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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

As demonstrated in Appellants' Initial Brief, Mr. Harvey is entitled to relief because of numerous fundamental errors in his trial and penalty-phase proceedings. The State's Answer Brief is formulaic, either ignoring Mr. Harvey's key arguments or presenting faulty readings of this Court's case law.

Several examples are instructive.

The State repeatedly suggests that Mr. Harvey's intellectual disability claim is barred under *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016), but it makes no effort to address Mr. Harvey's contentions that *Rodriguez* is factually distinguishable, was non-precedential when it was decided, and has been abrogated by a later decision of this Court. Likewise, the State emphasizes Mr. Harvey's prior IQ score of 86 without acknowledging that the school psychologist who assigned that score recanted under oath his evaluation of Mr. Harvey because he "didn't know what [he] was talking about" when he provided his initial opinions. The State's argument that Mr. Harvey's Eighth Amendment claim is foreclosed by *Asay v. State*, 210 So. 3d 1 (2016), fails to engage with Mr. Harvey's arguments that *Asay* did not resolve the question presented in this case.

Nothing in the State's Answer Brief disturbs the conclusion that Mr. Harvey is entitled to relief. Mr. Harvey's intellectual disability claim is not untimely, procedurally barred, or refuted by the record. To the contrary, the available

evidence strongly indicates intellectual disability and confirms that Mr. Harvey is entitled to an evidentiary hearing. *See infra* Section I. Moreover, Mr. Harvey is also entitled to relief because his death sentence was not supported by a unanimous jury recommendation, violating the Eighth Amendment. *See infra* Section II.

ARGUMENT

I. Mr. Harvey Is Entitled to an Evidentiary Hearing on Intellectual Disability Because His Intellectual Disability Claim is Not Untimely, Procedurally Barred, or Refuted by the Record.

A. Mr. Harvey's Intellectual Disability Claim Is Not Untimely or Procedurally Barred.

The State argues that Mr. Harvey's claim of intellectual disability—which arises under *Hall v. Florida*, 134 S. Ct. 1986 (2014)—is barred because he did not first raise an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Answer Br. at 8, 11. The State relies exclusively on one decision for the supposed rule that a capital defendant is barred from raising an intellectual disability claim under *Hall* unless he previously raised a claim under *Atkins*. That one decision is the non-binding, unpublished opinion in *Rodriguez*, 2016 WL 4194776 (Fla. Aug. 9, 2016). *See* Answer Br. at 7–8, 10–11.

As Mr. Harvey explained in his Initial Brief, there are two reasons why *Rodriguez* does not control. First, *Rodriguez* was abrogated by this Court's subsequent published decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016). The *Rodriguez* Court's ruling that the defendant could not bring a *Hall* claim because

he had not brought one under *Atkins* was made before this Court established in *Walls* that *Hall* constituted a "fundamental" "change in the law" that warranted retroactive application. *Id.* at 346. As *Walls* explained, *Hall*'s "rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty." *Walls*, 213 So. 3d at 346. After *Hall*, "[d]efendants with IQ scores that are *higher than* 70 must still be permitted to present evidence" of intellectual disability. *Id.* (emphasis added). Because *Hall* shields from execution those with "a broader range of IQ scores than before," *id.*, limiting it to only those who raised an intellectual disability claim pre-*Hall* would undo the very expansion that *Hall* created and that *Walls* held applies retroactively.

Second, even if *Rodriguez* were still good law, it is distinguishable here. The *Rodriguez* defendant had an IQ score below 70. *See Rodriguez*, No. SC15-1278, Initial Brief of Appellant, at 6–7. Before *Hall*, defendants with an IQ of 70 or below qualified as intellectually disabled, so the *Rodriguez* Court rejected Mr. Rodriguez's argument that "only after the U.S. Supreme Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), did he have the basis for asserting an intellectual disability claim." *Rodriguez*, 2016 WL 4194776 at *1. Due to his below-70 IQ, the Court found "there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins*." *Id.*

In contrast, Mr. Harvey has never received an IQ score below 70. As a result, Mr. Harvey—unlike Mr. Rodriguez—would not have had a viable intellectual disability claim at the time *Atkins* was decided because of the strict 70-or-below IQ cutoff. *See Cherry v. State*, 781 So.2d 1040, 1041 (Fla. 2000) (accepting expert testimony that intellectual disability required a score of 70 or below on a standardized intelligence test). The State fails even to acknowledge, much less refute, this basis for distinguishing *Rodriguez*. As a prisoner whose only available IQ test suggested a score above 70, Mr. Harvey was barred from presenting evidence of intellectual disability prior to *Hall*, and thus seeking relief after *Atkins* would have been futile.

B. Mr. Harvey's Intellectual Disability Claim Is Not Conclusively Refuted by the Record Because Undisputed Evidence Indicates that He Is Intellectually Disabled.

The State argues that, independent of the purported time bar, Mr. Harvey's intellectual disability claim should also be denied because it is "conclusively refuted by the record." Answer Br. at 12. First, Mr. Harvey notes that the Circuit Court did not address the factual record at all. The Circuit Court's only basis for denying Mr. Harvey an evidentiary hearing was the purported procedural bar. Thus, if this Court finds that the intellectual disability claim is not procedurally barred, this Court should remand for the Circuit Court to decide, on the merits, whether to grant Mr. Harvey an evidentiary hearing.

But to the extent this Court is inclined to consider the factual record, it squarely *supports*—rather than refutes—Mr. Harvey's claim of intellectual disability. Mr. Harvey's Initial Brief detailed the findings of Dr. Michael Norko, a Yale University psychiatrist who concluded that Mr. Harvey suffers from "organic brain dysfunction," including "particular deficits of mental functioning" that have left Mr. Harvey unable to "mentally manipulate information in a rational and logical fashion." Initial Br. at 18–19; Rule 3.850 Mot. to Vacate at 38, 188–99 (Fla. Cir. Ct. Aug. 27, 1990). The State does not and cannot dispute any of Dr. Norko's findings. Thus, as the State itself points out, this Court must now "accept[] the movant's factual allegations as true" because "they are not refuted by the record." *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009); *see* Answer Br. at 5.

Ignoring the many indications of severe intellectual impairment in Dr. Norko's findings, the State argues that Mr. Harvey is "well outside the definition of [intellectual disability]" solely because he previously received an IQ score of 86. Answer Br. at 12. However, this IQ score—which Mr. Harvey received 34 years ago—cannot be used to preclude Mr. Harvey from receiving an evidentiary hearing because the psychologist who administered the IQ test that resulted in this score has fully recanted his prior testimony regarding Mr. Harvey's intellectual capacity, including the IQ score. During previous postconviction proceedings, that psychologist testified that he "was incompetent at the time to identify the

likelihood or the probability of neuro-psychological and[/]or brain dysfunctioning." *See* Appx. in Support of Pet. for Habeas Corpus (S.D. Fla. Jan. 25, 2008) (Doc. 4–2, at 50). The psychologist specifically admitted that, due to his "lack of competence," he was wrong in his interpretations and scoring of Mr. Harvey's responses to the IQ test he administered. *Id.* at 48. Because the original IQ score was retracted and completely discredited, it is not competent evidence of Mr. Harvey's actual intellectual functioning and should not be considered.[1]

For the reasons explained above, Mr. Harvey's intellectual disability claim is not procedurally barred and is not conclusively refuted by any competent evidence.

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

Contrary to the State's assertions, Mr. Harvey's Eighth Amendment claim about jury unanimity is not a "re-packaged" Sixth Amendment claim.[2] The right to jury unanimity is distinct, and although the State urges this Court to ignore its own decisions recognizing that right, those decisions control here. *See Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016); *Perry v. State*, 210 So. 3d 630 (Fla. 2016). After the

[1] Even if the score of 86 had not been retracted, scholarship examining the reliability of the IQ test Mr. Harvey received (the WAIS-R) has found that, "regardless of scorer's experience level, mechanical scoring error produce[s] summary scores varying by as much as 4 to 18 IQ points." Joseph Ryan, et al., Scoring Reliability of the WAIS-R, 51 J. Consulting & Clinical Psych. 149 (1983).

[2] Mr. Harvey preserves his Sixth Amendment claim, but he did not press it in his Initial Brief. *See* Initial Br. at 3 n.1.

U.S. Supreme Court remanded *Hurst v. Florida*, this Court did more than "initially include[] the Eighth Amendment as a reason for warranting unanimous jury recommendations." Answer Br. at 15. This Court recognized a new right, holding that "a defendant [may] 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 61.

Instead of engaging with *Hurst v. State* and *Perry v. State*, the State contends that *Spaziano v. Florida* controls this case. 468 U.S. 447 (1984), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016). The State maintains that this Court did not and cannot overrule *Spaziano*, and thus it cannot require jury unanimity for death penalty verdicts. Answer Br. at 15. The State is wrong for two reasons.

First, the *Spaziano* Court never addressed the constitutionality of non-unanimous jury verdicts, nor was it asked to do so.[3] 468 U.S. at 447. Similarly, the Court in *Hurst v. Florida* took the lack of unanimity in Florida's sentencing scheme for granted, and was not asked to address whether it was constitutional. 136 S. Ct. 616 (2016). Neither decision supports the State's arguments against recognizing the right to jury unanimity.

[3] The issue in *Spaziano* was "whether the defendant is entitled to the benefit of both the lesser included offense instruction and an expired period of limitations on those offenses." *Spaziano*, 468 U.S. at 454.

Second, the U.S. Supreme Court may set a federal constitutional floor that Florida may choose to exceed in protecting its citizens' rights. *See Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992) ("Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes."). The State argues that the "conformity clause" of the Florida Constitution prohibits this Court from doing so. *See* Answer Br. at 15, citing Fla. Const. art. I, § 17. But this Court's precedent shows otherwise. *See, e.g.*, *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (holding that "the state constitutional conformity clause" did not preclude certain review because it is not required under the Eighth Amendment). This Court based its decision requiring jury unanimity for death penalty decisions in part on Florida law. *Hurst*, 202 So. 3d at 59–62. And this Court's decision construing its own Constitution binds all Florida courts. *Traylor*, 596 So. 2d at 962. Thus, *Hurst v. State* and *Perry v. State* control.

The State also wrongly conflates the Eighth Amendment right to jury unanimity with the Sixth Amendment right to have the jury make sentencing decisions, maintaining that both share the same 2002 cutoff for retroactive relief. This Court held that the Sixth Amendment right applies retroactively to 2002 because that is when the Supreme Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that juries—and not judges—must make the decision to impose a death sentence. *See Mosley v. State*, 209 So. 3d 1248, 1273 (Fla. 2016). Because the

decision recognizing that right in the context of Florida's sentencing scheme, *Hurst v. Florida*, 136 S. Ct. 616 (2016), applied the reasoning of *Ring*, this Court chose that specific date as the cutoff for that Sixth Amendment right. 209 So. 3d at 1273. But *Ring* said nothing about the Eighth Amendment right to jury unanimity.

The retroactive application of the right to jury unanimity has not yet been decided. The State's assertion that this Court "was abundantly clear" on this issue in *Asay v. State*, 210 So. 3d 1 (2016), is deceptive and flatly ignores Mr. Harvey's argument that *Asay*'s analysis actually supports retroactivity here. Answer Br. at 16. *Asay* applied the retroactivity analysis under *Witt v. State*, 387 So. 2d 922, 928 (Fla. 1980), to only the Sixth Amendment right to have a jury, rather than a judge, make the death penalty decision; it did not analyze the Eighth Amendment right to jury unanimity. Nor did *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), analyze the right's retroactivity under *Witt*. Mr. Harvey asks that this Court do so here.

Finally, the State contends that the lack of unanimity in Mr. Harvey's jury was harmless beyond a reasonable doubt. Answer Br. at 18–19. The State bears "an extremely heavy burden" to prove that "there is no reasonable possibility" that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [Mr. Harvey's] death sentence in this case." *Hurst*, 202 So. 3d at 68. Yet the State offers only the *ipse dixit* that had unanimity been required, the jury somehow would have achieved it. Answer Br. at 19.

In fact, the actual jury in this case did *not* unanimously recommend the death penalty. The State goes so far as to argue that Mr. Harvey's concession as to one aggravating factor implies that the jury would have *unanimously*: (1) found each of the three other aggravating factors, (2) found mitigating circumstances, (3) agreed that the aggravating factors outweighed the mitigating circumstances, (4) agreed that the aggravators were sufficient to impose death, and (5) decided to impose death. Answer Br. at 19. Because the jury was not required to make each of these findings, let alone unanimously, there is no way to know *beyond a reasonable doubt* that they would have done so. Thus, this Court cannot say "beyond a reasonable doubt there is no possibility that the . . . error in this case contributed to the sentence." *Hurst*, 202 So. 3d at 69 (Fla. 2016).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court vacate the Circuit Court's Order and remand this case to the Circuit Court.

Respectfully submitted May 21, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing Reply Brief of Appellant has been e-mailed to **e-file@flcourts.org**; 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 May 21, 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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