

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-203

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
CRIMINAL DIVISION

BRIEF OF APPELLEE

ASHLEY MOODY
Attorney General
Tallahassee, Florida

MELISSA ROCA SHAW
Assistant Attorney General
Florida Bar No. 0099628
Office of the Attorney General
1 SE 3RD Avenue, Suite 900
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

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STATEMENT OF CASE AND FACTS

On February 14, 1992, Appellant, Pablo San Martin, Ricardo Gonzalez, Pablo Abreu and Fernando Fernandez were charged by indictment with committing, on January 3, 1992: (1) first degree murder of a law enforcement officer, North Miami police officer Steven Bauer, (2) armed robbery, (3) aggravated assault, (4) two counts of grand theft and (5) two counts of burglary.¹ (R. 1-5)²

The matter proceeded to trial on May 23, 1994. (R. 24) After considering the evidence presented, the jury found Appellant guilty as charged on all counts. (T. 2324-25) The trial court

¹ Appellant was also charged with possession of a firearm during a criminal offense and an additional count of aggravated assault. (R. 1-4) However, the State entered a *nolle prosequi* to these charges after opening statement at Appellant's original trial. *Franqui v. State*, 699 So. 2d 1332, 1333 n.1 (Fla. 1997).

² The symbol "R." and "T." will refer to the record on appeal and transcripts of proceedings from Appellant's original direct appeal, Florida Supreme Court case no. SC84,701. The symbols "RSR." and "RST." will refer to the record on appeal and transcripts of proceedings from Appellant's resentencing appeal, Florida Supreme Court case no. SC94,269. The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental records on appeal from the appeal from the denial of Appellant's first motion for postconviction relief, Florida Supreme Court case no. SC04-2380. The symbol "PCR2." will refer to the record on appeal in the appeal from the denial of his second motion for postconviction relief, Florida Supreme Court case no. SC12-182. The symbol "PCR3." will refer to the record on appeal in the appeal from the denial of his third motion for postconviction relief, Florida Supreme Court case no. SC15-1630, which this Court consolidated with Appellant's other case (no. SC15-1441) when it issued the mandate reversing and remanding for the intellectual disability evidentiary hearing. The symbol "PCR4." will refer to the record in the instant appeal of the trial court's 2017 denial of Appellant's 3.203 motion. Appellant's initial brief will be referred to as "IB."

adjudicated Appellant in accordance with the verdicts. (T. 2333) After a penalty phase, the jury recommended a sentence of death for the murder of Officer Bauer by a vote of 9 to 3. (R. 480) The trial court followed the jury's recommendation and sentenced Appellant to death. (R. 588-601)

Appellant appealed his conviction and sentences to this Court, raising five issues, including a claim that the trial court improperly permitted the presentation of his codefendants' confessions at a joint trial. This Court affirmed Appellant's convictions but reversed Appellant's death sentence. *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997). This Court found that the trial court had erred in admitting the other codefendants' confession at the joint trial, that although the error was harmless in the guilt phase it was harmful in the penalty phase. *Id.* at 1335-36. In issuing its opinion, this Court found the following historical facts:

The [Appellant], [], along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft third degree, and burglary. [Defendant], Gonzalez, and San Martin were tried together before a jury in May, 1994.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were

found abandoned two blocks west of the bank.

Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that [Appellant] had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that [Appellant] had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that [Defendant] was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed \$1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how [Appellant] had shouted at the victim not to move before shooting him.

[Appellant] was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, [Appellant] initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. [Appellant] stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to [Appellant], San Martin, Fernandez and Abreu had stolen the vehicles. [Appellant] did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. [Appellant] denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of [Appellant], the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to [Appellant], upon the trial court's finding that their confessions "interlocked" with [Appellant's] own confession. In addition, an eyewitness identified [Appellant] as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints

were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that [Appellant] had shot the victim in the leg with his .9 mm handgun.

[Appellant] was convicted on all counts, and after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced [Appellant] to death.

Id. at 1333-34 (footnotes omitted). Both parties sought certiorari review in the United States Supreme Court, which was denied. *Franqui v. Florida*, 523 U.S. 1097 (1998); *Florida v. Franqui*, 523 U.S. 1040 (1998).

On remand, the matter proceeded to the new penalty phase on August 24, 1998. (RST. 1) After considering all of the evidence, the jury recommended that Appellant be sentenced to death by a vote of 10 to 2. (RSR. 155, RST. 1172) The trial court followed the jury's recommendation and sentenced Appellant to death. (RSR. 158-75, 225-47)

Appellant again appealed his sentence to this Court. This Court affirmed Appellant's sentence on October 18, 2001. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001).

Subsequent collateral challenges have been rejected. *Franqui v. State*, 965 So. 2d 22 (Fla. 2007) (denying post conviction relief and state habeas relief and finding counsel was not deficient and Dr. Toomer's testimony was not credible); *Franqui v. Florida*, No. 07-22384-CIV, 2008 WL 2747093, *1 (S.D. Fla. Jul. 10, 2008)

(denying federal habeas petition and treating the statement about Appellant's IQ as an attempt to raise a claim that Appellant was intellectually disabled and denied it as unexhausted, procedurally barred and meritless); *Franqui v. Florida*, 562 U.S. 1188 (2011) (denying certiorari review of Eleventh Circuit's May 18, 2010 order denying leave to appeal); *Franqui v. Florida*, 638 F.3d 1368 (11th Cir. 2011), *cert. denied*, 566 U.S. 978 (2012) (vacating the order denying the *pro se* motion for relief from the district court's judgment and remanded with instructions to the district court to dismiss the motion for lack of jurisdiction); *Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (affirming the denial of the second motion for postconviction relief finding Appellant's sentence did not violate the Sixth and Eighth Amendments under *Porter v. McCollum*, 130 S. Ct. 447 (2009), and affirming denial of the intellectual disability claim because the IQ score Appellant relied upon was not from an admissible IQ test, his scores on the admissible IQ tests that had been presented in Appellant's other case were too high and he did not proffer he could satisfy the third element of intellectual disability).

On May 27, 2015, Appellant filed a third motion for post conviction relief. (PCR3. 121-44) In this motion, Appellant contended that he was entitled to reconsideration of his claim that he was intellectually disabled because the United States Supreme Court issued *Hall v. Florida*, 572 U.S. 701 (2014), and

this Court ordered an evidentiary hearing in a different inmate's case. *Id.* The only support for Appellant's assertion that he was intellectually disabled was a statement from Dr. Toomer's testimony regarding intellectual disability in Appellant's other capital case as support for the intellectual disability claim in the second motion for postconviction relief. *Id.*

On June 25, 2015, Appellant filed a pleading titled "Notice of Proffer." (PCR3. 180-91) In this pleading, Appellant complained that the lower court's refusal to conduct a *Huff*³ hearing or allow him to file a motion for rehearing denied him notice and the opportunity to be heard. *Id.* While the case was pending on appeal in this Court, the Court issued an opinion in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), deeming *Hall v. Florida* to be retroactive. As a result, this Court granted his successive motion so that he could present evidence at an evidentiary hearing pursuant to his 2015 3.851 postconviction motion for determination of intellectual disability as a bar to execution pursuant to Florida Rules of Criminal Procedure Rule 3.203. *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017).

Relevant to the instant appeal is what occurred at Appellant's 2017 Rule 3.203 evidentiary hearing after this Court relinquished jurisdiction of Appellant's appeal regarding his claim that he was

³ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

intellectually disabled.

Findings at the 2017 Evidentiary Hearing

The evidentiary hearing was held by the postconviction court from October 31 to November 1, 2017. During the hearing, the postconviction court heard evidence from the following mental health experts: Drs. Gordon Taub and Jethro Toomer for the defense, and Dr. Enrique Suarez for the State. Their testimonies relied on certain documents and personal recounting of interviews. No lay witnesses were presented by either side.

The parties simultaneously submitted written closing memorandum on March 8, 2018. (PCR4. 652-886) After weighing the evidence and using "the criteria set forth in the DSM-5" (PCR4. 923), on October 4, 2018, the postconviction court made the following findings of fact and law:

1. "Mr. Franqui has not shown, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100." (PCR4. 924-928)

"Significantly sub average general intellectual functioning" was defined by the postconviction court as performance that is "two or more standard deviations from the mean score on a standardized intelligence test." PCR4. 924. The postconviction court noted that Dr. Taub, Appellant's expert, reviewed the prior 2003 reports "outlining the results of two intelligence tests, the Stanford-Binet IV and the WAIS III" prepared by Dr. Trudy Block-Garfield where Appellant "had scored a 76 and 75 respectively."

(PCR4. 924) Additionally:

In explaining Dr. Block-Garfield's report, Dr. Taub described that all intelligence tests are subject to the "Flynn effect," where scores increase every year due to societal changes relative to the date that the intelligence test is normed. Under the Flynn effect, scores increase by three points every decade. (H. Vol. 1, p. 24-25) Dr. Taub calculated that due to the number of years between when the Stanford-Binet IV test was normed (in 1985) and when it was administered to the {Appellant} (in 2003), the {Appellant's} score would have been inflated by roughly five points, changing the observed score from 76 to 71. Likewise, according to Dr. Taub, the WAIS III, normed in 1995, would have inflated the {Appellant's} score by two points, and the re-calculated score would be 73. (H. Vol. 1, p. 30-38)

Dr. Taub further opined that the average standard error of measurement ("SEM"), which accounts for the portion of unreliability in the measuring of intelligence, would have to be taken into account in order to properly score the {Appellant's} IQ. (H. Vol 1 p.40) Although not knowing the exact measurement of error, Dr. Taub hypothesized that an average of plus or minus four or five points would be appropriate. (H. Vol. 1, p. 40-42) Under this theory, Dr. Taub opined that the {Appellant's} IQ **could** fall under 70. (H. Vol. 1, P. 44) Dr. Taub was forthcoming when he conceded that the Flynn effect would not be applied in all cases where IQ is being tested. (H. Vol. 1. P. 71) Taking only the SEM into account, {Appellant's} score on the WAIS would be between 70 and 80, according to Dr. Taub. It is noteworthy that, despite the reported scores, Dr. Taub acknowledged that neither his nor Dr. Block-Garfield's report diagnosed the {Appellant} as intellectually disabled. Dr. Taub concluded that "Mr. Franqui may be intellectually [disabled]." But then added that "[he] did not make a determination of an intellectual disability." (H. Vol. 1, pg 57-59, 62).

PCR4. 924-25 (emphasis added).

Dr. Jethro Toomer, Appellant's second expert, administered the WAIS-R test and conducted a clinical interview with Appellant

in 1992, in addition to the Bender Gestalt Designs test, the Revised Beta Examination, the Carlson Psychological Survey and the Minnesota Multiphasic Personality Inventory ("MMPI"). PCR4. 925-

26. The postconviction court determined:

In discussing the intelligence tests, Dr. Toomer acknowledged that he administered the Revised Beta Test, despite knowing that the WAIS is the recommended test to determine intelligence. According to Dr. Toomer, the {Appellant} scored a 60 on the Revised Beta Test and an 83 on the WAIS-R. (H. Vol. 2, p. 155) In comparing the test results, Dr. Toomer opined that the Revised Beta Test is a more "performance driven test" and relies primarily on the individual's manipulation of objects and symbols whereas the WAIS-R test is broader in terms of domain, testing perceptual ability, processing speed, and verbal skills. Under the WAIS-R, the {Appellant} received a 79 on the verbal portion of the exam and a 92 on the performance portion of the exam. Dr. Toomer did not address the discrepancy of the poor score of 60 on the Revised Beta test in comparison to the score of 92 on the performance portion of the WAIS-R. He later administered the Carlson Psychological Test, where the {Appellant} scored highly on the malingering index, indicating his intent to not give his best effort and "faking" his responses. (H. Vol. 2, p. 200-208)

PCR4. 926.

According to Dr. Enrique Suarez's testimony, Appellant scored a 75 full-scale IQ score during the administration of the WAIS-IV in 2009. PCR4. 927. Dr. Suarez testified that taking the SEM into account, Appellant's score ranged from 71-80. PCR4. 927. Dr. Suarez also administered several validity tests which demonstrated that Appellant was malingering. PCR4. 927. As to the Flynn Effect, Dr. Suarez indicated that it is not wholly accepted among all psychologists and that even if it had been taken into account,

Appellant's scores "would still not put him in the range of intellectually disabled." *Id.*

The postconviction court rejected the Flynn Effect based on the reasoning stated by this Court in *Quince v. State*, 241 So. 3d 58 (Fla. 2018), *cert. denied sub nom.*, 139 S. Ct. 202 (2018) and found that even when applying the SEM to various IQ exams administered to Appellant, the lowest score Appellant could have is a 71. PCR4. 927-28. The postconviction court did not consider Appellant's score of 60 on the Revised Beta Test administered by Dr. Toomer who "acknowledged that the Revised Beta Test was not the recommended test in determining IQ." PCR4. 928 n.9 Thereby, Appellant had not shown by clear and convincing evidence that he satisfied the first prong on intellectual disability. PCR4. 928.

2. No Finding of Adaptive Deficits

Addressing the second prong of "how well a person meets community standards of personal independence and social responsibility", the postconviction court referenced the DSM-5 which describes deficits in adaptive functioning:

Adaptive functioning (Criterion B) involves three domains: conceptual, social, and practical. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, and acquisition of practical knowledge, problem solving, and judgement in novel situations among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy, interpersonal communication skills, friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal

care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among other. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning....

Criterion B is met when at least one domain of adaptive functioning conceptual, social, or practical- is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Criterion during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

PCR4. 928-29. Referencing Dr. Toomer's and Dr. Suarez's examinations, the postconviction court analyzed each of the three domains. PCR4. 929.

On the evidence presented, the postconviction court referenced Dr. Toomer's findings that Appellant did not know his father, his mother was absent, and he had "difficulties in learning academic skills involving reading, writing, arithmetic, time and money, with support needed in one or more areas to meet age-related expectations." PCR4. 929-30. While the postconviction court found that Appellant's home life "impacted his adjustment to and functioning in school", the court referenced the DSM-5 which indicated that "the inquiry does not stop there" and that "[t]o

meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to an intellectual impairment." PCR4. 930.

Referring to Appellant's school grades, Dr. Toomer admitted that Appellant was a "C" student when he went to school during the fifth and sixth grade. As to his failure to attend most of seventh grade, Dr. Toomer "had no way of knowing whether the absences were a result of [Appellant]'s decompensation or because he simply decided to skip school." PCR4. 930.

As to Dr. Suarez's testimony regarding the conceptual skills category, the postconviction court found:

... Dr. Suarez failed to find that the {Appellant} had deficits relative to his adaptive behavior. Dr. Suarez testified that the {Appellant} indicated that he was in special classes when he was in school in Cuba, but after arriving to the United States, was placed in the sixth grade and later promoted to the seventh grade. The {Appellant} repeated the seventh grade two or three times and stated that he eventually was expelled from school because of poor grades and excessive absences. According to Dr. Suarez, the {Appellant} admitted that he missed a considerable amount of time at school and left school because he "wanted to be with [the] other guys." (H. Vol. 3, p. 26) The {Appellant's} own explanation for his failing grades and eventual expulsion from school as a result of his absences, belie a claim of an adaptive deficit. While Franqui contends his poor school grades are indicative of this disability, school records presented include a report by a teacher indicating that his failing grades were due to absences and lack of participation when he was in school. His absences from school, not intellectual disability, were the cause of his academic difficulties.

PCR4. 930-31.

The postconviction court also determined that Appellant did not suffer from conceptual difficulties such as "abstract thinking, executive functions, such as planning and priority setting, short term memory and function use of academic skills" based on the evidence during the trial. PCR4. 931. The court was not persuaded by Dr. Toomer's testimony that Appellant was "merely responding to the officers' questions during his confession" as Appellant "went into great detail in explaining why he took the actions he did when planning the crimes." PCR4. 931. The postconviction court also stated that based on the testimony from both experts, Appellant did not suffer from any short-term memory problems. PCR4. 932.

In considering the social domain, the postconviction court cited the DSM-5 in explaining that the domain "involves awareness of others' thoughts, feelings, and experiences, empathy, interpersonal communication skills, friendship abilities and social judgment." PCR4. 933. Further, "[t]here was no testimony that the [Appellant] was immature, has difficulty perceiving social cues, has more concrete language than others of his age, or has problems regulating his emotions or behavior. In fact, much of what was presented regarding [Appellant's] life before prison would suggest the opposite."⁴ PCR4. 933. Appellant's home life and

⁴ "An examination of the language used by the [Appellant] during his statements to the police demonstrates that it was no more

the relationships he was able to make, despite his mother's abandonment and his father's use of drugs, suggest he does not suffer from social deficits. PCR4. 935.

Finally, the postconviction court found Appellant did not suffer from deficits under the practical domain, which "analyzes learning and self-management across life settings, including, but not limited to: personal care, job responsibilities, money management, and self-management." PCR4. 935-36. The court noted that Appellant's collective job skills and employment history at the sanitation department, golf course, and security guard at a marina did not "support a deficit in the practical domain." PCR4. 936. Additionally, his ability to handle money did not illustrate

concrete than normal, and he responded to open ended questions appropriately. Moreover, the [Appellant] communicates effectively with staff and other inmates at the Florida State Prison. [Appellant] has engaged in written correspondence with family members and an internet pen pal and has engaged in telephone conversations with his attorneys. He also has the ability to follow instructions, play chess and card games between cell walls with other inmates, all of which requires the ability to count and remember numbers. [Appellant] takes advantage of recreational activities, uses the mail for correspondence and uses resources in prison, including the law library to acquire legal materials and shares them with other inmates. Further, while in prison, the [Appellant] has requested specific books including "The Art of Thinking," "The Biology of Belief," "The Virus of the Mind," a French-English dictionary, a Spanish-English dictionary, and grammar books all indicative of a functional use of academic skills." PCR4. 934. "The [Appellant's] ability to recall and request very specific medications also indicates no conceptual deficits. [Appellant] is capable of dealing with perceived problems and injustices by filing grievance requests and paperwork." PCR4. 934.

a "level of deficiency required in this area, in order to support a claim of intellectual disability" given the fact that he was the owner of nine cars, possessed a driver's license, and could adapt his mode of transportation for "his family's needs." PCR4. 936. He also managed his money in his canteen account, was able to request specific medications, and communicated with a pen pal in a foreign country who would send him money. PCR4. 937. Additionally:

[Appellant's] crimes also belie a claim of a deficit in the practical domain. [Appellant] helped plan and carry out both robberies. He knew how to hot wire an automobile, box in the victims' vehicles, and use walkie-talkies to communicate with his accomplices. [Appellant] described his intention to receive \$26,000 from the North Miami robbery, clearly reflecting a financially driven motive for the crime. While Dr. Toomer opined that the thought process for committing these crimes is reflective of maladaptive behavior, and therefore not indicative of adaptive functioning, **each of the skills necessary to commit the crimes [Appellant] committed reflect his ability to coordinate and collaborate - skills that exceed the routine and regimented.**

Id. at 937 (emphasis added). The postconviction court also noted that Dr. Block-Garfield's report was indicative that Appellant was able not only to care for himself but could care for his wife and children; thus, his scores "reflect considerable difficulties, but it does not appear that [Appellant] functions in the [intellectually disabled] range." PCR4. 937-38.

3. No Onset of Adaptive Deficits Prior to Age 18.

Reviewing the third prong in determining whether Appellant's alleged deficits manifested before the age of 18, the postconviction court relied on the specific understandings held by this Court in *Glover v. State*, 226 So. 3d 795, 810 (Fla. 2017), *Simmons v. State*, 207 So. 3d 860, 866 (Fla. 2016), and *Phillips v. State*, 984 So. 2d 503, 511-512 (Fla. 2008), to find that Appellant did not suffer from adaptive impairments. PCR4. 938-940. To this point:

None of the experts could say, with any degree of certainty, the reason why [Appellant] dropped out of school in the 7th grade after receiving acceptable grades during the 6th grade. Dr. Toomer reluctantly admitted that [Appellant's] poor grades could be explained because he failed to attend classes and wanted to hang with friends instead of going to school.

There is a dearth of evidence that [Appellant] suffered from any adaptive deficits as an adult. The testimony and records provide that [Appellant] was able to cope with life's common demands. He was able to communicate, care for himself, and live normally in his home and with others. Prior to committing the crimes for which he was imprisoned, [Appellant] was able to function in the community, maintain employment, handle money, as well as drive and hot-wire a car. Franqui lived on his own, maintained a romantic relationship and took care of his girlfriend/wife and children. His ability to plan and carry out his crimes further support the conclusion that he possesses the ability to adapt to his surroundings.

PCR4. 940-41. Thus, "[t]he evidence presented is overwhelming that, prior to his incarceration, the [Appellant] functioned normally in society and, while incarcerated, the [Appellant] has shown no adaptive deficits. [Appellant] has failed to prove, by

clear and convincing evidence, any concurrent deficits that would satisfy the third prong of the intellectual disability test.” PCR4. 941.

Accordingly, the postconviction court concluded that under a “holistic inquiry required by *Hall*,” Appellant had failed to prove, by clear and convincing evidence, that he is intellectually disabled under § 921.137 (1), Fla. Stat. (2017) and denied Appellant’s motion. PCR4. 942.

On January 15, 2019, Appellant filed a notice of appeal stemming from this order. On July 8, 2019, Appellant filed his initial brief. This answer brief follows.

SUMMARY OF THE ARGUMENT

Appellant failed to establish by clear and convincing evidence that he is intellectually disabled and often mischaracterizes the postconviction court's findings of fact and implicit rejection of specific expert testimony. Clear and convincing evidence is the constitutional standard which the postconviction court followed and which is clearly outlined in sections §§921.137(1)-(4) of the Florida Statutes and Florida Rule of Criminal Procedure 3.203. Appellant failed to meet the definition of intellectual disability because he does not suffer from significant subaverage intellectual functioning, or concurrent adaptive functioning deficits which were onset before the age of 18. Because the postconviction court properly relied on current medical standards set forth in the DSM-5 and reviewed all presented evidence concerning the three prongs when analyzing Appellant's intellectual disability claim, this Court should affirm the postconviction court's determination that Appellant has not met the criteria set forth on any of the prongs of intellectual disability.

Appellant presents "supplemental" arguments concerning the constitutionality of his death sentences under the purview of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that were not presented to the postconviction court in this evidentiary hearing. Therefore, Appellant's arguments on

this issue are improper before this Court which does not hear matters in the first instance. Even if it had been properly raised to the postconviction court, Appellant's arguments fail on the merits because he is not entitled to a jury determination on his postconviction intellectual disability claim, and as his case was final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002) decision, he is not entitled to retroactive relief under *Hurst v. Florida* or *Hurst v. State*.

STANDARD OF REVIEW

As this Court recently stated:

"[I]t is necessary to clarify what *Moore* did not change—our standard of review. As noted in *Glover v. State*, 226 So. 3d 795 (Fla. 2017), neither *Hall* nor *Moore* "alter[ed] the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." *Id.* at 809.

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

Glover, 226 So. 3d at 809 (alterations in original) (quoting *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015)).

Wright v. State, 256 So. 3d 766, 769 (Fla. 2018), *reh'g denied*, No. SC13-1213, 2018 WL 5734373 (Fla. Nov. 1, 2018), *cert. denied*, No. 18-8653, 2019 WL 1458194 (U.S. June 3, 2019).

ARGUMENT

I. APPELLANT WAS GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE AS TO ALL THREE PRONGS OF INLLECTUAL DISABILITY BUT FAILED TO PROVE HE WAS INTELLECTUALLY DISABLED BY CLEAR AND CONVINCING EVIDENCE.

The postconviction court properly conducted a holistic review of the intellectual disability requirements in accordance with *Hall v. Florida*, 572 U.S. 701 (2014), and correctly found that Appellant did not present clear and convincing evidence of any of the intellectual disability prongs. Florida Statutes § 921.137(1) and § 921.137(4) explicitly state that for a defendant to establish a claim of intellectual disability, he must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. See § 921.137(1), (4), Fla. Stat. (2018) (“If the court finds, **by clear and convincing evidence**, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death....” (emphasis added)). The postconviction court properly followed that burden of proof in determining that Appellant was not intellectually disabled under the law.

A. Clear and convincing evidence is the appropriate and applicable burden of proof standard under section 921.137(4) which governs a Rule 3.203 evidentiary hearing.

Contrary to Appellant's assertion that Rule 3.203 is "silent on the evidentiary burden" and therefore means a lower burden is more proper, the governing law is found in the Florida Statutes and dictates how a trial court is to conduct a Rule 3.203 evidentiary hearing. It explicitly establishes the burden of proof as "clear and convincing evidence". § 921.137(1), Fla. Stat. (2018). The postconviction court noted that it was using the clear and convincing evidence standard and cited to the Florida Statute and longstanding case law. PCR4. 922. As such, the postconviction court correctly followed what it was mandated to follow at the time it conducted its Rule 3.203 inquiry.

Additionally, Appellant argues that clear and convincing evidence is not the "proper burden of proof" and that it runs afoul of the Eighth and Fourteenth Amendments of the Constitution. See IB at 31. Appellant argues that by stating in its order that the postconviction court applied the clear and convincing evidence standard, "the lower court erred in imposing an unconstitutional burden of proof and in disallowing [Appellant] to be heard on the issue." Specifically, Appellant did not raise this constitutional issue during the actual evidentiary hearing but noted in its "Motion for Leave to File a Reply to the State's Closing" that the

standard of clear and convincing evidence ran contrary to the holdings in *Hall* and *Moore v. Texas*, 137 S. Ct. 1039 (2017).⁵

First, Appellant is conflating two separate issues by arguing that the legal burden of proof diminishes the force of the medical community's consensus in *Moore* and *Hall*. IB. at 934 n. 31. However, this Court has already stated unequivocally that the holdings in *Moore* and *Hall* do not "alter the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." See *Glover v. State*, 226 So. 3d 795, 809 (Fla. 2017) (reiterating clear and convincing evidence is the standard that the trial court employs even where "*Hall* authorizes defendants who, like Glover, have IQ scores within the SEM to raise an intellectual disability claim,"); *Wright*, 256 So. 3d at 778 ("we can again conclude that Wright failed to prove adaptive deficits **by clear and convincing evidence—a conclusion that Moore did not alter.**" (emphasis added)).

"The clear-and-convincing-evidence standard, although not insatiable, is still demanding." See *Raulerson v. Warden*, 928 F.3d 987, 1007 (11th Cir. 2019)) (finding "a state prisoner may prove

⁵ In a footnote, Appellant pointed the postconviction court to *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (internal quotations omitted), which stated: "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' 572 U.S., at , 134 S. Ct., at 2000. That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." PCR4. at 889.

the factual predicate of an *Atkins* claim in federal court with clear and convincing evidence even when the state in which he was convicted and sentenced imposes a more demanding burden of proof for precisely the same factual issue") (citing *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quotations omitted)). While Appellant cites to dicta in the *Raulerson* opinion, importantly the opinion approves of the clear and convincing evidence standard and highlights that the *Atkins*⁶ Court expressly decided to "leave to the States the task of developing appropriate ways to enforce [Atkins's] constitutional restriction." *Id.* at 1008 (citing *Atkins v. Virginia*, 536 U.S. at 317 (alteration adopted) (citations omitted)).

As explained *infra*, after being informed of the views of the defense and state medical experts, each of whom had varying medical opinions, the postconviction court, as the fact finder, took into consideration the opposite theories in determining what evidence was credible. The trial court weighed the evidence adopting the standard from the Florida statute which was in line with this Court's recent decisions and Florida law. Therefore, the postconviction court did not err by applying this standard.

Secondly, there was no due process violation. Appellant relies on *Huff v. State*, 622 So. 2d 982 (Fla. 1993) to assert that

⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

"he was deprived his right to be heard after the State invoked a burden of proof that is inconsistent with the governing constitutional standards." IB. at 33. However, Appellant's reliance conflicts with his own arguments.

In *Huff*, the appellant filed a motion to vacate judgment and death sentence pursuant to Rule 3.850⁷. 622 So. 2d at 982-83. Notably, "[t]he standard of review for a trial court's determination regarding a motion to amend a rule 3.850 motion is whether there was an abuse of discretion." *Lukehart v. State*, 70 So. 3d 503, 514 (Fla. 2011) (citing *Huff v. State*, 762 So. 2d 476, 481 (Fla. 2000)). Huff's motion was signed by an attorney who was not licensed in the State of Florida; as such, the postconviction court struck down the motion as null and void. *Huff*, 622 So. 2d at

⁷ A 3.850 motion is akin to a 3.851 motion in a death penalty case, and where 3.850 motions were utilized prior to October 1, 2001, the effective date of Rule 3.851. See *Franqui v. State*, 59 So. 3d 82, 95 n.13 (Fla. 2011). Appellant fails to mention in his due process argument that after the evidentiary hearing was completed, the trial court indicated and agreed with the parties that both sides would file written closing memoranda in lieu of oral closing arguments pursuant to Rule 3.851(f)(5)(E). The State then put Appellant on notice that pursuant to this rule, simultaneously filed written closing arguments shall be filed and **no answer or reply arguments shall be allowed**. See PCR4. 1137; Fla. R. Crim. P 3.851(f)(5)(E) (emphasis added). Appellant did not object at that time or at the status hearing on February 9, 2017 when the trial court repeated the limitation of the parties simultaneously filing written closing arguments, and the State announcing that "there will be no argument. All arguments are going to be in writing." See PCR4. 1155. Further, as the 3.203 evidentiary hearing stems from Appellant's 2015 3.851 motion, Appellant should not be allowed to assert that Rule 3.851 is completely inapplicable after failing to object to closing memorandums adhering to 3.851 Rules.

982-83. On appeal, this Court remanded to the postconviction court, finding that it should have considered the motion. *Id.* at 983. The trial court subsequently denied the motion without a hearing and sent out a proposed order. *Id.* This Court found that Huff's due process rights were violated because the appellant's attorneys "received a copy of the proposed order denying the motion on Friday before the court signed it on Monday" which "did not afford Huff a sufficient opportunity to review the order, much less to object to its contents." *Id.*

In this case, while the postconviction court made no ruling as to whether there would be further oral argument on the constitutionality of the burden of proof, there was no abuse of discretion by ruling on the written memorandums and supplemental motions without an oral hearing.⁸ Appellant could not have been unaware that Florida Statute § 921.137(4) indicates that in conducting a Rule 3.203 inquiry, a postconviction court may not impose death if it finds clear and convincing evidence that a defendant is intellectually disabled. Nothing prevented Appellant from making that argument during the evidentiary hearing or in his initial closing memorandum. Notwithstanding, Appellant was able to state its grounds for its objection to the standard in a Motion

⁸ See also *Evans v. State*, 764 So. 2d 822 (Fla. 4th DCA 2000) (holding no due process violation occurs when trial court fails to allow defendant to reply to 3.850 response).

for Leave to Reply to the State's Closing Memorandum and its subsequent response to the State's response. See PCR4. 887-96, 901-04.

Unlike the time constraint in *Huff*, the postconviction court here ruled **months later** on June 6, 2018, orally pronouncing that Appellant did not meet the criteria for intellectual disability and indicated the court would enter a detailed written order. PCR4. 995-99. On that date, Appellant had the opportunity to raise again his objection or ask the trial court for a ruling on its Motion for Leave to Reply to the State's Response but failed to do so. The postconviction court entered its written order months later on October 4, 2018. Appellant then filed a 17-page Motion for Rehearing, again raising the objection that "the Court adopted a burden of proof, advanced by the State, that is nowhere to be found in Rule 3.203 and which appears inconsistent with governing law." PCR4. 946-63. The governing statute explicitly requires the postconviction court to employ a clear and convincing evidence standard.⁹ Accordingly, the postconviction court explicitly denied

⁹ Appellant in his initial brief completely misconstrues the State's argument from its written closing memorandum that in the alternative, "even if the burden were preponderance of the evidence," Appellant failed to meet that burden." IB. at 32 n. 9. The State never suggested that preponderance of the evidence is the proper standard or that § 921.137(4) of Florida Statutes does not apply to Rule 3.203. It proposed that Appellant's evidence in this case to establish intellectual disability was so weak that had the trial court even employed a lower standard, Appellant would not be able to meet the criteria. PCR4. 682-84. It is implicit

Appellant's motion for rehearing on December 17, 2018. PCR4. 964. Thus, in contrast to time constraints and facts in *Huff*, Appellant had ample opportunity to make argument and no due process violation has occurred.

B. The impact of *Moore v. Texas* on the holistic approach required by *Hall v. Florida* does not remove the postconviction court's ability to make factual findings and credibility determinations on each prong.

The postconviction court analyzed the evidence properly and consistently in light of *Moore* because the postconviction court's analysis of intellectual disability was consistent with prevailing current clinical standards and based on a proper credibility determination of the conflicting experts' opinions. The Supreme Court's decision in *Moore* however does not call into question the postconviction court's findings that Appellant failed to establish that he suffers from **significant** subaverage intellectual functioning or concurrent deficits in his adaptive functioning prior to age 18.

In *Moore*, the Texas Court of Criminal Appeals (CCA) reversed a lower court's decision finding Moore intellectually disabled because the lower court "erroneously employed intellectual-disability guidelines currently used in the medical community

throughout the court's order that much of Appellant's evidence was insufficient, or what the postconviction court described as "little, if any, competent evidence" (PCR4. 937), making it clear he would not prevail under a lower burden.

rather than the 1992 guidelines adopted by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (2004).” *Moore*, 137 U.S. at 1044. Employing the *Briseno* analysis, the CCA found five of Moore’s IQ scores unreliable and only considered valid his scores of 74 and 78. *Id.* at 1047. Notably, when looking at these two scores, the CCA discounted the lower end of the SEM range associated with these scores due to Moore’s academic behavior and performance when taking the tests and concluded that his scores ranked above the intellectually disabled range. *Id.* at 1049-50.

The Supreme Court reversed and concluded that the CCA’s analysis of Moore’s intellectual functioning was irreconcilable with *Hall* because the CCA had not accounted for the SEM and had deviated from prevailing clinical standards by relying on the outdated 1992 guidelines. *Id.* at 1049-50.

Despite Appellant’s suggestion as to what *Moore* and *Hall* require, this Court has made clear that in reviewing each prong under a holistic approach, “[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.” *Wright v. State*, 213 So. 3d 881, 895, 898 (Fla. 2017) (holding that Wright failed to prove that he is of subaverage intellectual functioning and “[f]or this reason alone, Wright does not qualify as intellectually disabled under Florida law.”); *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016). This Court has clarified that although “no single factor can be

considered dispositive,” “even after *Hall*, a failure to prove any one prong of the intellectual disability test is a failure to prove the claim.” *Foster v. State*, 260 So. 3d 174, 179 n.7 (Fla. 2018) (citing *Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018)); *Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017) (citing *Salazar*, 188 So.3d at 812)). As shown below, Appellant failed to prove any of the prongs by clear and convincing evidence.

- i. There was competent substantial evidence for the postconviction court to determine that Appellant did not prove by clear and convincing evidence that he had subaverage intellectual functioning.

[W]hile an assessment of intellectual disability involves “conjunctive and interrelated” factors, *Hall*, 134 S. Ct. at 2001, if a defendant cannot produce an IQ score that shows significantly subaverage intellectual functioning even when the standard error of measurement is taken into account, the claim will fail for lack of proof of the first prong.

See *Foster*, 260 So.3d at 179 n.7 (citing *Quince*, 241 So.3d at 62). Where an IQ score “is close to, but above, 70, courts must account for the test’s standard error of measurement.” See *Moore*, 137 S. Ct. at 1049 (citing *Hall*, 572 U.S. at 712, 723-24 (finding “[a] test’s standard error of measurement [SEM] “reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score.” (citations omitted)); see also *Glover*, 226 So. 3d at 809 (“when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence

of intellectual disability, including testimony regarding adaptive deficits.”).

The postconviction court found that taking into account the SEM, Appellant’s IQ test scores on the WAIS and Stanford-Binet test range from 71-80. PCR4. 927. However, Appellant argues that the postconviction court erred by rejecting the use of the Flynn Effect to detract from the raw score. IB at 43. The postconviction court found that the Flynn Effect “is not wholly accepted among all psychologists and the Flynn Effect adjustments are mostly sought after in the criminal forensic arena.” PCR4. 927. Additionally, Appellant’s own defense expert Dr. Taub¹⁰ conceded that “the Flynn Effect would not be applied in all cases where IQ is being tested.” PCR4. 925. Specifically, Dr. Taub opined in his testimony that should the Flynn Effect apply to the score of 76 on the Stanford-Binet test, it would have:

“an overestimate of IQ of 5/4 points. So we round that down to five points, so we have an inflated IQ score of five points on the Stanford-Binet Four, and we simply deduct the five points from the observed IQ score. And best practice is to report the observed score which is 76, and also to report the corrected Flynn Effect score, which would be 71.”

PCR4. 421. As to the score of 75 on the WAIS test given in 2009, Dr. Taub conceded that as that test had been “normed” in 2007 and

¹⁰ Dr. Taub conceded he is not board certified in Forensic Psychology and has only done forensic work for defense attorneys who he gives seminars to. PCR4. 440-41.

published in 2008, there would only be a .3 to .6 discrepancy, which would lower the score down to a 74. PCR4. 478-79. The postconviction court specifically questioned Dr. Taub after cross examination and redirect examination to get a clear answer that even accounting for the Flynn Effect, Dr. Taub agreed with the consensus that the scores would be "all over 70." PCR4. 503. Appellant's counsel confirmed with Dr. Taub once more that the range would consist of scores of 71-78¹¹ if the Flynn Effect were to apply. PCR4. 514.

The other defense expert, Dr. Toomer, indicated that he did not consider the Flynn Effect when he conducted the WAIS-R on Appellant who scored an 83; conveniently, he would adjust it now to a 78. PCR4. 926 n.7. The trial court also noted in its order that in conjunction with the IQ tests, Dr. Toomer conceded he conducted "the Carlson Psychological Test, where the [Appellant] scored highly on the malingering index, indicating his intent to not give his best effort and 'faking' his responses." PCR4. 926. The postconviction court found that the State's expert, Dr. Suarez, also administered several validity tests and agreed with Dr. Toomer

¹¹ Dr. Suarez also concluded that the SEM or confidence interval for the WAIS score of 75 would be 71-80 (which would be consistent with Dr. Taub's range for the Flynn Effect but it would be improper to adjust the score for both). PCR4. 1258-66. In determining the WAIS score of 83, Dr. Suarez found the range could be as high as 88 taking the SEM into account. PCR4. 1260. Dr. Suarez opined that score of 80 would be a "low average", whereas "79 to 70 is the borderline" range of intellectual disability. PCR4. 1342.

that "the results indicated that the Defendant was malingering, with the intent to perform poorly." PCR4. 927. Dr. Suarez discredited the Flynn Effect testifying that while the Flynn Effect is a phenomenon that was observed and measured, the problem lies in that "it was measured in many different countries, and they took the group numbers, the data, and collapsed it all and came up with a .33" to decrease scores every year; thus, the decision to change scores is subjective to the expert given the "enormity of data" and how some subjects would respond differently by going up or down in IQ score. PCR4. 1254. As such, Dr. Suarez opined that this published data was controversial, specifically where it is only used to adjust scores in the criminal forensic area. PCR4. 1253-54.

As such, the postconviction court was able to review the record and find that there was competent substantial evidence to suggest that prong one had not been met, given not every score would be lowered four to five points just for the Flynn Effect. Contrary to Appellant's claim, both Dr. Taub and Dr. Suarez agreed that there is a disagreement in the medical community as to when the Flynn Effect should be applied and specifically as to which type of criminal cases. PCR. at 486-88; 1253-54. To this point, the postconviction court noted that it was "persuaded" (not constrained as Appellant suggests (IB. at 43)) by the expressed reasoning of this Court in *Quince v. State*:

As many courts have already recognized, *Hall* does not mention the Flynn effect and does not require its application to all IQ scores in Atkins cases. E.g., *Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017) (noting that *Hall* does not even mention the Flynn effect and does not require that IQ scores be adjusted for it), petition for cert. filed, No. 17-8275 (U.S. Mar. 26, 2018); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."), cert. denied, --- U.S. ---, 137 S. Ct. 1333, 197 L.Ed.2d 526 (2017); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 639 (11th Cir. 2016) ("*Hall* did not mention the Flynn effect. ... There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of *Hall* wholly inapposite."), cert. denied, --- U.S. ---, 137 S. Ct. 1432, 197 L.Ed.2d 650 (2017). Although the AAIDD's DPID publication may now advocate the adjustment of all IQ scores in Atkins cases that were derived from tests with outdated norms to account for the Flynn effect, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, --- U.S. ---, 137 S. Ct. 1039, 1049, 197 L.Ed.2d 416 (2017).

Quince, 241 So. 3d at 61-62; see also *Raulerson*, 928 F.3d at 1008 (finding no adjustment for the Flynn Effect is required because "as we have acknowledged, there is no consensus about the Flynn effect among experts or among the courts." (citations omitted)); *Hampton v. State*, 219 So. 3d 760, 778-79 (Fla. 2017), *reh'g denied*, No. SC15-1360, 2017 WL 2590804 (Fla. June 15, 2017) (affirming circuit court's determination to reject the Flynn Effect where "testimony was presented during the evidentiary hearing that adjusting for the Flynn effect is controversial and not routinely applied in a clinical setting").

Importantly, “*Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards. Instead, the language justifies the expansion of Florida’s definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.” See *Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017), cert. denied, 138 S. Ct. 927 (2018) (citing *Hall*, 572 U.S. at 709-13) for the proposition that “*Hall* looks to the medical community “[t]o determine if Florida’s cutoff rule is valid,” but does not change credibility determinations in intellectual disability proceedings.”). Therefore, there was competent substantial evidence to support the postconviction court’s decision to reject the Flynn Effect in this case.

- ii. Appellant failed to establish that he had concurrent significant deficits in his adaptive functioning.

As previously noted, under Florida law, a defendant claiming intellectual disability as a bar to execution must establish by clear and convincing evidence that he has “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.” See § 921.137(1), Fla. Stat. (2018). Section 921.137 defines the term “adaptive behavior,” as the “effectiveness or degree with which an individual meets the standards of personal independence and social responsibility

expected of his or her age, cultural group, and community." *Id.* The postconviction court, citing the DSM-5, noted adaptive functioning "involves three domains: conceptual, social, and practical."¹² PCR4. 928.

As this Court has held:

The deficits "must be **directly related** to the intellectual impairments" associated with the first prong; namely, "reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding." *Id.* at 37-38. The diagnostic requirements of the second prong are met when at least one of these domains "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38.

Hampton, 219 So. 3d at 779 (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013)) (emphasis added).

In this case, the postconviction court allowed Appellant to

¹² The trial court went on to quote the DSM-5: "The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, and acquisition of practical knowledge, problem solving, and judgement in novel situations among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy, interpersonal communication skills, friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among other. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning...." PCR4. 928-29.

present further evidence of adaptive functioning regardless of the IQ scores which is compliant with the requirements of *Hall*. In analyzing the second prong, the postconviction court considered both Dr. Toomer's and Dr. Suarez's testimony. PCR4. 929. The postconviction court additionally analyzed the record on appeal and the specific portions of the record that Appellant entered into evidence and pointed to in its closing memorandum. PCR4. 929-38.

Appellant primarily attacks the postconviction court's credibility determinations and posits the court as one which ignored the record and misrepresented key evidence by Appellant's defense expert. IB. at 47-48; 50-51. However, a postconviction court has the benefit of observing the witnesses' testimony and making credibility determinations. *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008) ("Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions. See *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007) ("This Court does not ... second guess the circuit court's findings as to the credibility of witnesses." (citing *Trotter v. State*, 932 So.2d 1045, 1050 (Fla. 2006)); *Bottoson v. State*, 813 So. 2d 31, 33 n. 3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's

superior vantage point in assessing the credibility of witnesses and in making findings of fact."").

In this case, after listening to the evidence from both experts, the trial court found:

No evidence was presented regarding the [Appellant's] preschool experience, except that his mother was absent and he did not know his father. According to Dr. Toomer, individuals lacking in the conceptual domain appear to have difficulties in learning academic skills involving reading, writing, arithmetic, time, and money, with support needed in one or more areas to meet age-related expectations. (H. Vol. 2, p. 158-59) With respect to the conceptual/academic domain, Dr. Toomer claimed that [Appellant's] family history and school-life established conceptual impairments. Dr. Toomer explained that disruption in the home or other domestic difficulties preclude an individual -- specifically this Defendant -- from progressing in the areas of learning and obtaining the skills necessary to adjust and function in school. Dr. Toomer testified that [Appellant] never met his biological father, his mother was absent in Cuba, his younger brother died and, at the age of thirteen, he was forced to move into his grandmother's home after his adoptive father began using drugs. (H. Vol. 2, p. 177)

PCR4. 929-30. When the postconviction court refers to "no evidence", it can be inferred there was no competent, substantial evidence, and the factual findings it is setting forth in the order is what the postconviction court determined to be competent, substantial evidence.¹³

¹³ See ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts* in INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (1997) ("expressio unius est exclusio alterius. Expression of the one is exclusion of the other. What it means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The

Likewise, Appellant faults the postconviction court for failing to mention the testimony of lay persons, such as penalty phase testimony of Appellant's uncle Mr. Suarez-Franqui. IB. at 48. However, this was something that the United States Supreme Court in *Moore* cautioned against. *Moore*, 137 S. Ct. at 1051-52 ("[t]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled . . . Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.").

Appellant further mischaracterizes *Moore* when it criticizes the postconviction court for adopting the exact language this Court and the DSM-5 uses in recognizing that "deficits in adaptive functioning must be directly related to an intellectual impairment." IB. at 49. See *Hampton*, 219 So.3d at 779. To put into context, Appellant is referring to the postconviction court's reference it made concerning Dr. Toomer's testimony about the conceptual domain and when he claimed that Appellant's family history and school-life precluded him from "progressing in the areas of learning and obtaining the skills necessary to adjust and function in school." PCR4. 929. The postconviction court went on to find, "[Appellant's] home life obviously adversely impacted his adjustment to and functioning in school. However, for purposes of

inclusion of the one class is an implicit exclusion of the other.").

determining intellectual disability, the inquiry does not stop there....” PCR4. 930.

The language “directly related to an intellectual impairment” is pulled from the DSM-5 which this Court adhered to after the Supreme Court published its opinion in *Moore*. See *Hampton*, 219 So. 3d at 779 (reiterating the deficits “must be directly related to the intellectual impairments associated with the first prong; namely, reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding.”). (quotations omitted)). As such, Appellant’s contention that *Moore* is in direct contradiction of the language in the DSM-5 itself is disingenuous. Appellant takes the postconviction court’s findings out of context by claiming it tried to establish a “nexus” (IB. at 49); rather, the postconviction court had competent, substantial evidence to determine that the school records were contrary to Dr. Toomer’s testimony and indicated Appellant’s academic difficulties were the result of excessive absences from school. PCR4. 930-31.

Additionally, Appellant suggests that the postconviction court misrepresented the school records which were never entered into evidence. IB. at 50-51. It is clear from the order that the postconviction court did in fact review the records and ultimately found that there was a more probable and likely explanation as to his poor grades. Specifically, the postconviction court’s order

found:

Dr. Suarez testified that the [Appellant] indicated that he was in special classes when he was in school in Cuba but after arriving to the United States, was placed in the sixth grade and later promoted to the seventh grade. The [Appellant] repeated the seventh grade two or three times and stated that he eventually was expelled from school because of poor grades and excessive absences. According to Dr. Suarez, the [Appellant] admitted that he missed a considerable amount of time at school and left school because he "wanted to be with [the] other guys." (H. Vol. 3, p. 26) The {Appellant's} own explanation for his failing grades and eventual expulsion from school as a result of his absences, belie a claim of an adaptive deficit. While [Appellant] contends his poor school grades are indicative of this disability, school records presented include a report by a teacher indicating that his failing grades were due to absences and lack of participation when he was in school. His absences from school, not intellectual disability, were the cause of his academic difficulties."

PCR4. 930-31.

Appellant is fundamentally asking for this Court to "second guess" the postconviction court's determinations regarding the credibility of the witnesses, which is "contrary to this Court's case law." See *Diaz v. State*, 132 So. 3d 93, 122 (Fla. 2013) (holding that "this Court is required to respect the postconviction court's determination as to the credibility of the experts' testimonies regarding the deficits in adaptive functioning prong) (citing *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011); *Brown*, 959 So. 2d at 149). As such, there was competent substantial evidence for the postconviction court to find that Appellant did not prove any deficits in the conceptual domain by clear and

convincing evidence.

As to the two remaining domains, the postconviction court's factual findings are not contradictory or in violation of the Supreme Court's pronouncements in *Moore* and comply with prevailing clinical standards. In *Moore*, the Supreme Court found that the Texas court's consideration of Moore's adaptive behavior deviated from prevailing clinical standards. *Moore*, 137 S. Ct. at 1050. Specifically, the Court faulted the Texas court for overemphasizing Moore's adaptive strengths and concluding that his strengths overcame "the considerable objective evidence of Moore's adaptive deficits." *Id.* The Court cautioned in *Moore* that a trial court should not overemphasize an individual's adaptive strengths and should not rely on strengths developed in a controlled setting like prison.¹⁴ *Id.*

Appellant conflates the postconviction court's order to suggest it "scour[ed] [the record] to find a "strength" to offset or cancel out the deficits." *IB.* at 54. However, unlike in *Moore*, the postconviction court here did not find considerable objective evidence of Appellant's adaptive deficits. In fact, the postconviction court's order demonstrates it evaluated the

¹⁴ See *Moore*, 137 S. Ct. at 1050 (citing the DSM-5 and noting that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained").

evidence or lack thereof to determine whether the claimed adaptive deficits actually existed.

For instance, when analyzing the practical domain, Dr. Toomer suggested that Appellant had the inability to hold a job. PCR4. 935. Appellant had briefly worked at a tire store for his uncle, for the sanitation department, for a golf course tending to the greens, and finally as a security guard for a marina, prior to his arrest. PCR4. 936. The postconviction court accepted Dr. Suarez's testimony over Dr. Toomer's testimony finding, "as [Appellant] moved from job to job, so did the level of conceptual skills necessary to complete the job. Each subsequent job required more adaptive functioning than the previous one. There was no testimony [Appellant] was ever fired from a job nor was he unemployed for any prolonged periods of time." PCR4. 935-936. While Appellant claims the postconviction court incorrectly stated Dr. Suarez's testimony that Appellant was fired from his security job, Appellant neglects to mention that postconviction court heard the cause was for absences that coincided with when Appellant began committing the crimes and stealing/hotwiring cars. PCR4. 1228. Thus, the factual evidence demonstrated to the postconviction court that Appellant's employment history did "not support a deficit in the practical domain." PCR4. 936.

Next, Dr. Toomer claimed that Appellant had an inability to manage money. While the postconviction court may have noted that

Appellant had a driver's license (which Dr. Suarez opined is uncommon for people with intellectual disability), the postconviction court ultimately connected the ability to own and maintain nine cars like Appellant did to demonstrate that he was in fact able to manage his money. PCR4. 936-937. Specifically, the fact that he was able to "adapt his modes of transportation" for his family ("trading in his sports car for a four-door family friendly car to adapt to his family's needs"), as well as grocery shop and maintain a bank account also supported that the deficit of being unable to manage money did not exist. PCR4. 936-38. Hence, the expert's testimony about his ability to drive, maintain and own cars was relevant and connected to the inquiry of whether Appellant was able to manage money. Additionally, "[t]hese actions reveal that the [Appellant] had (and currently has) a practical understanding of how to personally care for himself and his family." PCR.937.

While the postconviction court noted that "the only [competent] evidence presented was that instead of paying the [Appellant] a salary, [Appellant's] uncle would pay the [Appellant's] bills when [Appellant] worked for him", "there was no testimony or other evidence that the [Appellant] was unable to pay his rent and other bills from his subsequent employment." PCR4. 932, 936. None of the experts disputed the short length of time that Appellant worked for his uncle. Thus, this again is not the

postconviction court failing to acknowledge a deficit; rather, the court found that the scarcity and lack of weight of the evidence surrounding the time Appellant's uncle paid his bills was not sufficient compared to the other significant evidence that demonstrated he was able to handle and manage money. See *Williams*, 226 So. 3d at 769 ("In evaluating adaptive deficits. . . after [the trial court] considers "the findings of experts and all other evidence," Fla. R. Crim. P. 3.203(e), it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations.") (citing *Dufour v. State*, 69 So. 3d 235, 250 (Fla. 2011)).

Finally, this case is distinguishable from *Moore* in that the postconviction court did not "overemphasize" Appellant's strengths while in prison, as Appellant suggests. See *Wright*, 256 So. 3d at 776-777 (holding no *Moore* violation occurred where the postconviction court's credibility determinations relied on expert testimony with regard to connected adaptive deficits and "did not arbitrarily offset deficits with unconnected strengths.")

As this Court recently analyzed in *Wright*:

In *Moore*, one of the reasons that the Supreme Court reversed was because the CCA "overemphasized" the defendant's adaptive strengths. *Id.* The CCA concluded that the defendant's adaptive strengths "constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits" even though the "medical community focuses the adaptive-functioning

inquiry on adaptive deficits." *Id.* The Supreme Court further explained that "the CCA stressed Moore's improved behavior in prison" despite experts' "caution[ing] against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* (quoting DSM-5, at 38). It is uncertain exactly where Moore drew the tenuous line of "overemphasis" on adaptive strengths. In fact, that uncertainty spawned the dissent's criticism. *Id.* at 1058-59 (Roberts, C.J., dissenting) ("The Court faults the CCA for 'overemphasiz[ing]' strengths and 'stress[ing]' Moore's conduct in prison, ante, at 1050, suggesting that some—but not too much—consideration of strengths and prison functioning is acceptable. The Court's only guidance on when 'some' becomes 'too much'? Citations to clinical guides." (alterations in original)).

Id. at 776.

While this Court referenced Appellant's conduct and statements during confession, as well as his actions in the complex crime spree committed by Appellant, this was only one basis of this Court's entire analysis on the issue and was a valid consideration when analyzing Appellant's alleged deficits in adaptive behavior. The postconviction court did not arbitrarily offset deficits with unconnected strengths because those considerations were also consistent with clinical standards for evaluating adaptive behavior which the postconviction court noted would be reflective of "conceptual difficulties" including "impairments in abstract thinking, executive functions, such as planning and priority setting, short term memory and functional use of academic skills." PCR4. 931. As such, the ability to plan and execute the crimes was evidence for the postconviction court

that demonstrated Appellant did not suffer from these conceptual difficulties as an adult. The postconviction court's analysis of the crime was not focused on the maladaptive behavior itself, but rather on the connected adaptive deficits which the postconviction court found did not exist due to Appellant's ability to communicate, collaborate, and coordinate. PCR4. 937.

Additionally, the skills in prison were not overemphasized when considering the competent, substantial expert testimony regarding Appellant's behavior before being incarcerated. To this point, most of the postconviction court's analysis of the skills that Appellant exhibited while in prison were indicative that Appellant did not suffer from adaptive deficits in the social domain. PCR4. 933-34. Additionally, the postconviction court also accepted Dr. Suarez's findings in the social domain prior to being incarcerated, stating:

There was no testimony that the [Appellant] was immature, has difficulty perceiving social cues, has more concrete language than others of his age, or has problems regulating his emotions or behavior. In fact, much of what was presented regarding [Appellant's] life before prison would suggest the opposite.

Dr. Suarez points to the fact that at the age of seventeen, [Appellant] met Vivian Gonzalez and, shortly after, they moved into his uncle's home together. Approximately a year later, the couple moved into a home of their own and [Appellant] worked to provide financial support for his family. Notably, with respect to this domain, the [Appellant's] father-in-law described [Appellant] as a "devoted husband." The [Appellant]

formed friendships, had a wife, accomplices, children, all of which reveal no social deficits.

PCR4. 933, 935. Thus, the postconviction court had competent, substantial evidence to find Appellant did not suffer from adaptive deficits and did not overemphasize skills developed in prison, which only furthered the already established lack of existing deficits.

iii. Appellant presented no evidence as to the manifestation of deficit prior to age 18.

Appellant was required to not only prove prongs I and II by clear and convincing evidence, but also "the age of manifestation." See *Salazar*, 188 So. 3d at 813 ("The United States Supreme Court explained that this prong requires that a defendant demonstrate that his "intellectual deficiencies manifested while he was in the 'developmental stage'—that is, before he reached adulthood." *Brumfield v. Cain*, --- U.S. ----, 135 S.Ct. 2269, 2282, 192 L.Ed.2d 356 (2015).").

Appellant completely mischaracterizes the State's closing memorandum, which did analyze the third prong for the postconviction court's consideration, but noted the discussion was "not addressed in length" primarily because little to no evidence was presented on any of the prongs. PCR4. 707. The State maintained throughout the brief that all evidence should be presented under the holistic requirements of *Hall*, which is what the postconviction court employed as its methodology throughout its order. PCR4. 922-

23, 940-42.

Appellant claims that there is "abundant" evidence that definitively showed he satisfied the third prong of the intellectual disability criteria by clear and convincing evidence. IB. at 57. However, the evidence was anything but clear and convincing, as the postconviction court heard competent and substantial evidence to support its finding that there was "dearth of evidence" to support Appellant had concurrent adaptive deficits, and that any "adaptive deficits as a minor appear to be a result of behavioral or psychological issues rather than an intellectual disability." PCR4. 940-41.

A postconviction court's finding that the evidence supports a defendant's adaptive deficits prior to the age of eighteen are "a result of behavioral or psychological issues (rather than intellectual disability)" . . . "does not run afoul of *Hall*." See *Glover*, 226 So. 3d at 810 (holding "[t]estimony and records provide substantial and competent evidence Glover was able to communicate, care for himself, and live normally in his home with others," and "his performance at school belies any contention of intellectual disability.").

To this point, the postconviction court reiterated the summary of its factual findings as to the "little, if any, competent evidence" of Appellant's adaptive deficits, even taking into consideration "the terrible losses [Appellant] sustained as

a child (the abandonment by his mother, the failure to know his father, the loss of his little Brother, the abandonment by his step-father, and his failing out of school." PCR4. 937, 940-41. The postconviction court highlighted that none of the experts could say, "with any degree of certainty, the reason why [Appellant] dropped out of school in the [seventh] grade after receiving acceptable grades during the [sixth] grade." PCR4. 940-41. Consequently, Appellant did not meet his burden.

Certainly, the postconviction court was informed of Appellant's own self-reporting to Dr. Suarez that he wanted to be with his friends and therefore did not attend school. PCR4. 931. In fact, Appellant's own defense expert Dr. Toomer reluctantly admitted that Appellant's poor grades could possibly be explained because he failed to attend classes and wanted to hang out with friends instead of going to school. PCR4. 573-74. The postconviction court's order emphasized that point earlier in its order regarding Dr. Toomer testimony:

Dr. Toomer acknowledged that he had no way of knowing whether the absences were a result of [Appellant's] decompensation or because he simply decided to skip school. (H. Vol. 2, p. 182) Without more, the Defendant's failing grades and eventual disenrollment from school altogether, at the age of 15, could just as easily been attributable to his excessive absences as to an adaptive deficit.

PCR4. 930. Thus, there was competent substantial evidence to support the finding that a lack of attendance explained Appellant's

poor performance and failure of the seventh grade.

Appellant further claims that the postconviction court ignored certain evidence including school records and the fact that he was held back in the seventh grade. He faults the trial court for "not mentioning" the same factual findings in prong III that the postconviction court wrote in its order analyzing prong II. IB. at 57. The postconviction court however is not required to reiterate and repeat its factual findings in certain sections of its order for this Court to find that there was competent, substantial evidence to support the postconviction court's ultimate determinations. Moreover, the standard is competent substantial evidence to support the court's factual findings; not what evidence the postconviction court rejected.

Rather, as argued *supra*, the postconviction court found the school records dispelled Appellant's assertion that they proved he suffered from intellectual disability. Notably, Appellant never requested to admit the school records into evidence for substantive purposes but rather questioned the defense expert about his opinion. Even though the school records were not entered for substantive purposes and Dr. Toomer was merely referencing them to fashion his own opinion, PCR4. 537-39, the order nevertheless refutes any claim that the postconviction court outright ignored these records. PCR4. 930-31. Dr. Toomer could not give a definitive reason for why he was placed in remedial Spanish classes or in

special classes in Cuba and his opinion regarding the basis of Appellant's limited reading and writing abilities were dispelled and rebutted by other logical reasons for why Appellant did so poorly in school. Importantly, there was no testimony that Appellant was intellectually disabled when he was in the U.S. school where he attended regular classes and received C average grades during sixth grade.¹⁵

Accordingly, there is competent substantial evidence to 1) demonstrate that the postconviction court considered these school records; and 2) support its factual determination Appellant's poor performance in school was attributed to an explanation other than intellectual disability. See *Snelgrove v. State*, 217 So. 3d 992, 1000 (Fla. 2017) (finding there was competent substantial evidence to affirm the trial court's determination where "[i]n the absence of records, Snelgrove and the prosecution offered conflicting expert testimony regarding why a child may receive such a designation" and [the appellant's] "expert limited his discussion to the manifestation of deficient adaptive behavior and admitted that he could not provide a definitive answer as to intellectual functioning prior to age 18.").

¹⁵ Dr. Toomer conceded that in the fifth grade, the records show "as far as he can tell" that Appellant was not in special classes and mostly received Cs and that in the sixth grade, Appellant was also not in special classes and received all C's except for one A in art class. PCR4. 572.

Likewise, Appellant insists the postconviction court did not consider Dr. Toomer's recounting of Appellant's uncle's statement that Appellant was "a slow child, somewhat retarded to understand things." IB. at 57-58. However, there is nothing in the postconviction court's order to support Appellant's assertion that the postconviction court did not consider Appellant's uncle's penalty phase testimony or Dr. Toomer's recounting of Appellant's uncle's statements; rather, the postconviction court implicitly rejected this evidence and found other facts that did not support a finding of such adaptative deficits. PCR4. 931-32.

Notably, the postconviction court's order mentions certain details of Dr. Toomer's recounting of statements made by Appellant's uncle during its analysis of prong II. *Cf. Oats v. State*, 181 So. 3d 457, 468 (Fla. 2015) (finding that the trial court did not consider where there was an explicit statement by the postconviction court that "it "accept[ed]" the 1990 postconviction court's ruling and was "not in a position to reevaluate the credibility of the witnesses who testified or the evidence" the postconviction court considered in those prior proceedings."). These "mentions" are evidence that the postconviction court indeed considered certain aspects of Appellant's uncle's testimony at the penalty phase concerning Appellant's job responsibilities for the city, which was entered into evidence by Appellant during the evidentiary hearing. PCR4.

623-35.

Appellant's reliance on *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), is misplaced and only highlights the distinction between the significant evidence in that case and the "dearth" of evidence presented in this case. PCR. 941. First, unlike Florida, Louisiana requires that a defendant prove by a reasonable doubt that he is entitled to an evidentiary hearing to determine intellectual disability.¹⁶ *Brumfield*, 135 S. Ct. at 2281. Additionally, in *Brumfield*, numerous experts and lay persons testified to specific facts and evidence demonstrating that Brumfield was:

[A]t risk of neurological trauma at birth, was diagnosed with a learning disability and place in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot process information....

Id. at 2281. Specifically:

"Brumfield's mother testified that Brumfield had been born prematurely at a very low birth weight. App. 28a. She also recounted that he had been taken out of school in the fifth grade and hospitalized due to his behavior, and recalled an incident in which he suffered a seizure. *Id.*, at 34a-38a, 41a, 47a.

¹⁶ Additionally, the Court pointed out that "in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a "reasonable doubt" as to his intellectual disability to be entitled to an evidentiary hearing." *Brumfield*, 135 S. Ct. at 2281. "in light of the evidence of Brumfield's deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt." *Id.*

Social worker Dr. Guin elaborated on this testimony, explaining that Brumfield's low birth weight indicated "that something ha[d] gone wrong during the pregnancy," that medical records suggested Brumfield had "slower responses than normal babies," and that "they knew that something was wrong at that point." *Id.*, at 75a-76a. Dr. Guin also confirmed that, beginning in fifth grade, Brumfield had been placed in special classes in school and in multiple mental health facilities, and had been prescribed antipsychotics and sedatives. *Id.*, at 89a, 93a-94a.⁷ Moreover, one report Dr. Guin reviewed from a facility that treated Brumfield as a child "questioned his intellectual functions," and opined that "he probably had a learning disability related to some type of slowness in motor development, some type of physiological [problem]." *Id.*, at 89a. Dr. Guin herself reached a similar conclusion, stating that Brumfield "obviously did have a physiologically linked learning disability that he was born with," and that his "basic problem was that he ... could not process information." *Id.*, at 90a, 98a.

Dr. Bolter also testified that Brumfield's low birth weight had "place[d] him [at] a risk of some form of potential neurological trauma," and affirmed that the medications administered to Brumfield as a child were generally reserved for "severe cases." *Id.*, at 130a, 132a.

Id. at 2279-80.

Converse to the factual evidence in *Brumfield*, the postconviction court in this case indicated that the evidence put forth by Appellant regarding the third prong (namely the school records, Dr. Toomer's testimony and concessions as argued above, and Appellant's uncle's lay observations of Appellant's alleged "slowness") was not clear and convincing that Appellant's poor grades in the seventh grade were the result of intellectual

disability. PCR4. 930-31, 940-41. Rather, the stated reason on the records for his failure indicated "excessive absences." PCR4. 931. In fact, none of the experts could unequivocally say those absences were the result of intellectual disability instead of behavioral issues. PCR4. 940-41. Importantly, nowhere in the record did the postconviction court state that it "weighed evidence". Rather, the postconviction court considered all the evidence put forth under the third prong and came to a determination that unlike *Brumfield*, whose evidence of intellectual disability raised "substantial reason" that his adaptive deficits were due to a neurological trauma at birth, *Brumfield*, 135 S. Ct. at 2281, Appellant did not prove by clear and convincing evidence that he suffered from adaptive deficits that manifested prior to the age of 18.

Appellant additionally argues that the postconviction court like the trial court in *Brumfield* "unduly stressed that [Appellant's] crimes belie adaptive deficits". IB. at 55. However, unlike in *Brumfield*, the postconviction court considered the facts and medical opinion of Dr. Suarez regarding Appellant's ability to carry out the crime by aligning them with the abilities set forth by the DSM-5 in determining whether Appellant's adaptive deficits were actually proven. This led the postconviction court to conclude that the ability to carry out the crime "further supports the conclusion that he possesses the ability to adapt to his surroundings" which demonstrates that he did not have the

intellectual disability deficits described in § 921.137 (1), Fla. Stat. (2017), “namely, reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding.” PCR4. 941 (quoting DSM-5, 37-38 (5th ed. 2013)).

Accordingly, the actions Appellant took during the crime itself was not the only evidence that was taken into consideration or unduly stressed; rather, taken as a whole, it supported Dr. Suarez’s testimony that Appellant’s adaptive deficits as an adult had not been sufficiently proven. Just because Appellant had an adverse outcome in his intellectual disability hearing does not mean that there was no competent substantial evidence to support the postconviction court’s conclusion that he failed to establish that he has significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior that were onset before age 18. *See Wright*, 256 So. 3d at 778 (“At the ID hearing, the parties presented all the evidence that they could muster, which resulted in an outcome adverse to Wright. Because that decision was supported by competent, substantial evidence. . . we can again conclude that Wright failed to prove adaptive deficits by clear and convincing evidence...”). Thus, this Court should deny Appellant’s renewed motion for determination of intellectual disability.

II. APPELLANT'S ARGUMENT THAT *HURST V. FLORIDA* INVALIDATES APPELLANT'S DEATH SENTENCES WAS NOT CONSIDERED IN THIS LIMITED EVIDENTIARY HEARING AND THEREFORE HAS BEEN RAISED IMPROPERLY. EVEN IF IT HAD BEEN PROPERLY RAISED, *HURST V. FLORIDA* DOES NOT ENTITLE APPELLANT TO A JURY DETERMINATION OF HIS ID CLAIM.

This Court did not grant Appellant leave to file supplemental briefing regarding *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The mandate issued by this Court made clear that the postconviction court was to conduct an evidentiary hearing to determine whether Appellant could demonstrate the existence of intellectual disability. PCR4. 152-66. Appellant's *Hurst* claims are outside the scope of this Court's 2017 mandate to conduct a single intellectual disability evidentiary hearing.¹⁷

As this Court has stated, it does not entertain issues in the first instance. See *Jacques v. Wellington Corp.*, 183 So. 718, 719 (Fla. 1938) (when reviewing the orders of a lower court, this court "should confine itself to consideration of only those matters and questions which were before the lower court and should not go beyond the record made and appearing in the lower court"). The record in this case is void as to any argument pertaining to *Hurst* and as conceded by Appellant in a footnote, this is supplemental

¹⁷ See *Franqui v. State*, 211 So. 3d 1026, 1032 (Fla. 2017) ("Based upon the foregoing, we reverse the circuit court's summary denials in the Hialeah and North Miami cases and remand for the court to conduct a single evidentiary hearing on Franqui's claims of intellectual disability.").

argument which was not presented to the trial court below in the instant appeal. See IB. at 59 n.2. (noting Arguments II and III “are meant to supplement the briefing already before this Court which has yet to be addressed.”); see also *Jacques*, 134 So. at 719; see also *Sunset Harbour Condo. Ass’n v. Robbins*, 914 So. 2d 925 (Fla. 2005) (“As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal)”).

Even if Appellant had presented argument, Appellant fails on the merits. Appellant contends that *Hurst v. Florida* entitles him to a jury determination on his Intellectual Disability claim and insists that his case is not yet final because this Court has not yet affirmed the postconviction court’s rejection to find him intellectually disabled. IB. at 65-66. Appellant continues to be sentenced to death; accordingly, a postconviction determination that he is not intellectually disabled does not alter the determination of “finality” in his case. Nor is Appellant entitled to a jury determination as explained below.

The “imposition of the death sentence upon an intellectually disabled defendant is prohibited” statute, § 921.137(4), Florida Statutes (2018), provides:

After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and

an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. **If the court finds**, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(emphasis added).

Florida's rule of criminal procedure governing "defendant's intellectual disability as a bar to imposition of the death penalty," Rule 3.203(e), provides:

The circuit court shall conduct an evidentiary hearing on the motion for a determination of intellectual disability. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is intellectually disabled. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is intellectually disabled as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. **If the court determines** that the defendant has not established intellectual disability, the court shall enter a written

order setting forth the court's specific findings in support of the court's determination.

(emphasis added). Accordingly, as Rule 3.203 and section 921.137 of the Florida Statutes directly state that it is the judge's role to make the determination as to whether a defendant is intellectually disabled, this claim should be denied.

This Court has recently held in *Oats v. Jones*:

It is clear that the Florida Legislature designated the trial judge, not the jury, as the factfinder for intellectual disability determinations. Intellectual disability is not a "necessary finding[] to impose a death sentence" but is, rather, the opposite—a fact that bars death. *Hurst*, 202 So.3d at 67. Therefore, nothing from the United States Supreme Court's decisions in *Ring*, *Atkins*, *Hall*, or *Hurst v. Florida*, compel a conclusion either way on the issue of whether a judge or jury must determine that a criminal defendant is intellectually disabled. Rather, the United States Supreme Court explicitly left the implementation of *Atkins* to the states. Thus, *Oats* has not demonstrated that Florida's *Atkins* procedure, as set forth in section 921.137, is unconstitutional.

Oats v. Jones, 220 So. 3d 1127, 1130 (Fla. 2017). Unless this Court agrees with Appellant that this Court erred in finding Florida's method of conducting an *Atkins* procedure is constitutional, the result in this case should be the same here as it was in *Oats*.

Appellant attempts to make a vague Sixth Amendment argument as a basis for this claim regarding the right to a jury determination for intellectual disability, but the Sixth Amendment only requires aggravating factors be found by the jury. Intellectual disability is a per se mitigator, not an aggravating

factor. Facts that increase a sentence or the minimum mandatory must be found by the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its extensive progeny. See *Betterman v. Montana*, 136 S. Ct. 1609, 1613, n.2 (2016) (reserving for another day the question whether the Speedy Trial Clause applies to bifurcated sentencing proceedings at which “facts that could increase the prescribed sentencing range are determined” such as “capital cases in which eligibility for the death penalty hinges on aggravating factor findings”).

A finding of intellectual disability conversely decreases the sentence. Any fact that decreases the sentence may be found by a judge alone. As the United States Supreme Court stated in *Alleyne v. United States*, 570 U.S. 99, 116 (2013), our “ruling today does not mean that any fact that influences judicial discretion must be found by a jury.” It is only “aggravating facts” that must be “submitted to the jury and found beyond a reasonable doubt.” *Alleyne*, 570 U.S. at 116. A fact that “influences judicial discretion” need not be found by a jury. *Id.* at 116. Thus, Appellant’s argument totally ignores the entire reasoning of *Alleyne* and should be rejected.

III. EVEN IF APPELLANT HAD PROPERLY RAISED HIS *HURST* ARGUMENT TO THE POSTCONVICTION COURT, APPELLANT DOES NOT PREVAIL ON THE MERITS AND WOULD NOT RECEIVE THE RETROACTIVE BENEFIT OF *HURST V. STATE* BECAUSE IT IS INAPPLICABLE TO HIS CASE.

Importantly, Appellant likewise did not raise any argument to

the postconviction court regarding the applicability of *Hurst v. State*; thus, as a preliminary matter, this argument is also unpreserved and improper given this Court's mandate to the postconviction court to conduct the evidentiary inquiry on the sole issue as to whether he is intellectually disabled. See Issue II, P. 60-61.

Notwithstanding, Appellant's argument that his case is not final is completely untenable. See Fla R. Crim. P. 3.851(d)(1)(B). ("For the purposes of this rule, a judgment is final . . . on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

Appellant's death sentences were finalized prior to *Ring v. Arizona*, 536 U.S. 584 (2002) (April 27, 1998 and January 16, 2002 respectively) when the United States Supreme Court denied certiorari review in his cases. Thus, Appellant would not receive the benefit of retroactivity under *Hurst*. See *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017) ("We have consistently applied our decision in *Asay [v. State]*, 210 So. 3d 1 (Fla. 2016)) [*"Asay V"*], denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002)."). Appellant's Rule 3.203 evidentiary hearing stemmed from the granting of his 2015 Rule 3.851 postconviction motion for relief, which was filed

many years after the judgement of his death sentence was final.

Appellant's reliance on *Card v. Jones*, 219 So. 3d 48 (Fla. 2017) is completely misplaced and he misleads this Court by asserting that the same logic should apply in determining whether Appellant's death sentence is final when the facts are clearly distinguishable from *Card*. There, as Appellant concedes in his brief, the circuit court ordered a new penalty phase proceeding. In other words, "the trial court vacated [Card's] sentence of death after an evidentiary hearing based on an improper procedure used in permitting the State to prepare the original sentencing order." See *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001). Card was resentenced on June 28, 2002, four days after the Supreme Court issued its opinion in *Ring*. Thus, this Court found that *Hurst* applied retroactively to Card. *Card*, 219 So. 3d at 48.

In this case, *Card* is inapplicable because this Court did not order a new penalty phase proceeding or vacate Appellant's sentence of death in 2017 when it ordered the case be remanded to the circuit court to conduct the limited postconviction Rule 3.203 evidentiary hearing stemming from his Rule 3.851 motion in 2017. He remains sentenced to the death penalty and nothing has changed since his sentence was finalized prior to the issuance of *Ring*. There can be no *Hurst* error because *Hurst v. State* is not retroactive to Appellant, nor does it entitle him to relief.

This Court has consistently applied its *Asay V* decision by

denying retroactive application of *Hurst* to defendants whose death sentences were final prior to *Ring*. See *Hitchcock*, 226 So. 3d at 216 (Fla. 2017). Thus far, this Court has refused to extend *Hurst v. Florida* and *Hurst v. State* to those categorical cases based on *Hitchcock*. See *Rodriguez v. State*, 219 So. 3d at 751, 760 (holding *Hurst* could not be applied retroactively to those cases final on direct appeal before *Ring* was decided where intellectual disability claim was also raised); *Cole v. State*, 234 So. 3d 644 (Fla. 2018); *Beasley v. State*, 234 So. 3d 553 (Fla. 2018); *Willacy v. State*, 238 So. 3d 100 (Fla. 2018), *cert. denied*, *Willacy v. Fla.*, 139 S. Ct. 191 (2018); *Zack v. State*, 228 So. 3d 41, 48 (Fla. 2017) (denying *Hurst* claim where intellectual disability was also raised); *Long v. State*, 235 So. 3d 293 (Fla. 2018), *cert. denied*, 139 S. Ct. 162 (2018); *Foster v. State*, 258 So. 3d 1248, 1251 (Fla. 2018), *reh'g denied*, No. SC18-860, 2019 WL 76862 (Fla. Jan. 2, 2019) (denying *Hurst* claim where intellectual disability was also raised); *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019) (denying *Hurst* claim where separate intellectual disability evidentiary hearing is pending); *Reese v. State*, 261 So. 3d 1246, 1247 (Fla. 2019). *Asay V* and *Hitchcock* therefore foreclose relief in Appellant's case.

CONCLUSION

Under the criteria set forth in *Hall v. Florida*, Appellant had a holistic review of all three prongs of intellectual

disability by the postconviction court. Appellant received a full evidentiary hearing and had the opportunity but failed to prove he suffers from intellectual disability by clear and convincing evidence. Therefore, this Court should affirm the postconviction court's order denying Appellant's renewed motion for determination of intellectual disability.

Respectfully submitted,

ASHLEY MOODY
Attorney General
Tallahassee, Florida

/s/Melissa Roca Shaw
MELISSA ROCA SHAW
Fl Bar No. 0099628
Assistant Attorney General
Office of the Attorney General
1 SE 3rd Avenue, Suite 900
Miami, Florida 33131
Phone: (305) 377-5441
Fax: (305) 377-5655
Email: capapp@myfloridalegal.com
and Melissa.
Shaw@myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished via email to Martin McClain, martymcclain@comcast.net, 141 N.E. 30th Street, Wilton Manors, Florida 33334 and Todd Scher, TScher@msn.com, 17222 Sheridan Street, Suite 346, Hollywood, FL 33020, on this 9th day of August 2019.

/s/ Melissa Roca Shaw

MELISSA ROCA SHAW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-
point font.

/s/ Melissa Roca Shaw
MELISSA ROCA SHAW
Assistant Attorney General