In the Supreme Court of Florida

CASE NO.: SC17-790

HAROLD LEE HARVEY JR.,

Appellant,

v.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR OKEECHOBEE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant Harold Lee Harvey, Jr.'s original trial and penalty-phase proceeding were plagued by serious structural flaws from beginning to end. This Court itself has previously ordered that Mr. Harvey be granted a new trial. *See Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. Jul. 3, 2003). *But see Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006) (withdrawing prior opinion in light of intervening Supreme Court precedent). Presently before this Court is Mr. Harvey's timely appeal of the Circuit Court's cursory Order denying Mr. Harvey's successive motion to vacate his conviction and death sentence, which only exacerbated the constitutional errors that have infected this capital case.

Mr. Harvey currently appeals the Circuit Court's denial of two of his claims for relief. First, Mr. Harvey appeals the lower court's decision refusing to grant him an evidentiary hearing to determine whether he is intellectually disabled and therefore ineligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *Walls v. State*, 213 So. 3d 340 (Fla. 2016). Second, Mr. Harvey's sentence should be vacated because he was not sentenced to death by a unanimous jury, in violation of the Eighth Amendment. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. 2016).

STATEMENT OF THE CASE

On February 27, 1985, Mr. Harvey was arrested and charged with murder and robbery. On June 18, 1986, a jury found Mr. Harvey guilty of two counts of first-degree murder. The jury proceeded to the sentencing phase and recommended a sentence of death by a vote of eleven to one. The judge then found facts sufficient to establish four aggravating factors. *Harvey v. State*, 529 So. 2d 1083, 1087 & n.4 (Fla. 1988). The judge found Mr. Harvey's low IQ and poor educational and social skills were the only mitigating circumstances. Accordingly, the judge sentenced Mr. Harvey to death. The Florida Supreme Court affirmed on June 16, 1988, *see Harvey v. State*, 529 So. 2d 1083 (Fla. 1988), and the United States Supreme Court denied certiorari on February 21, 1989, *see Harvey v. Florida*, 489 U.S. 1040 (1989).

On August 27, 1990, Mr. Harvey filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The Circuit Court ultimately denied all of his claims, and Mr. Harvey appealed to this Court. On February 23, 1995, this Court remanded the case to the Circuit Court for an evidentiary hearing on Mr. Harvey's ineffective assistance of counsel claims. The Circuit Court again denied relief, and Mr. Harvey again appealed to this Court. On July 3, 2003, this Court reversed the Circuit Court and remanded the case for a new trial. While the government's petition for rehearing of that decision was pending, the United States

Supreme Court decided *Florida v. Nixon*, 543 U.S. 175 (2004), which caused this Court to vacate its prior decision. *See Harvey*, 946 So. 2d at 937.

On December 20, 2016, Mr. Harvey filed the instant motion to vacate his death sentence under Florida Rule of Criminal Procedure 3.851. On March 29, 2017, the Okeechobee County Circuit Court issued a three-paragraph Order denying the motion. (R. 248–49, Order.) Mr. Harvey timely appealed to this Court on April 17, 2017. (R. 4–8.) Following briefing on a show-cause order regarding the import of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *reh'g denied*, No. SC17-445, 2017 WL 4118830 (Fla. Sept. 18, 2017), this Court allowed Mr. Harvey to proceed to merits briefing on most of his claims. This Court declined to hear the merits of Mr. Harvey's claim under *Hurst v. Florida*, which requires that a sentence of death be imposed by a jury rather than a judge. 136 S. Ct. 616 (2016). Mr. Harvey preserves that claim[1] and presses his remaining arguments here.

[1] Mr. Harvey maintains that his claim under *Hurst v. Florida* is meritorious even after this Court's recent opinion in *Hitchcock v. State*, No. SC17-445, 2017 WL 343150 (Fla. Aug. 10, 2017). As Mr. Harvey explained in his show-cause briefs, his case comes to this Court in a different procedural posture than did *Hitchcock*. Unlike the petitioners in *Hitchcock* and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), Mr. Harvey's death sentence was vacated by this Court ***after*** *Ring v. Arizona* was decided in 2002. That fact alone makes this case akin to *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *reh'g denied*, No. SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017), and entitles Mr. Harvey to a new sentencing hearing.

SUMMARY OF ARGUMENT

Mr. Harvey respectfully submits that the Circuit Court erred in finding that his intellectual disability claim was procedurally barred because it was not originally raised after the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). As explained in detail below, the fact that Mr. Harvey did not raise the issue of intellectual disability after *Atkins* does not bar him from doing so now under *Hall v. Florida*, 134 S. Ct. 1986 (2014), because Mr. Harvey did not have a valid intellectual disability claim until *Hall* was decided. Only after *Hall* did the category of defendants ineligible for the death penalty due to intellectual disability expand to include defendants, such as Mr. Harvey, whose existing IQ test results are not below 70. As a result, *Hall*—not *Atkins*—is the proper starting point for determining whether there is any procedural bar to Mr. Harvey's intellectual disability claim. And given that Mr. Harvey timely asserted his claim under *Hall* two months after this Court established that *Hall* is retroactively applicable, *see Walls*, 213 So. 3d at 346, there is no procedural bar in this case. Because Mr. Harvey's intellectual disability claim is not procedurally barred, this Court should remand so that the Circuit Court can conduct an evidentiary hearing on Mr. Harvey's intellectual functioning.

Mr. Harvey's sentence should also be vacated because Mr. Harvey was not sentenced to death by a unanimous jury, which violates the Eighth Amendment.

See Hurst v. State, 202 So. 3d 40 (Fla. 2016); *Perry v. State*, No. SC16-547, 2016 WL 6036982 (Fla. 2016). This Court has not yet decided whether the right to jury unanimity applies retroactively. That said, the right meets all of the requirements of *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), and thus this Court should decide that the right is retroactive and mandates relief in Mr. Harvey's case.

STANDARD OF REVIEW

The denial of an evidentiary hearing on a Rule 3.851 motion presents "a pure question of law, subject to de novo review." *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). Similarly, the Circuit Court's decision to summarily deny a successive rule 3.851 motion based on the lack of jury unanimity is reviewed de novo. *Id.*

ARGUMENT

I. Mr. Harvey Is Entitled to an Evidentiary Hearing to Determine Whether He Is Ineligible For the Death Penalty Due to Intellectual Disability.

Mr. Harvey argued in the Circuit Court that he should be afforded a full opportunity to show that he is ineligible for the death penalty due to intellectual disability. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) ("[T]he execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment."). Without hearing any evidence or even allowing Mr. Harvey an opportunity to secure an expert evaluation, the Circuit Court

rejected Mr. Harvey's claim of intellectual disability. The court refused to consider Mr. Harvey's claim on the merits despite undisputed evidence in the record that Mr. Harvey suffers "organic brain dysfunction" and has "particular deficits of mental functioning." Rule 3.850 Mot. to Vacate at 38, 188–99 (Fla. Cir. Ct. Aug. 27, 1990). The Circuit Court denied Mr. Harvey's intellectual disability claim on the ground that it was "procedurally barred." (R. 248.) This was error. There is no procedural bar or time bar that precluded Mr. Harvey from raising his intellectual disability claim in his motion to vacate under Rule 3.851.

Because Mr. Harvey's claim is not barred, this Court should—at a minimum—remand for the Circuit Court to decide, on the merits, whether to grant Mr. Harvey an evidentiary hearing on the issue of intellectual disability. Alternatively, this Court should remand and affirmatively instruct that the Circuit Court conduct the evidentiary hearing on intellectual disability.

A. Mr. Harvey's Intellectual Disability Claim Was Timely Raised In His Rule 3.851 Motion.

Generally, a capital defendant's motion to a vacate judgment of conviction and a death sentence must be filed within one year after the judgment and sentence have become final. Fla. R. Crim. P. 3.851(d)(1). However, a defendant may file a successive motion to vacate *after* the one-year period from judgment has passed if (1) the defendant asserts a "fundamental constitutional right" that "was not

established within" the one-year period from judgment and (2) the right "has been held to apply retroactively." *Id.* 3.851(d)(2)(B), (e)(2); *see also Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

Mr. Harvey's intellectual disability claim complies with these requirements for the filing of a successive motion to vacate. Mr. Harvey seeks relief from the death penalty on the basis of intellectual disability under the United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Hall*, the United States Supreme Court held that Florida's rigid IQ cutoff for determining intellectual disability violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 1990, 2000. Prior to *Hall*, any person with an IQ score above 70 was automatically deemed not to have an intellectual disability and was barred from presenting any other evidence of intellectual impairment. *See Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007) (per curiam). *Hall* eliminated the requirement that a defendant have an IQ score of 70 or below to qualify as intellectually disabled. As this Court has explained, *Hall*'s "rejection of Florida's mandatory IQ score cutoff means defendants with IQ scores that are *higher than* 70 must still be permitted to present evidence" of intellectual disability. *Walls*, 213 So. 3d at 346 (emphasis added). Because the record contains compelling evidence of intellectual disability—but no finding of an IQ below 70—Mr. Harvey was not able to seek relief based on intellectual disability until *Hall* was decided.

Mr. Harvey's *Hall* claim satisfies each of the prerequisites for a successive motion under Rule 3.851. First, this Court has held that *Hall*'s expansion of intellectual disability to defendants with an IQ above 70 constitutes a "fundamental" constitutional right. *Id.* Second, the right announced in *Hall* was "not established within" one year of when Mr. Harvey's judgment became final, but rather some 25 years later. *See* Fla. R. Crim. P. 3.851(d)(2)(B). Lastly, this Court established in *Walls* that "*Hall* does apply retroactively." *Walls*, 213 So. 3d at 346. Mr. Harvey has therefore satisfied the requirements of Rule 3.851(d)(2)(B) for the filing of a successive motion based on his *Hall* claim.

In addition to the requirements of Rule 3.851(d)(2)(B), a successive motion to vacate based on a new, retroactively applicable constitutional right must be filed within "one year from the date of the decision announcing that the right applies retroactively." *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018). Mr. Harvey's motion was filed on December 20, 2016, just two months after *Walls* was decided. As such, Mr. Harvey's Rule 3.851 motion timely sought relief under *Hall* based on Mr. Harvey's intellectual disability.

B. Mr. Harvey's Intellectual Disability Claim Is Not Procedurally Barred, And This Court Should Reverse The Circuit Court's Ruling To The Contrary.

The Circuit Court's Order does not mention Mr. Harvey's intellectual disability claim or address the claim directly. Instead, the Circuit Court denied all

of Mr. Harvey's non-*Hurst* claims, without distinguishing between them, on the ground that they are "procedurally barred." (R. 248.) The court disposed of Mr. Harvey's non-*Hurst* claims with one sentence: "[T]he court incorporates by reference the State's answer and the State's hearing argument, and adopts the State's reasoning in finding the remaining claims/sub-claims procedurally barred and/or beyond the scope of *Hurst* relief." *Id.*

As an initial matter, the Circuit Court's decision to credit all of the State's arguments without any reasoned explanation is itself grounds for remand. A court commits error when, as here, it simply "accept[s one party's] position on all of the issues of fact and law" and fails to articulate the grounds upon which it based its decision. *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 542 (Wis. Ct. App. 1993). Indeed, the cursory nature of the Circuit Court's Order raises due process concerns that should be cured by requiring a reasoned opinion addressing Mr. Harvey's claims. *See, e.g.*, *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) (noting that "the right to be heard" is one of the "fundamental requisites of due process"); *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 Fed. Appx. 752, 756 n.3 (11th Cir. 2015) ("[W]e take this opportunity to once again strongly criticize the practice of trial courts' uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party.").

Although the Circuit Court gave no further explanation as to why Mr. Harvey's intellectual disability claim is procedurally barred, the court apparently accepted the argument made by the State below. The State argued that Mr. Harvey's intellectual disability claim is procedurally barred because he did not raise the claim after the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). But the fact that Mr. Harvey did not raise the issue of his intellectual disability after *Atkins* does not bar him from doing so now under *Hall*. That is because Mr. Harvey did not have a valid intellectual disability claim until *Hall* was decided.

Atkins established the general principle that it is a violation of the Eighth Amendment to execute a defendant who is intellectually disabled. 536 U.S. at 321. But, as described above, Florida "required an IQ score of 70 or below" to come within the category of intellectual disability. *Walls*, 213 So. 3d at 345. This Court has described the "IQ score cutoff rule" as "strict" and "mandatory." *Id.* at 345–47; *see also Hall*, 134 S. Ct. at 1998 ("[T]he Florida Supreme Court interpreted the law to require a bright-line cutoff at 70.").

At the time *Atkins* was decided, there was *no* evidence in the record that Mr. Harvey had an IQ of 70 or less. In fact, the record even contained evidence of one IQ test which showed a score of 86. *See* Rule 3.850 Mot. to Vacate at 16. Although later-developed evidence, discussed *infra* pp. 16–17, has undermined the

credibility of the psychologist who conducted this IQ test, the then-existing record put Mr. Harvey outside the category of defendants eligible for relief under the IQ score cutoff that was in place before *Hall*. Mr. Harvey's intellectual disability claim was foreclosed by the IQ score cutoff rule, and became viable only after that rule was struck down. Because Mr. Harvey's intellectual disability claim would have been futile before *Hall*, he did not have an obligation to raise his claim under *Atkins* in order to now raise the issue under *Hall*. *See C.U. Assocs., Inc. v. R.B. Grove, Inc.*, 472 So. 2d 1177, 1179 (Fla. 1985) ("[T]he law does not require a futile act."); *Blatch v. State*, 389 So. 2d 669, 672 (Fla. Dist. Ct. App. 1980) ("The exercise of due diligence does not require the doing of an obviously futile act.").

To support its argument that Mr. Harvey was required to raise a claim under *Atkins*, the State relied below on *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016). In *Rodriguez*, this Court affirmed the trial court's denial of a *Hall* claim as time barred because the petitioner had not previously raised a claim under *Atkins*. *Id.* at *1. However, *Rodriguez* does not control here.

Rodriguez—which was a non-binding, unpublished decision—has been abrogated by this Court's subsequent published decision in *Walls*. The decision in *Rodriguez* that the defendant could not bring a claim under *Hall* without having first brought one under *Atkins* was made prior to this Court's ruling in *Walls* that *Hall* has retroactive effect. *See Walls*, 213 So. 3d at 346. In holding that *Hall*

applies retroactively, this Court clarified for the first time that *Hall* articulated a new rule that can be invoked *independently* of the rule announced in *Atkins*. *Walls* makes clear that an *Atkins* claim is not a necessary prerequisite for every *Hall* claim because *Hall* "*increase[d]* the number of potential cases in which the State cannot impose the death penalty." *Id.* (emphasis added). As *Walls* explained, "*more defendants* may be eligible for relief . . . . more than just those cases in which the defendant has an IQ score of 70 or below." *Id.* (emphasis added).

But even if *Walls* did not invalidate *Rodriguez*, *Rodriguez* is distinguishable from this case. *Rodriguez* held that the defendant's failure to seek relief under *Atkins* constituted a procedural bar because "there was *no reason* that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins*." *Rodriguez*, 2016 WL 4194776, at *1 (emphasis added). In *Rodriguez*, there was evidence in the record that the defendant's IQ was *below* 70. *See Rodriguez v. State*, No. SC15-1278, Initial Brief of Appellant, at 6–7 (noting that Rodriguez obtained two separate full-scale IQ scores of 62 and 58). Because his IQ scores were below 70, Rodriguez could have been found intellectually disabled even under the pre-*Hall* IQ cutoff. In contrast, Mr. Harvey has never received a below-70 IQ score. Thus, he had no viable intellectual disability claim until *Hall* was decided. *See Walls*, 213 So. 3d at 347. Unlike the defendant in *Rodriguez*, Mr. Harvey's intellectual disability claim is not an *Atkins* claim masquerading as a *Hall*

claim; it is a genuine *Hall* claim. Mr. Harvey falls within the class of prisoners that *Hall* placed beyond the State's power to execute. *Id.* at 346. Therefore, the fact that Mr. Harvey did not raise the issue of intellectual disability under *Atkins* does not bar him from raising it now based on *Hall*.

C. Because Mr. Harvey's Intellectual Disability Claim Is Not Procedurally Barred, This Court Should Remand For an Evidentiary Hearing on the Question of Intellectual Disability.

Because the procedural bar was the Circuit Court's only basis for denying Mr. Harvey an evidentiary hearing on intellectual disability, if this Court finds the intellectual disability claim is not barred, this Court must remand for the Circuit Court to decide, on the merits, whether to grant Mr. Harvey an evidentiary hearing. Alternatively, because it is clear Mr. Harvey has never received the constitutionally required determination of his intellectual capacity—and because there is compelling evidence that Mr. Harvey is intellectually disabled—this Court may remand and order the Circuit Court to conduct the evidentiary hearing. *See Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding that the denial of an evidentiary hearing on a Rule 3.851 motion is "subject to de novo review").

1. The Eighth Amendment Requires that Intellectual Disability Be Determined Through a "Conjunctive and Interrelated Assessment."

In addition to invalidating a strict IQ cutoff for intellectual disability, *Hall* also held that "courts must consider all *three prongs* in determining an intellectual

disability, as opposed to relying on just one factor [IQ score] as dispositive." *Oats v. State*, 181 So. 3d 457, 467 (Fla. 2015) (citing *Hall*, 134 S. Ct. at 2001) (emphasis added). The three prongs are: "[1] significantly subaverage intellectual functioning, [2] deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and [3] onset of these deficits during the developmental period [*i.e.*, before age 18]." *Hall*, 134 S. Ct. at 1994. Although subaverage intellectual functioning—often indicated by a person's IQ score—is *one* of the factors, *Hall* held that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." 134 S. Ct. at 2001; *see Oats*, 181 So. 3d at 459 ("[A]ll three prongs generally must be considered in tandem."). "[B]ecause these factors are interdependent," this Court has explained, "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." *Id.* 467–68; *see Walls* at 346–47 (reaffirming "the [United States] Supreme Court's mandate that all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive.")

When a capital defendant has "not receive[d] the type of holistic review to which he is now entitled [under *Hall*]," this Court has repeatedly held that the defendant's case must be "remand[ed] for the Circuit Court to conduct a new

evidentiary hearing as to [the defendant's] claim of intellectual disability." *Id.* at 348; *see, e.g.*, *Thompson v. State*, 208 So. 3d 49, 60 (Fla. 2016), *reh'g denied*, No. SC15-1752, 2017 WL 237658 (Fla. Jan. 19, 2017) (reversing and remanding "for a new evidentiary hearing regarding intellectual disability"); *Cardona v. State*, 185 So. 3d 514, 527 (Fla. 2016) ("[I]n a subsequent intellectual disability hearing, the trial court should . . . perform a comprehensive analysis of all three prongs as set forth in *Hall* and its progeny.").

2. Mr. Harvey Has Never Received the Assessment of Intellectual Disability Required by the Eighth Amendment.

Mr. Harvey has never received the holistic review of his intellectual functioning that *Hall* and the Eighth Amendment require. During the penalty phase of Mr. Harvey's trial, a psychologist presented limited mental health evidence as part of the defense's mitigation case. *See* Rule 3.850 Mot. to Vacate at 208–10, 237. But this Court has made clear that psychological evidence received as part of mitigation proceedings is no substitute for the separate determination of whether a defendant is constitutionally exempt from the death penalty due to intellectual disability. *See Thompson*, 208 So. 3d at 54 (distinguishing between evidence "presented for mitigation" and "evidence of intellectual disability as a bar to execution").

Even if mitigation evidence alone could somehow show whether a defendant is categorically exempt from execution, the psychological evaluation that served as Mr. Harvey's mitigation evidence was constitutionally incomplete and unreliable on the question of intellectual disability. Mr. Harvey's trial counsel failed to hire a psychiatrist to evaluate Mr. Harvey's intellectual functioning despite receiving a psychologist's recommendation that a psychiatrist be retained and despite the fact that the trial court authorized funds for counsel to do so. *See* Rule 3.850 Mot. to Vacate at 73, 236–37. Instead, Mr. Harvey's counsel retained an inexperienced psychologist who had never before evaluated a capital defendant. *Id.* at 238. This psychologist conducted a "personality evaluation"—*not* a forensic evaluation of intellectual disability—and concluded that Mr. Harvey needed "assertiveness training." *Id.* at 237; *see* Appx. in Support of Pet. for Habeas Corpus (S.D. Fl. Jan. 25, 2008) (Doc. 4-3, at 93). It is no surprise, then, that the psychologist's testimony did not provide a "conjunctive and interrelated assessment" of the three factors for determining intellectual disability.

More importantly, the penalty-phase testimony offered by the psychologist cannot be relied on as an assessment of Mr. Harvey's intellectual capacity because that very psychologist, after receiving additional training and professional experience, recanted that testimony in its entirety. In an evidentiary hearing on Mr. Harvey's previous petition for post-conviction relief, the psychologist

conceded that, as a result of his "lack of competence" and his "focus on Mr. Harvey's emotional concerns" at the direction of defense counsel, his trial testimony as to Mr. Harvey's intellectual functioning was wrong. *See* Appx. in Support of Pet. for Habeas Corpus (S.D. Fl. Jan. 25, 2008) (Doc. 4-2, at 47–48). The psychologist admitted that he "didn't know what [he] was talking about" when he opined during Mr. Harvey's trial that Mr. Harvey did not have "brain dysfunctioning." *Id.* at 50. This is the same psychologist who opined at trial that Mr. Harvey received an IQ score of 86. *See* Rule 3.850 Mot. to Vacate at 16. The psychologist's later, undisputed recanting of his trial testimony undermines whatever conclusions might be drawn about Mr. Harvey's intellectual capacity from the psychologist's trial testimony and underscores the need for a new intellectual-disability assessment.

The determination of whether a defendant is intellectually disabled, and thus ineligible for the death penalty, must be based on "current medical standards," *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017), and an evaluation of the three prongs by which "the medical community defines intellectual disability," *Hall*, 134 S. Ct. at 1994. Mr. Harvey has never received a determination that complies with these requirements. Thus, he "has yet to have 'a fair opportunity to show that the Constitution prohibits his execution.'" *Thompson*, 208 So. 3d at 60 (quoting *Hall*, 134 S. Ct. at 2001) (alteration adopted). Mr. Harvey should be given that chance.

3. There Is a Strong Likelihood that Mr. Harvey Would Be Found Intellectually Disabled If Given a Constitutionally Compliant Evaluation.

This Court should remand for an evidentiary hearing on the issue of intellectual disability not only because Mr. Harvey has never before received such a hearing, but also because the existing record shows that Mr. Harvey is likely intellectually disabled. *See Brumfield*, 135 S. Ct. at 2281.

The relevant evidence comes from the psychiatric assessment of Mr. Harvey conducted by Dr. Michael Norko, a professor of psychiatry at Yale University. Dr. Norko evaluated Mr. Harvey during Mr. Harvey's initial state post-conviction proceedings. Dr. Norko found that "*every element* of Mr. Harvey's life represents a risk factor for mental illness and poor psychological function: he inherited a genetic predisposition to mental and emotional problems; was poorly nourished in utero and as a child; experienced toxic insults to his developing nervous system; had evidence of organic brain damage as a school age child; had no support or affection to ameliorate these negative influences; suffered a serious head injury and emotional trauma as a teenager which altered his personality and mental function; experienced loss in the relationships on which he was dependent; and had a marriage that was troubled from the start." Rule 3.850 Mot. to Vacate, Appx. No. 3, at 18 (Fla. Cir. Ct. Aug. 27, 1990).

The most important of Dr. Norko's conclusions is that Mr. Harvey "suffers from organic brain dysfunction." *Id.* at 13. As Dr. Norko explained, Mr. Harvey "most likely had some dysfunction even in his early years, based on descriptions of him as slow, dull and having trouble with school work." *Id.* As a young child, Mr. Harvey "did poorly in school," "had difficulty learning," and "could not sit still and do homework assignments." *Id.* at 3, 7. "This organicity was dramatically compounded by [the] head trauma" that Mr. Harvey suffered in a tragic car accident when he was sixteen years old. *Id.* at 3, 13. According to Dr. Norko:

> The symptoms [Mr. Harvey] experienced thereafter, which are consistently described by many individuals, point to both frontal lobe and brain stem damage. He experienced an acute post-concussion syndrome and has been left with a chronic syndrome of frontal lobe dysfunction. This is manifested in an inability to think abstractly, very poor organizational and executive functions, diminished capacity for decision-making and goal-directed behavior, irritability and mood swings, and lack of foresight and insight.

Id. In assessing Mr. Harvey, Dr. Norko found he was unable to perform the simple diagnostic task of counting backwards by intervals of seven. *Id.* at 11. He also had difficulty "nam[ing] the similarities betwe[e]n objects" and "explain[ing] common proverbs." *Id.* In sum, Dr. Norko found, Mr. Harvey has "great difficulty understanding abstract concepts, [and] can not mentally manipulate information in a rational and logical fashion in order to arrive at answers to questions." *Id.* at 14.

Dr. Norko's findings raise grave doubts as to whether Mr. Harvey has the intellectual capacity to be executed. *See Hall*, 134 S. Ct. at 1990 (explaining that the Eighth Amendment is violated where there is "an unacceptable risk that [a] person[] with intellectual disability will be executed."); *id.* at 2001 ("[The defendant] may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime."). Mr. Harvey is therefore entitled to a determination of this issue on the merits.

Mr. Harvey respectfully requests that this Court reverse the Circuit Court's denial of his intellectual disability claim and remand for an evidentiary hearing to determine whether he is intellectually disabled. Even if this Court does not order the Circuit Court to conduct an evidentiary hearing, this Court should, at the least, remand so that the Circuit Court can decide the propriety of such a hearing based on the merits, rather than on the erroneous basis of a procedural bar.

II. Mr. Harvey's Sentence Violates the Eighth Amendment Because the Jury in His Case Did Not Unanimously Recommend the Death Penalty.

Mr. Harvey argued in the Circuit Court that his death sentence violates the Eighth Amendment because his sentence was not supported by a unanimous jury, as is required by *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210

So. 3d 630 (Fla. 2016). Without expressly considering this separate claim, the Circuit Court denied Mr. Harvey relief.

In recent decisions concerning the Eighth Amendment, this Court has held that standards of decency have evolved to require jury unanimity before imposing a death sentence. *Hurst*, 202 So. 3d at 53–54; *Perry*, 210 So. 3d at 633–34. Specifically, this Court explained that "[t]he vast majority of capital sentencing law enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances." *Hurst*, 202 So. 3d at 60.

The Eighth Amendment right to unanimity is distinct from the Sixth Amendment right articulated in *Hurst v. Florida* to have jurors, rather than a judge, find the facts supporting a death sentence. These two distinct rights are based on different amendments to the federal Constitution and serve different purposes. Jury unanimity serves to "provide the highest degree of reliability" that death is an appropriate sentence in each particular case. *Id.* at 60. Jury unanimity also expresses "the values of the community as they currently relate to imposition of death as a penalty," consistent with our "evolving standards of decency." *Id.* at 60. For these reasons, this Court decided to bring Florida's "capital sentencing laws

into harmony with the direction of society reflected in [the majority of] states and with federal law," and require unanimous jury verdicts in capital cases. *Id.* at 61.

This Court has not yet decided whether the jury unanimity requirement applies retroactively. *See Hitchcock v. State*, 226 So. 3d 216, 220 (Fla. 2017) (Pariente, J., dissenting). To determine whether any new right is retroactively applicable, this Court must engage in the full analysis prescribed in *Witt v. State*, 387 So. 2d 922, 928 (Fla. 1980). Under that analysis, new rules apply retroactively when they: (1) emanate from the United States Supreme Court or the Florida Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id.* at 931.

The right to jury unanimity satisfies all three prongs of the *Witt* analysis. The first requirement is satisfied because the rule in question emanates from this Court. The second requirement is satisfied because the rule is constitutional in nature. And the third requirement is satisfied because this rule is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Witt*, 387 So. 2d at 929. That three-part test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id.* at 926. All three of those considerations point in favor of retroactivity.

First, jury unanimity serves the important purpose of ensuring the reliability and appropriateness of death sentences.[2] *Hitchcock*, 226 So. 3d at 220 (Pariente, J., dissenting) ("Reliability is the linchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death is inherently unreliable."). Second, reliance on the old rule, requiring only a majority vote to impose a death sentence, was unreasonable given that the federal government and all but three states had long required jury unanimity, leaving Florida a "clear outlier." *Hurst v. State*, 202 So. 3d at 61. Third, applying the unanimity requirement retroactively would affect only those death row petitioners whose sentences were not supported by a unanimous verdict. Finally, in the particular context of Florida's death sentencing scheme, which no longer allows for anything less than unanimity, "[c]onsiderations 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*, 387 So. 2d at 925 (quotations omitted).

Contrary to the State's frequently articulated position, *Asay* did *not* determine the retroactive applicability of the Eighth Amendment right to jury

[2] These purposes have nothing to do with the reasoning underpinning *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Hildwin v. Florida*, 490 U.S. 638 (1989); or *Spaziano v. Florida*, 468 U.S. 447 (1984), which analyzed the Sixth Amendment, not the Eighth Amendment.

unanimity. *See Hitchcock*, 226 So. 3d at 220 (Pariente, J., dissenting). *Asay* addressed only the retroactive applicability of the Sixth Amendment right to have a jury—and not a judge—decide each factor supporting a death sentence. *Asay*, 210 So. 3d at 15–17. As explained in detail below, that distinction is relevant to *Asay*'s specific reasoning and to its application of the *Stovall*/*Linkletter* test. In fact, a close reading of this Court's opinion in *Asay* actually supports the notion that the unanimous jury requirement should be retroactive.

Asay suggested that the first prong of the *Stovall*/*Linkletter* test (which focuses on the "purpose of the new rule") weighed in favor of retroactivity, *id.* at 17–18, but then indicated that the second prong of that test (which focuses on reliance on the old rule) weighed against retroactivity because the State of Florida had "relied on the constitutionality of Florida's death penalty scheme" when "prosecuting . . . crimes," *id.* at 18-20. There are no such reliance interests implicated by applying a unanimous jury requirement retroactively; a prosecutor would not have done anything differently when arguing the case if he or she had known that a unanimous jury was required. Thus, the portion of *Asay* concerning reliance interests has no relevance or applicability to this case. Finally, *Asay*'s analysis of the third prong of the *Stovall*/*Linkletter* test (which focuses on the "effect on the administration of justice") turned on this Court's conclusion that applying *Hurst* retroactively would disturb numerous death sentences and thus

would present serious practical concerns. *Id.* at 20–22. That analysis has no applicability here due to significant differences between this case and *Asay*. The number of cases that would be disturbed by declaring retroactive the right to have a jury decide all elements of a death sentence is far greater than the number of cases that would be disturbed by declaring retroactive the right to jury unanimity. That is because Mr. Harvey's case is part of a subset of cases in which the death sentence was recommended by a non-unanimous jury.

Mr. Harvey respectfully requests that this Court retroactively apply its rule requiring jury unanimity and vacate Mr. Harvey's conviction and death sentence.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court vacate the Circuit Court's Order and remand this case to the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida.

Respectfully submitted April 27, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing Initial Brief of Appellant has been e-mailed to **e-file@flcourts.org**, the original was mailed to John A. Tomasino, Clerk, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy was furnished by U.S. Mail to Donna M. Perry, Assistant Attorney General, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, and by email to Celia Terenzio, Leslie Campbell, and Ryan Butler, on April 27, 2018.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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