work – just carrying bricks. . . . [H]e wasn’t lazy, but he wasn’t able to do much of anything except use his muscles. Joe couldn’t even play cards. Anytime he tried, he would end up with extra cards and be all confused and embarrassed. I'm sure some people thought he was cheating, but he wouldn't have knowingly done that. He suffered in all areas because of how bad his brain is.” Eddie Ingram Aff. ¶ 6 (Sept. 21, 1993), ROA 3085.
- “Joe was not good in making decisions and needed help to make even the most basic day-to-day decisions. I had to help Joe make decisions that were simple to me, but nearly impossible for Joe.” Eddie Ingram Aff. ¶ 3 (Sept. 21, 1993), ROA 3084.
- “I did [Joe’s] laundry for him. He could separate whites from darks but not much more. The water temperature, load size, fabrics, etc. were way over his head.” Gail Igles Aff. ¶ 5 (June 23, 2017), ROA 8411.
- “A lot of fairly routine tasks had to be explained to [Joe], usually more than once. Because he had such difficulties, almost everything was done for him. My mother, sisters and I not only cooked and cleaned for him but also washed all of his clothes. Left to his own devices, none of this would have gotten done. He would have been unable to do

something as easy as cooking a roast.” Mattie Lou Sol Aff. ¶ 5 (June 5, 2017), ROA 8433-8434.

- “Joe was not a planner. He lived day to day. . . . He was never concerned about dressing appropriately for the weather. Whatever he had on at the time the door open was what he was going out in.” Gail Igles Aff. ¶ 8 (June 23, 2017), ROA 8412.
- “[Joe] just didn’t have the skills required to take care of himself. For as long as I have known him, he has relied on family for survival. There is no way he could have lived on his own.” Gail Igles Aff. ¶ 10 (June 23, 2017), ROA 8412.
- “My Uncle Tom was a brick mason. He would bring [Joe] to work with him. . . . [Joe] didn’t have the smarts to lay the brick so he was used mainly to carry bricks and other materials around.” Johnnie Pearl Sanders Aff. ¶ 4 (June 23, 2017), ROA 8415.
- “I gave [Joe] a job because he was kin. Based upon his skillset and abilities, I would not have hired him otherwise. He was unemployable. . . . [Joe] was poor with directions. I couldn’t rely on him to get from one jobsite to another by himself. Similarly, I was unable to send [Joe] to pick up supplies from the construction store for me. There is just no way he could have done it.” Thomas Igles Aff. ¶¶ 2, 5 (June 23, 2017), ROA 8427-8428.

See also Affidavit of Denis William Keyes, Ph.D. ¶ 17 (June 15, 2006), ROA 4326 (“[Joe’s] actual adaptive functioning is roughly estimated to be at the developmental stage expected of a 6-8 year old child.”); 2006 MH Tr. at 45:16-46:1, ROA 1210-1211 (“[Joe] was unable to take care of himself. . . . These are all basic adaptive skills. If he couldn’t do these things, it’s clear that he was not able to adapt to a situation.”); Crown, Evid. Hrg. Tr. 74:1-4 (July 30, 2018), ROA 9197 (“[Individuals with intellectual disability have] [d]ifficulty with maintaining hygiene, difficulty in maintaining appropriate dress. Difficulty in following

instructions, difficulty in following directions, particularly multiple-part directions. . . .”).

As with all of the evidence presented so far, this aspect of the record is undisputed and has been since the Circuit Court’s very first hearing on intellectual disability. The State’s expert testified at the evidentiary hearing on October 23, 2006, “I’ll concede he has adaptive deficits. Okay. He has got adaptive deficits throughout his records.” See 2006 MH Tr. at 212:23-24, ROA 1253. The State then explicitly declined to contest the issue. See State v. Nixon, 1984CF2324, Order at 14 (Fla. 2d Jud. Cir. Apr. 26, 2007), ROA 5514.

To the extent that the Court may consider present functioning to be of relevance, but see Initial Brief of Appellant at 39-42, Nixon v. State, No. SC15-2309 (Fla. Mar. 7, 2016), ROA 4077-4080; Bowles v. Sec’y, Fla. Dep’t of Corr., 935 F.3d 1176, 1181-82 (11th Cir. 2019) (noting “Atkins focuses on the prisoner’s culpability at the time of the crime”), the uncontested record below further establishes that even in the restricted environment of the prison, Mr. Nixon is unable to perform such simple daily tasks as selecting menu items or sorting his laundry into categories, much less write a grievance or even read one written for him. See Rachel Aaron Investigation Report at 14-17 (Sept. 5, 2017), ROA 8825-28.

3. *Additional Data From Recent IQ Testing of Mr. Nixon Confirms His Intellectual Disability*

As the Court was well aware in 2017 when it decided Nixon VI, the record

contains various IQ scores for Mr. Nixon, see 2017 WL 462148, at *1 n.2, a fact that, as this Court specifically held, did not disqualify him from an intellectual disability diagnosis.

The only change since then is that after remand Mr. Nixon was tested with the WAIS-IV testing instrument—the current “gold standard” IQ test that is statistically more sound than all previous IQ tests—and scored a 67. See Crown, Evid. Hrg. Tr. 31:15-22 (July 30, 2018), ROA 9155 (“In the field of psychology . . . the Wechsler Adult Intelligence Scale – IV . . . is the gold standard. It’s the test that’s used by most school systems in the United States. It’s used by most clinics. It is used by most facilities. It is the test that’s most often and most typically used in the diagnosis of an assortment of psychological and neuropsychological problems.”); id. at 34:4-5, ROA 9157 (“[The WAIS-IV] is based on a methodology that is both mathematically and statistically more accurate . . . it derives its score from a factor analysis, which . . . means that it looks at whether the underlying factors in this test . . . allow certain . . . subtests to cluster together.”); id. at 40:17-24, ROA 9163 (“[The WAIS-IV developers] relied on the United States census and drew from a diverse population of 2,200 people. . . . unlike the previous Weschler tests, the sample was more diverse in terms of ethnicity, in terms of geography, in terms of race, in terms of education. It included the neurologic population, and as a result, it’s more accurate than earlier tests.”).

Indeed, the State’s expert, Dr. Prichard testified at the evidentiary hearing below:

Q. You would agree, would you not, that the WAIS-IV and the Stanford-Binet-V are the best and most reliable measures of intellectual functioning today?

A. Yes.

(Prichard, Evid. Hrg. Tr. 350:2-5 (July 31, 2018), ROA 9473.

4. The Circuit Court Committed Legal Error in Denying Relief Under Hall

In light of the foregoing overwhelming uncontested record, the agreement of all the experts that no IQ scores are necessary to support a diagnosis of sub-average intellectual functioning before age 18 (Prichard, Evid. Hrg. Tr. 351:10-15 (July 31, 2018), ROA 9474), and Hall’s grounding in clinical practice, one may well wonder how the Circuit Court reached the result it did.

The answer is simple: the Circuit Court, fixated on IQ scores,¹² remains convinced that the existence of an IQ score, or scores, above 75 disqualifies a defendant from receiving the holistic assessment mandated by Hall.

That is what the Circuit Court thought in 2015: “Mr. Nixon’s [2006] score of 80 means that Hall does not apply.” (2015 Order at 4, App. 410.) We responded in

¹² Thus, the statement of the State’s youth counselor, Robert Newkirk, that by age 15 Mr. Nixon’s “IQ was such that he did not qualify” even for vocational training is not be found in the opinion below, perhaps because no number appears in the sentence. See Section III.A.I.c. above.

our brief in this Court (see Initial Brief at 30-36, ROA 4068-4074; Reply Brief at 13-14, ROA 4105-4106) by citing numerous post-Hall cases showing that this is simply not the law. See Brumfield v. Cain, 576 U.S. 305, 314-15 (2015); State v. Agee, 358 Ore. 325 (2015); Pruitt v. Neal, 788 F.3d 248, 270 (7th Cir. 2015) (granting federal habeas relief on finding that defendant “demonstrated with clear and convincing evidence that he is intellectually disabled” notwithstanding an attained IQ score of 76); Commonwealth v. Taylor, No. 12-CR-2381, Op. & Order (Jefferson Cir. Ct., Ky. Dec. 1, 2014) (finding after evidentiary hearing conducted under Hall standards that defendant was intellectually disabled notwithstanding IQ scores of 79 and 91 obtained by Kentucky Correctional Psychiatric Center in 2007 and 2014). We noted that this judicial unanimity was hardly surprising, since Hall himself had achieved an IQ score of 80. Hall, 572 U.S. at 707.

Thus, it was equally unsurprising that this Court, which knew all about the very test scores now relied upon below, reversed in 2017. See Nixon IV, 2017 WL 462148, at *1 n.2.

On remand, the Circuit Court simply failed to understand the law, candidly admitting, “I am uncertain what Hall requires of the trial court under these circumstances.” 2019 Order at 25, ROA 9675. It adhered to its 2015 theory and, in flat contradiction to this Court’s remand order, held that the above-75 IQ scores in the record meant that this was not a case “in which Hall would require resort to the

interrelated and conjunctive assessment.” (Id. at 2, 8, 25-27, ROA 9652, 9658, 9675-9677). But see Nixon VI, 2017 WL 462148, at *2 (reversing because the Circuit Court “should have conducted the more holistic, interrelated assessment for which Nixon’s counsel argued at the Huff hearing”).

In the 2019 Hall/Hurst Order that is the subject of this appeal, the Circuit Court once again insisted that Hall permits a consideration of adaptive-deficit evidence only when no IQ scores exceed 80.¹³ In its view, “Hall’s adaptive behavior analysis must be bounded by the standard error of measurement.” 2019 Order at 27, ROA 9677. “Hall does not suggest that an IQ range of 75 to 85 or 83 to 93 should be adjusted by applying deficits in adaptive behavior to then further reduce the estimate of intellectual functioning lower than the standard error of measurement.” Id. at 26, ROA 9676. Thus, the fact that “Mr. Nixon’s score of 80 exceeded the statutory definition of ‘significantly subaverage’ – higher than two standard deviations below the mean” was fatal to his Atkins-Hall claim. Id. “Mr. Nixon 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.” Id. at 30, ROA 9680.

¹³ “Hall requires the court to consider the bottom range of the SEM to account for adaptive deficits. Hall does not permit the court to expand the SEM to account for adaptive deficits.” 2019 Order at 25, ROA 9676.

The Circuit Court suggested that it would be absurd to conduct a holistic adaptive-deficit analysis where a defendant had an IQ score of 120. See 2019 Order at 8, ROA 9658. To be sure, if an IQ score of 120 were the only evidence in the record concerning intellectual functioning a court would need to go farther. Zack v. State, 228 So. 3d 41 (Fla. 2017) (dismissing claim of litigant with no qualifying IQ scores).

But that is far from this case.

Indeed, in this case, the most recent test score—which is based on an instrument that the state’s expert conceded is state of the art (Prichard, Evid. Hrg Tr. 350 (July 31, 2018), ROA 9473)—was 67. But the Circuit Court mentioned that only in passing (2019 Order at 9, 16, 28, ROA 9659, 9666, 9678), instead focusing on the scores it wrongly considered exempted it from conducting a holistic analysis of the record.

The Circuit Court this time did exactly what this Court held was error last time: “because of its ruling as to the subaverage intellectual functioning prong, the court here did not look to all of the record evidence of Nixon’s intellectual disability, even disregarding other non-IQ evidence that could have been relevant.” Nixon VI, 2017 WL 462148, at *1.

The whole point of Hall’s statement that “[i]ntellectual disability is a condition, not a number,” Hall, 572 U.S. at 723, is that when clinicians are

confronted with a series of IQ scores, some of which are in the qualifying range, no single number is dispositive of the diagnosis.¹⁴ Under those circumstances, professional standards require an evaluation of the whole picture. But the Circuit Court here ruled against Mr. Nixon because it held that once above-75 IQ scores are found Hall does not apply. This legal error led it to simply disregard the massive and uncontradicted record that is canvassed above.

In a truly remarkable statement, the Circuit Court wrote, “The most basic information regarding Mr. Nixon’s functioning [e.g.] whether Mr. Nixon ‘had good hygiene, could care for himself, and could drive’ is largely absent from the record.” 2019 Order at 29, ROA 9679 (internal citation omitted). In truth, as set forth above, the record evidence presented to the Circuit Court and admitted without objection (ROA 9239-40, 9190) could hardly be stronger. But the Circuit Court’s legal blinders prevented it from seeing that.

5. This Court Should Order the Imposition of a Life Sentence

The correct outcome here is clear. Whether, as Mr. Nixon contends, he was only required to prove his intellectual disability by a preponderance of the

¹⁴ The underlying reasoning is straightforward. Suppose a high school baseball player faced major league pitching. A reasonable number of plate appearances would demonstrate his actual abilities. If he happened to hit a single home run, one would hardly conclude that this best performance represented his true capacity. But see 2019 Order at 30, ROA 9680.

evidence,¹⁵ or instead this Court’s clear and convincing standard is correct makes no difference in this case because it is hard to image a more clear and convincing presentation of general subaverage intellectual functioning before age 18. Indeed, a decision to the contrary on this record would be both an unreasonable application of clearly established federal law and an unreasonable determination of the facts in light of the evidence. Hence, the Court should adopt Mr. Nixon’s prior suggestion (Supplemental Brief filed Sept. 27, 2016, ROA 4121-56), and—just as it did in Hall v. State, 201 So. 3d 628 (Fla. 2016) and Herring v. State, No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017)—order the imposition of a life sentence.

6. *Requiring Mr. Nixon To Prove His Intellectual Disability By “Clear and Convincing” Evidence Is Unconstitutional*

Mr. Nixon reiterates what he told this Court in 2007 and it then found unnecessary to address, see Nixon v. State, 2 So. 3d 137, 145 (Fla. 2009), that placing on him the burden of proving intellectual disability by clear and convincing evidence is unconstitutional. Mr. Nixon has maintained that position ever since. See 2019 Mtn. for Rehr. at 2 n.1, ROA 9683. This Court’s repeated invocation of its existing standard, e.g., Wright v. State, 256 So. 3d 766, 771 (Fla. 2018), has not been accompanied by any re-assessment of its validity.

¹⁵ See § III.A.6, infra.

Yet the clear and convincing standard for a determination of intellectual disability as articulated in Fla. Stat. Ann. § 921.137(4) (2020) is an outlier both within Florida’s own legal framework and among the remaining states with the death penalty. Only three states—Arizona, North Carolina, and Florida—currently use the clear and convincing standard. Ariz. Rev. Stat. Ann. § 13-753(G) (2011); N.C. Gen. Stat. § 15A-2005(c) (2015). The standard is not used in any other context within Florida criminal law. It creates an unacceptable risk that intellectually disabled persons will be executed in violation of Moore v. Texas, 139 S. Ct. 666 (2019) (“Moore II”); Moore I, 137 S. Ct. 1039; Hall v. Florida, 572 U.S. 701, 701 (2014); and Atkins v. Virginia, 536 U.S. 304 (2002), because identifying people with mild intellectual disability, the category that covers 80-90% of diagnosed cases, depends on evidence which is frequently less than clear and convincing. The standard thus fails to properly “allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” See Addington v. Texas, 441 U.S. 418, 423 (1979). In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court determined that the proper burden of proof to place on defendants seeking a determination of incompetence was a preponderance of the evidence. The “standard of proof, as . . . embodied in the Due Process Clause . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions.” Id. at 362 (citing Addington). As all but a few

isolated States have seen by now, reducing the risk of being wrongly sentenced to death is at least as important to society as reducing the risk of being wrongly brought to trial.

7. ***Phillips Does Not Apply to Mr. Nixon's Case and Applying It to Deny Him Relief Under Hall Would Be Unconstitutional***

Mr. Nixon is of course aware of the decision of this Court's decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (announcing that Walls v. State, 213 So. 3d 340 (2016) erred in holding Hall v. Florida, 572 U.S. 701 (2014) retroactive under Witt v. State, 387 So. 2d 922 (1980)). Although Phillips may at first glance appear similar to this one, it is not. Moreover, applying it to deny Mr. Nixon the review required by Hall would be unconstitutional.

Unlike Mr. Nixon, Mr. Phillips had not obtained a final decision of this Court definitively requiring the Circuit Court to apply Hall to his case, nor did the decision in Phillips address such situations. Thus, Phillips simply has no precedential bearing on this case.

Mr. Nixon is entitled to the enforcement of this Court's 2017 mandate in Nixon VI both as a matter of elementary state law and because the failure to apply Hall to his case would violate the federal constitution.

When, following the procedure suggested by the Court in Nixon IV, 932 So. 2d at 1024, Mr. Nixon sought post-conviction relief on his intellectual disability

claim, he presented evidence in support of an IQ score of 73, and asserted his entitlement to relief under Atkins.

At the hearing in 2006, the State's expert, Dr. Prichard, readily agreed that the measured score was not inconsistent with intellectual disability. When he was read the statement from the DSM, "it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation," he responded, "Correct. I would agree with that, yes." 2006 MH Tr. at 216:15-22, ROA 1254.

When this Court in Cherry in 2007 determined that the Florida statute imposed an IQ score cutoff of 70, Mr. Nixon told first the Circuit Court and then this Court that, if so construed, the Florida statute was unconstitutional. See Case No. SC07-953, Amended Initial Brief of Appellant, at 1-2 (Fla. Nov. 14, 2007) ("2007 Am. Initial Br."), App. 432-33. In 2009, this Court disagreed with Mr. Nixon. See Nixon V, 2 So. 3d at 142-43 (defending Cherry's construction of statute as consistent with Atkins). When in 2014 the United States Supreme Court in Hall agreed with Mr. Nixon, it did not hold the statute unconstitutional. It simply held that the statute was required to mean what it meant pre-Cherry:

On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It

has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. See *Cherry v. State*, 959 So. 2d 702, 712-713 (Fla. 2007) (*per curiam*). That strict IQ test score cutoff of 70 is the issue in this case.

Hall v. Florida, 572 U.S. at 711-12.

Decisions explicating statutes favorably to criminal defendants are – and as a matter of federal constitutional due process and equal protection must be – applied retroactively. See Bousley, 523 U.S. at 620-21; Schriro, 542 U.S. at 351 (distinguishing “decisions that narrow the scope of a criminal statute by interpreting its terms” from “constitutional determinations”).

This court has implicitly recognized the point. The case of Haliburton v. Florida, 163 So. 3d 509 (Fla. 2015) was one in which – like that of Mr. Nixon but unlike that of Mr. Phillips, see Phillips, 299 So. 3d at 1017, – the petitioner’s post-conviction intellectual disability claim had been rejected solely on the basis of over-70 IQ scores. In the wake of Hall, this Court held Mr. Halliburton entitled to the benefits of Hall with no discussion of retroactivity doctrine.

When Mr. Nixon filed his successive petition under Hall in 2015, one of the State’s defenses was that Hall was not retroactive under Witt. Mr. Nixon responded by making exactly the argument set forth above, see Reply Brief in Support of Successive Motion Under Fla. R. Crim. P. 3.203 & 3.851, at 1-3 (Fla. 2d Jud. Cir. Aug. 13, 2015) App. 514-16, which he expanded in the briefing before this Court

that resulted in his victory in Nixon VI. See Case No. SC15-2309, Reply Brief of Appellant, at 11 n.3 (Fla. Apr. 13, 2016), ROA 7465. As in Halliburton, this Court in Nixon VI quite rightly applied Hall while saying nothing about retroactivity doctrine – appropriately recognizing that in cases involving statutory interpretation as opposed to constitutional innovation the federal constitutional requirement of retroactive application requires no discussion.

The State did not seek certiorari from Nixon VI nor did it pursue the retroactivity issue on remand. The Court would be well-advised to apply its ordinary doctrines of law of the case, e.g., Jordan v. State, 285 So. 3d 267 (Fla. 2019), and not be drawn into an attempt to reject Mr. Nixon’s intellectual disability claim on the basis of Phillips, lest it violate Mr. Nixon’s federal due process rights.

The doctrine of law-of-the-case, firmly embedded in Florida law, is a state-created interest upon which individuals are entitled to rely and which is protected by the federal constitution against arbitrary deprivation under such cases as Sherbert v. Verner, 374 U.S. 398 (1963); Goldberg v. Kelly, 397 U.S. 254 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Evitts v. Lucey, 469 U.S. 387 (1985); Bell v. Burson, 402 U.S. 535, 539 (1971) and Graham v. Richardson, 403 U.S. 365, 374 (1971).

If the Court were to apply some ad hoc exception here, Mr. Nixon will certainly pursue the path laid out in the caselaw stemming from Williams v. Georgia,

349 U.S. 375, 383 (1955), which holds that “where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right.” Cases like James v. Kentucky, 466 U.S. 341, 348-349 (1984), hold that only a “firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights.” See, e.g., Ford v. Georgia, 498 U.S. 411 (1991); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964). In light of Nixon VI, Mr. Nixon is entitled today to the same Hall-based review that Mr. Franqui received just a few months ago in Franqui v. State, 301 So. 3d 152 (Fla. 2020), in light of Franqui v. State, 211 So. 3d 1026 (Fla. 2017).

Quite apart from the matters already discussed, Phillips should not be extended to this case because that decision is wrong under both state and federal law, and its application here would run afoul of both state and federal ex post facto prohibitions.

The conclusion of Phillips that Hall announced a new non-watershed rule of federal Eighth Amendment law for purposes of Teague v. Lane, 489 U.S. 288 (1989) and Witt - was error and violated both Witt and Teague. As this Court stated:

The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity

in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very “difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.”

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). But this is precisely what this Court did when it abruptly reversed course and opined that Hall announced a new, non-watershed rule of law for Eighth Amendment purposes. The reasoning of this Court’s analysis applying the Witt factors to Hall in Walls should not have been disturbed. The Phillips decision raises a grave risk that Florida will execute intellectually disabled capital defendants. This Court’s determination that Hall announced a new non-watershed rule was error. See Bousley v. United States, 523 U.S. 614, 620 (1998).

Moreover, both the Eighth and Fourteenth Amendments preclude states that retain capital punishment from making arbitrary eligibility determinations. See Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)). The line drawn in Phillips may divide those defendants who get the benefits of Hall from those who do not on the basis of the timing of changes in the membership of this Court, or the congestion of court calendars but certainly does not

do so on any basis that can be defended as relating to culpability-grounded line-drawing.

Finally, Mr. Nixon pointed out to this Court in 2007, see 2007 Am. Initial Br. at 7-8 n.2, App. 438-39, that to apply the intervening Cherry decision to his case would be impermissibly retroactive in violation of Bouie v. City of Columbia, 378 U.S. 347 (1964), and Marks v. United States, 430 U.S. 188 (1977). See also Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965); Cole v. Arkansas, 333 U.S. 196 (1948). Just as he was entitled to the prior reading of the statute then, he is entitled to it now. It is a commonplace of ex post facto history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. See Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.). Protection against retroactive punishment resulting from regime change was very much in the mind of the Framers when they included two ex post facto clauses in the federal Constitution. See Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322 (1866). To deprive Mr. Nixon of the benefits of a rule that this Court as recently as 2017 squarely held to be applicable to his case would violate Article I, § 10 of the federal Constitution and Article I, §10 of the Florida Constitution. See State v. Lancaster, 731 So. 2d 1227, 1233 (Fla. 1998); see also State v. Ramseur, 843 S.E.2d 106, 113-19 (N.C. 2020).

As the United States Supreme Court has pointed out in finding that a change in State evidentiary standards violated the ex post facto clause, “[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.” Carmell v. Texas, 529 U.S. 513, 533 (2000).

B. The Circuit Court Erred in Denying Mr. Nixon’s Hurst Claims

1. Poole’s Decision to “Recede From” Hurst Does Not Validate the Decision Below

The single-sentence ruling below rejecting Mr. Nixon’s Hurst claims was erroneous as a matter of state and federal law for the reasons he explicated in great detail to the Circuit Court and reiterates here. See ROA 7 (Mr. Nixon’s Second Successive Motion Filed on Jan. 9, 2017), ROA 7810 (Mr. Nixon’s Reply Brief in Support of his Second Successive Motion Filed on July 7, 2017), ROA 8118 (Mr. Nixon’s Pre-Hearing Memorandum Filed on May 15, 2018), ROA 8140 (Mr. Nixon’s Pre-Hearing Answering Memorandum Filed on May 29, 2018), and ROA 9682 (Mr. Nixon’s Motion for Rehearing of Order of Hall and Hurst Motions Filed on Dec. 6, 2019).

But the Circuit Court’s ruling appears to have been overtaken by the implications of State v. Poole, 297 So. 3d 487 (Fla. 2020), and Owen v. State, --- So. 3d ----, 2020 WL 3456746 (Fla. June 25, 2020), in which this Court “recede[d] from

Hurst v. State except to the extent that it held that a jury must unanimously find the existence of statutory aggravating circumstance beyond a reasonable doubt,” Poole, 297 So. 3d at 491.

If Poole states the law of Florida that this Court believes applied to, and now sustains, Mr. Nixon’s death sentence, then the law of Florida and Mr. Nixon’s death sentence are inconsistent with at least three provisions of the federal Constitution and its Florida counterparts in multiple respects.¹⁶

When Mr. Nixon presented his fully-preserved Ring claim here in 2006, the Court wrote in Nixon v. State, 932 So. 2d 1009, 1024 n.12 (Fla. 2006):

In addition, two of the aggravating factors found in this case are prior violent felony and murder during the commission of a kidnapping. As we have previously said, these aggravators take this case out of the purview of Ring. See Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003); Banks v. State, 842 So. 2d 788, 793 (Fla. 2003).

In the aftermath of Hurst v. State, this Court rejected that position. See Franklin v. State, 209 So. 3d 1241, 1248 (Fla. 2016) (“We also reject the State’s

¹⁶ Apart from the constitutional invalidity of the Poole framework as a general matter, which is discussed in the remainder of this brief, the application of that framework specifically to Mr. Nixon – whose appeal of a decision decided under prior law was pending in the Court when that law was unforeseeably upended to his disadvantage – would violate Mr. Nixon’s federal due process rights as enunciated in Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) as well as the ex post facto and Equal Protection principles canvassed supra at pp. 57-59. See Marks v. United States, 430 U.S. 188 (1977); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-92 (1965); Cole v. Arkansas, 333 U.S. 196 (1948).

contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from Ring and Hurst v. Florida.”); Johnson v. State, 205 So. 3d 1285, 1289 (Fla. 2016) (“We reject the State’s contention that Johnson’s contemporaneous convictions for other violent felonies insulate Johnson’s death sentences from Ring and Hurst v. Florida. See Hurst, 202 So. 3d at 53 n.7.”). See also Mtn. to Relinquish Ex. B. at 4-5 (State’s filing citing 18 similar cases during 2017).

This Court wrote in Poole:

The jury in Poole’s case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court’s longstanding precedent interpreting Ring v. Arizona and under a correct understanding of Hurst v. Florida, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. See Poole II, 151 So. 3d at 419. In light of our decision to recede from Hurst v. State except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court’s order vacating Poole’s death sentence.

Poole, 297 So. 3d at 508.

It accordingly appears that, silently abrogating the post-Hurst cases cited above, this Court is prepared to hold that the constitutional requirements for the imposition of a capital sentence were satisfied when the guilt-phase jury found Mr. Nixon guilty of crimes that were also aggravating circumstances. At that point the

jury had, albeit unknowingly, created a situation in which “death is presumed to be the proper sentence,” and the Constitution did not require the judge to receive any further input from the jury before imposing that sentence. Poole, 297 So. 3d at 502.

Upholding Mr. Nixon’s death sentence on this basis would be unconstitutional.

2. Applying the Reasoning of Poole to Mr. Nixon’s Case Would Violate the Eighth Amendment

The Eighth Amendment requires the State to ensure that the death penalty is reliably inflicted only on the most morally culpable subset of those criminals who commit the most serious homicides (see, e.g., Roper v. Simmons, 543 U.S. 551, 568 (2005); Godfrey v. Georgia, 446 U.S. 420, 428 (1980)). The essentially non-existent sentencing role that Poole allocates to the jury is not only at odds with decades of binding precedent but also disregards the lessons of centuries of common law history, contemporary consensus in the States, and “the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case.” Sumner v. Shuman, 483 U.S. 66, 72 (1987). Only a unanimous jury verdict can supply the requisite assurance of reliability. See Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner in Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924), 2019 WL 2549461.

The system sanctioned by Poole is irremediably inconsistent with the Eighth Amendment, and therefore applying the Florida death penalty statute as interpreted by Poole to Mr. Nixon would violate the United States Constitution.

- a. The Eighth Amendment Requires That the Ultimate Decision to Impose a Sentence of Death Rather Than Life Must Be Made By a Unanimous Jury

At its broadest level, Poole is irreconcilable with the Eighth Amendment's requirement today that the ultimate decision to impose a sentence of death rather than life be must made by a unanimous jury. Contrary to the position of the Poole majority, unanimous-jury sentencing in capital cases is now a requirement of the Eighth Amendment to the federal Constitution. As the Court is well aware, see Poole, 297 So. 3d at 513 (Labarga, J., dissenting), only Alabama and now, again, Florida, cling to the contrary position, which is inconsistent with both contemporary standards of decency and the overwhelming consensus of American jurisdictions. Florida does so only as a result of the atavistic Poole ruling, which is at odds with the judgment of the Florida Legislature -- rendered in 2017 and still firmly in place -- that a death sentence without unanimous jury approval is intolerable. As this Court concluded four years ago, the requirement of jury unanimity requirement reflects the vital role of the jury as the conscience of the community. It is deeply rooted in common law and is required in capital cases by the Eighth Amendment.

Capital sentencing procedures that have been repudiated as a result of the “evolving standards of decency that mark the progress of a maturing society,” Atkins v. Virginia, 536 U.S. 304, 312 (2002), violate the Eighth Amendment, see Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325, 332-33 (1976), as do capital sentencing procedures which are out of touch with the overwhelming consensus of contemporary practice in jurisdictions nationwide, see Beck v. Alabama, 447 U.S. 625, 635 (1980).

These considerations demonstrate that the Eighth Amendment today demands a unanimous jury determination in favor of a death sentence before a state may impose that sentence. To give Mr. Nixon anything less would violate his federal constitutional rights.

- b. Even if the Eighth Amendment Does Not Require Jury Unanimity in Death Sentencing, it at Least Requires a Jury to Make the Ultimate Decision to Impose a Death Sentence

Mr. Nixon maintains that, for the reasons discussed above, the Eighth Amendment requires both jury sentencing and jury unanimity in capital cases. However, this Court need not accept that jury unanimity is a federal constitutional requirement in order to conclude that application of Poole in this case would violate Mr. Nixon’s Eighth Amendment rights. It is enough for the Court to agree that the Eighth Amendment at least requires, as Justices Stevens, Breyer, and others have explained, that a jury make the ultimate decision to impose a death sentence, whether

unanimously or not. See, e.g., Harris v. Alabama, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting); Ring, 536 U.S. at 615-18 (Breyer, J., concurring).

Indeed, no American jurisdiction in 2020 fails to recognize that such a requirement reflects the vital role of the jury in reflecting a “reasoned moral response” (Penry v. Johnson, 532 U.S. 782, 797 (2001)) to the balance of aggravation and mitigation – excepting, again, Alabama by statute and Florida because this Court feels unburdened by statute. Alabama’s statute is on shaky ground in the Supreme Court of the United States, and under basic Eighth Amendment principles Poole should be invalidated there as well.

The reason is straightforward. See, e.g., Reynolds v. Florida, 139 S. Ct. 27, 28-29 (2018) (Breyer, J., statement respecting the denial of certiorari). As more and more states abandon the death penalty altogether, the split in national opinion on whether the death penalty itself is “cruel and unusual” has deepened. Even in retentionist jurisdictions, increasing numbers of people believe that the death penalty continues to be imposed based on convictions that may turn out to be unreliable, that it can be applied in a geographically, racially, and socio-economically biased manner, and that delays between sentencing and execution are excessively cruel.

In this situation, juries, rather than “a single government official,” Ring 536 U.S. at 619 (Breyer, J., concurring), are the only mechanism that can provide a death sentence comporting with the Eighth Amendment: an expression of the “conscience

of the community on the ultimate question of life or death,” Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), and whether the particular crime at hand is “so grievous an affront to humanity that the only adequate response may be the penalty of death,” Gregg, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, JJ.). Even if this Court does not accept that the Eighth Amendment requires jurors to be unanimous in making a death determination, it should at least decide that the Eighth Amendment requires a jury to make the ultimate decision. For that reason, Poole cannot be constitutionally applied to Mr. Nixon.

c. At a Minimum, the Eighth Amendment Requires that a Jury Have Meaningful Input Into a Capital Sentencing Decision

At a minimum, Poole cannot be squared with the Eighth Amendment, and should not be applied to Mr. Nixon, because even if jury unanimity in capital sentencing is not a federal constitutional requirement, and even if a jury need not make the ultimate decision to impose the death penalty, the Eighth Amendment certainly does require that a jury have some meaningful input into a capital sentencing decision. Meaningful jury input in death sentencing is required to ensure that each individual decision to impose capital punishment comports with prevailing moral standards. Woodson, 428 U.S. at 302-05. Applying Poole to Mr. Nixon would necessarily rob him of that federal constitutional protection.

The core tenet of present-day Eighth Amendment capital-trial jurisprudence is that “the sentence imposed at the penalty stage should reflect a reasoned moral

response to the defendant's background, character, and crime” (Abdul-Kabir v. Quarterman, 550 U.S. 233, 252 (2007)), on the basis that “justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender” (Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)). Whether the circumstances of the crime as well as the defendant’s character and history render him death-worthy are reasoned moral decisions that must be made by a jury which deliberates with careful solemnity on just those questions and feels the weight of their importance. Cf. Caldwell v. Mississippi, 472 U.S. 320, 328-30 (1985). That did not happen in this case.

As Mr. Nixon told the court below, see Second Successive Motion Under Fla. R. Crim. P. 3.851, at 14-15 (Fla. 2d Jud. Cir. Jan. 9, 2017), ROA 27-28, the importance of the jury’s advisory verdict was repeatedly minimized by the trial judge and both lawyers, as the extensive trial excerpts in the record show. See Nixon v. Jones, No. 4:10-cv-00020-MCR-WCS, Memorandum of Law in Support of Motion for Summary Judgment (Dkt. 26-1), at 84-85, 163-166 (N.D. Fla. Oct. 5, 2012), ROA 391-392, 470-473. The Eighth Amendment requires at minimum that the jury be an important actor in the sentencing phase of a capital case, not simply a spectator offering comments. See Reynolds v. Florida, 139 S. Ct. 27, 27-29 (2018) (Breyer, J., statement respecting denial of certiorari); *id.* at 32-36 (Sotomayor, J., dissenting from denial of certiorari); Kaczmar v. Florida, 138 S. Ct. 1973, 1973-74 (2018)

(Sotomayor, J., dissenting from the denial of certiorari); Guardado v. Jones, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of certiorari); Middleton v. Florida, 138 S. Ct. 829, 830 (2018) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari); Truehill v. Florida, 138 S. Ct. 3, 3 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari).

d. The Eighth Amendment Forbids a “Gotcha” System In Which By Voting for Guilt a Jury is Unconsciously Voting for a Death Sentence

Independently of the foregoing, a “gotcha” system in which by voting for guilt a jury is unconsciously voting for a death sentence—which may be imposed without the jury ever affirmatively determining that death rather than life is the appropriate punishment—is unconstitutional. See Woodson, 428 U.S. at 293; Jackson v. Dugger, 857 F.2d 1469, 1473-74 (11th Cir. 1988) (vacating death sentence because Florida presumption, relied on by Poole, 297 So. 3d at 502, that death is appropriate once the existence of an aggravating circumstance is established, “vitiates the individualized sentencing determination required by the Eighth Amendment”). See also Lockett v. Ohio, 438 U.S. 586 (1978); cf. Poole, 297 So. 3d at 503 (jury’s role following guilt phase findings limited to recommending mercy if warranted). The Eighth Amendment forbids imposition of a death sentence based on the vote of a guilt-phase jury that was unaware it was effectively deciding whether a death sentence would be imposed.

As indicated above, Mr. Nixon's jurors were led to believe that their only task was to decide guilt or innocence, and that the final sentencing decision rested solely with the judge. Decades later, Poole has abruptly converted those jurors' guilt-phase verdict into a death warrant. The Eighth Amendment cannot possibly countenance this legerdemain.

3. *Applying the Reasoning of Poole to Mr. Nixon's Case Would Violate the Sixth Amendment*

The regime sanctioned by Poole diminishes the jury's factfinding role below the Sixth Amendment floor established long ago. Because a jury verdict at trial will be given heavy weight during all subsequent stages of review, a capital punishment system that seeks to make death flow from the fact of conviction of the crimes on trial while insulating jurors from consideration of that prospect violates the Sixth Amendment. Adams v. Texas, 448 U.S. 38, 50 (1980). The same is true of a death sentence flowing from a prior conviction without jury consideration of the underpinnings of that conviction.¹⁷ That would be so even if the only issue before a

¹⁷ The problem is especially significant in this case because Mr. Nixon has repeatedly asserted – although no court has ever investigated – the claim that the two prior convictions used as aggravators were obtained in violation of his rights under the United States Constitution and hence, under Johnson v. Mississippi, 486 U.S. 578 (1988), could not have been utilized for that purpose in any event. See Corrected Motion to Vacate Judgment of Conviction and Sentence, and Consolidated Request That Leave to Amend Be Allowed, Joe Elton Nixon v. State, No. 84-2324 (Fla. 2d Jud. Cir. Oct. 14, 1993), at 279-87, App. 77-85.

Florida jury for applying the prior violent felony conviction aggravator were the bare fact of a prior conviction. But it is not.

The statutory aggravating factor delineated in Fla. Stat. Ann. § 921.141(6)(b) (2020) is that the defendant was “previously convicted of . . . a felony involving the use or threat of violence to the person.” On its face, this factor is void for vagueness, *see, e.g., Johnson v. United States*, 576 U.S. 591, 595-97 (2015), and Florida death sentences cannot constitutionally be based upon it.

But even if the statute were not invalid on its face, reading it as Poole does makes it so because Poole’s re-writing of the statute reduces the jury’s role below the floor laid down by the Sixth Amendment in Hurst v. Florida.¹⁸

¹⁸ Any reliance on Almendarez-Torres v. United States, 523 U.S. 224 (1998) to deny Mr. Nixon’s Hurst-based claims, which he has repeatedly asserted ever since Apprendi first gave rise to them, would be a stark violation of the Sixth Amendment. As Apprendi itself recognized, “it is arguable that Almendarez-Torres v. United States [a decision primarily concerned with federal statutory construction –] was incorrectly decided” insofar as it implied that a prior conviction might be an exception to the “general rule” that the Sixth Amendment (as incorporated into the Fourteenth) requires that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. Only a single paragraph in Almendarez-Torres speaks to the Sixth Amendment caselaw; that paragraph involves nothing more than an analogy (*see* 523 U.S. at 547, observing that Almendarez-Torres’s argument that a sentence-enhancing finding “would trigger a constitutional ‘elements’ requirement . . . would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty”) and the analogy is to three Sixth Amendment cases that have since been overruled: Walton v. Arizona, 497 U.S. 639 (1990); Hildwin v. Florida, 490 U.S. 638 (1989) (*per curiam*); and Spaziano v. Florida, 468 U.S. 447 (1984). None of these cases survive Ring and

This Court has repeatedly recognized that the contours of the statutory aggravating factor are fact-dependent, requiring consideration of more than just the legal elements of the crime.

Thus, in Bevel v. State, 983 So. 2d 505 (Fla. 2008), this Court stated the established rule that “whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime.” Id. at 518 (citing Rose v. State, 787 So. 2d 786, 800 (Fla. 2001)). Rose, in turn, elaborates further:

Section 921.141(5)(b), Florida Statutes, provides: “The defendant was previously convicted of another capital felony or another felony involving the use or threat of violence to the person.” We have held that the “finding of a prior violent felony conviction aggravator only attaches ‘to life-threatening crimes in which the perpetrator comes in direct contact with a human victim.’”

Id.

Hurst. Unsurprisingly, then, a majority of United States Supreme Court Justices have subsequently concluded – as Mr. Nixon asserts here -- that Almendarez-Torres was indeed wrongly decided. See Shepard v. United States, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (“Almendarez-Torres . . . has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided. See 523 U.S., at 248-249 . . . (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); Apprendi, *supra*, at 520-521. . . (THOMAS, J., concurring).”). See also Mathis v. United States, 136 S. Ct. 2243, 2259 (Thomas, J., concurring) (The “Sixth Amendment problem persists regardless of whether ‘a court is determining whether a prior conviction was entered, or attempting to discern what facts were necessary to a prior conviction.’”).

Determining whether a previous offense was life-threatening requires careful consideration of the specific facts of that crime. For example, in Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), the trial judge based his finding of this aggravator on the defendant's "two convictions of breaking and entering with intent to commit a felony, two convictions of escape, one conviction of grand larceny, and one conviction of possession of a firearm by a convicted felon." This Court disapproved this finding because proof was lacking that the crimes were life-threatening with direct contact with a human victim, and held "that none of these crimes falls within the meaning of this aggravating circumstance as defined by the statute." Id. In Ford v. State, 374 So. 2d 496, 502 (Fla. 1979), the trial judge found that this aggravating circumstance applied on the following basis:

The defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotics drugs, which likewise involves a threat to the safety of members of the public.

Id. at 501 n.1. This Court rejected this finding out of hand.

Whether a felony is one involving the use or threat of violence to the person might be proved by "documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." Johnson v. State, 465 So. 2d 499, 505 (Fla. 1985), overruled on other grounds, In re Instructions in Criminal

Cases, 652 So. 2d 814 (Fla. 1995). Thus, and of some pertinence here, a conviction for the crime of robbery has been rejected as a predicate for this aggravator where defense counsel from the prior robbery case testified and explained the facts of the robbery offense. Mahn v. State, 714 So. 2d 391, 394-95, 399 (Fla. 1998).

No matter how narrowly one might read the Sixth Amendment, it requires fact-finding on which capital eligibility depends to be made by a jury, for the reasons that Mr. Nixon first explained to his court in his habeas corpus petition of May 14, 2002, ROA 68-70 and that the United States Supreme Court ultimately adopted in its Hurst decision. Yet part of the predicate for the death sentence in this case was the judge's determination that Mr. Nixon's prior felony conviction for armed robbery "involved the use or threat of violence to the person." Transcript of Judgment and Sentence at 2 (July 30, 1985) ("Judgment & Sentence Tr."), App. 14.

No jury ever found any such thing. Indeed, the only evidence in the record regarding the circumstances of the crime has emerged during post-conviction. It shows without contradiction that Mr. Nixon (who was very drunk) was not armed and was led by his co-defendant. The latter, who was "armed" only with a butter knife (and was also very drunk) assured the victim that there was no intent to injure her (ROA 4742, 8823).¹⁹

¹⁹ As the co-defendant (Mr. Nixon's cousin and lifetime companion) explained for the intellectual disability hearing below: "The only reason [Joe] was in that store that night was me. I told [Joe] to come with me because I didn't want to go alone. I knew

The Florida case law described above requires consideration of the facts of the prior offense as a predicate to the application of the aggravator. Under Poole those facts will not be found by a jury. The violation of Hurst v. Florida is manifest. See Mathis v. United States, 136 S. Ct. 2243, 2252 (2016).

Similar if not worse²⁰ problems underlie the use of the contemporaneous conviction of other felony charges to render this murder capital – especially when one remembers that defense counsel chose to concede guilt. The jury convicted Mr. Nixon of robbery. The judge’s theory in support of aggravation was that the robbery “constituted [Mr. Nixon’s] primary motive for abducting and thereafter murdering his victim.” 1985 Judgment & Sentence Tr. at 3, App. 15. If Mr. Nixon’s death eligibility rested even in part on this determination he was, under Hurst v. Florida, entitled by the Sixth Amendment to have the jury make it – particularly because, as we showed the court below, the record here is hardly such as to inspire confidence

he couldn't say no. I was the brains of the operation. I was the lead. [Joe] never would have robbed that store alone. As described in the warrant, I was the one in control. I had the knife. I directed the store clerk to the back room. [Joe's] only role was to get the money from the register, which I told him to do. [Joe] could be talked into anything. [Joe] never thought about the consequences of his actions criminal or otherwise-he didn't have the capacity to.” Declaration of Eddie Sam Ingram ¶¶ 11-12 (June 5, 2017), ROA 8438-8439.

²⁰ Whatever may be said about Almendarez-Torres, see n.18 supra, it deals with prior convictions, not contemporaneous ones. It aims to spare the government from the need to retry and re-prove old criminal charges that have been reduced to judgment. It is simply inapplicable to the contemporaneous convictions also embraced by Poole.

in the findings made by the sentencing judge. See Joe Elton Nixon's Second Successive Motion Under Fla. R. Crim. P. 3.851 (Jan. 9, 2017), ROA 26-27.

IV.

CONCLUSION

This Court should reverse the decision below, vacate Mr. Nixon's sentence of death, and reduce his sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy of the foregoing Initial Brief of Appellant has been electronically filed with the Court on this 14th day of December, 2020 using the Florida E-Filing Portal and electronically served to the parties listed below and by U.S. mail to Joe Elton Nixon.

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