IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-203

LEONARDO FRANQUI,
Appellant,

v.

STATE OF FLORIDA,
Appellee

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the denial of a motion pursuant to Fla. R. Crim. P. 3.851 following an evidentiary hearing. Mr. Franqui, the Appellant, has two capital cases,[1] both of which were consolidated by this Court for purposes of conducting the evidentiary hearing. In light of that consolidation, Mr. Franqui challenges the lower court's order as it applies to both cases in one brief.

Mr. Franqui will refer to the record on appeal in the instant appeal as "2019-R" followed by the page number. To the extent references to prior proceedings in one of the two separate criminal prosecutions, Mr. Franqui will include the letter "H" in the citation format when citing the record in the Hialeah case ("H R __") or the letter "N" in the citation format when citing the record in the North Miami case ("N R __").

REQUEST FOR ORAL ARGUMENT

Mr. Franqui requests that oral argument be heard in this case. Although this appeal involves a successive Rule 3.851 motion, this is the first opportunity that Mr. Franqui has had to argue the merits of his intellectual disability issue after the evidentiary hearing that this Court ordered and the current Eighth Amendment

[1] *Franqui v. State*, Miami-Dade Circuit Court Case No. F92-2141-B (the North Miami case); *Franqui* v. State, No. F92-6089-B (the Hialeah case). Mr. McClain represents Mr. Franqui in the North Miami case, and Mr. Scher represents him in the Hialeah case.

jurisprudence regarding intellectual disability (ID). A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, the stakes at issue, and the evidentiary development that has occurred.

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STATEMENT OF THE CASE

Mr. Franqui has two separate capital cases; the Hialeah case and the North Miami case. *See* n.1. In remanding for an evidentiary hearing in both cases, this Court set out the procedural history of each case and, for the sake of brevity, it is not repeated herein. *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017).[2] The proceedings on remand are addressed below.

A. Course of Proceedings Following Remand

The evidentiary hearing took place on October 31 and November 1, 2017 (2019-R at 392-6746 (first day)); (1200-1378) (second day)). The parties filed post-hearing memoranda (*Id*. at 652-709) (State's Memorandum); 710-886 (Mr. Franqui's Memorandum). After a series of status hearings, the lower court issued its written order denying relief (*Id*. at 919-45). Mr. Franqui filed a motion for rehearing (*id*. at 946-63). It was denied on December 17, 2018 (*Id.* at 964). A timely notice of appeal was filed (*Id*. at 965-66). This Brief follows.

B. Statement of Facts from Evidentiary Hearing

At the evidentiary hearing, Mr. Franqui called two witnesses: Dr. Gordon

[2] During the pendency of the prior appeal, *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), were decided. The Court permitted supplemental briefing in both of his cases that. But because it remanded for an evidentiary hearing, the Court declined to address those "at the present time." *Franqui*, 211 So. 3d at 1027 n.2. In this brief, Mr. Franqui supplements those arguments. *See* Arguments II & III, *infra.*

Taub and Dr. Jethro Toomer. The State called one witness: Dr. Enrique Suarez. Documentary evidence was also introduced. It included transcripts from prior proceedings.

Dr. Gordon Taub. Dr. Taub has a Ph.D. in school psychology, an area of psychology dealing with psychometrics and test development, administration, and interpretation (2019-R 401). He has published numerous articles on the efficacy of intelligence testing instruments, including the Wechsler Scales, as well as research on the Flynn effect. He has testified in Florida courts as an expert in the field of intelligence testing, measurement, and development and interpretation of intelligence test scores (*Id.* at 4020-04).[3]

In 2015, Dr. Taub was contacted by one of Mr. Franqui's attorneys to review the written report authored by Dr. Trudy Block-Garfield in 2003 (*Id*. at 405-06).[4] He had been tasked to simply review her report, conduct research, and report back to counsel (*Id.* at 406).[5] Dr. Block-Garfield had administered the Stanford-Binet

[3] This Court has described Dr. Taub as a "psychologist and associate professor at the University of Central Florida specializing in measurement of intelligence, structure of intelligence, intelligence theory, and evaluation of intelligence tests . . ." *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). Federal courts have also cited his published works. *See, e.g. Jorgensen v. Berryhill*, 2018 WL 2180261 at n.4 (D. Ct. Minn. Jan. 26, 2018).

[4] Mr. Franqui had listed Dr. Block-Garfield as a witness (2019-R 168), but she could not be located to testify at the hearing (*Id*. at 1070, 1088, 1091, 1093).

[5] When asked by the State why he did not review background documents or personally examine Mr. Franqui, Dr. Taub explained that he had not been asked to render a diagnosis; rather he was hired to explain the significance of the scores

Intelligence Scale IV, and the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) (*Id.*). The WAIS-III has since been revised and the most current version is the WAIS-IV (*Id.* at 407).[6]

Dr. Taub explained that tests are re-normed to formulate a current representation of the entire United States population (*Id*. at 409-10). Mr. Franqui was given the Stanford-Binet IV in 2003 when he was 32 years old; this test was normed in 1985 and therefore his performance was compared to other individuals who were 32 years old in 1985 (*Id*. at 410). The WAIS-III was normed in 1995 and published in 1997, when it was administered to Mr. Franqui, his results were compared to the normative sample's results in 1995 (*Id*. at 411).

This process is problematic because someone who was 32 in 1990 had difference life experiences than someone who was 32 in 2015 (*Id*.). This is called a test date/norm date mismatch (*Id.*). In fact, each year there has been an increase in population IQ scores by about one third of an IQ point. The average score for someone tested in 2007 on a test that was normed in 2007 would be 100; but, if that test were to be administered in 2017, the average score on that same test would be 103 (*Id*. at 412). In other words, "people are getting bonus IQ points, because the

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reported by Dr. Block-Garfield (2019-R 447; 449-50). Not being tasked to render a diagnosis is not the same thing as not diagnosing Mr. Franqui with ID, a distinction that appeared lost on the lower court (Id. at 924 n.3).

[6] The WAIS-IV was administered by Dr. Suarez, the State's expert. Mr. Franqui obtained a full scale IQ score of 75 (2019-R 1265).

population is scoring higher by one-third of a point every year" (*Id*.). The exact cause for this established fact (often called the Flynn Effect) is unclear but it is a "very stable construct and the effect is as reliable as any other effect within psychometrics and psychology" (*Id*. at. 414). As of 2014 there have been about 4,000 studies on the Flynn Effect. The Flynn Effect caught the attention of test publishers because it meant that over time the meaning of an IQ result changed. As a result, the test instruments have to be revised and re-normed on a regular basis (*Id*. at 414-16).

The Stanford-Binet IV administered to Mr. Franqui in 2003[7] was normed in 1985 and published in 1986 (*Id*. at 420). The 18-year difference between 1985 and 2003 is substantial. The increase of one-third of an IQ point per year from the Flynn Effect means that the result in 2003 is a 5.4 (lowered to 5) point overestimate (*Id.* at 421). The observed score of 76 in 2003 translates into a score of 71 in 1985 (*Id.*).

Dr. Block-Garfield also administered the WAIS-III in 2003, on which Mr. Franqui scored a 75 (*Id*. at 426-28). The difference between the date Mr. Franqui was tested (2003) and the norming date (1995) was 8 years (*Id.* at 429). Given the Flynn Effect, the score translates into a 73 IQ in 1995 (*Id*.).

The standard error of measurement [SEM] is the known unreliability in each

[7] The Stanford-Binet IV measures a different area of intelligence than the WAIS-III but it tended to provide lower scores than the WAIS because of faulty norming (2019-R at 418). In other words, the Stanford-Binet IV was over-identifying individuals with an intellectual disability (*Id*. at 419).

test's measurement of intelligence (*Id*. at 431). The SEM for the WAIS-III is plus or minus 5 points (*Id*. at 433). This means that with Mr. Franqui's IQ score on the WAIS-III of 75, pursuant to the SEM, there is a confidence level of plus or minus 5 points, i.e. the test results shows an IQ between 70 and 80.

This range does not take into account the Flynn Effect. Under the Flynn Effect, Mr. Franqui's score of 75 translates into a 73 when the test was normed (Mr. Franqui's observed score was 75; the a 2-point reduction for the Flynn Effect, results in a score of 73). When factoring in the SEM, Mr. Franqui's true IQ on the WAIS-III was between 68 and 78 (*Id*. at 435). These calculations are considered the best practice for evaluating a capital defendant's ID because "no one's life should depend on the date that a test is normed" (*Id*.).

On cross, Dr. Taub disagreed that the Flynn Effect is not accepted in the psychological community as there have been some 4,000 articles on the subject as of 2014 (*Id*. at 462). A Flynn Effect adjustment, however, is not made in every instance when someone is being evaluated for ID; rather, it depends on the context and purpose of the evaluation (*Id*.). For example, in a school setting where the precise number is not literally a matter of life and death, as it may be in a capital case, the Flynn Effect adjustment is not generally necessary (*Id*. at 463). But, that does not mean that the Flynn Effect does not exist. Indeed, it is a "widely accepted psychological principle" (*Id.* at 469). Dr. Taub explained that the Flynn Effect's

significance grew when the United States Supreme Court ruled that the Eighth Amendment barred the execution of the intellectual disabled (*Id*. at 487). Most experts in the field agreed that with the stakes so high, the Flynn Effect meant IQ scores had to be adjusted in all death penalty cases (*Id*. at 487-88). To the extent that there is a minority view, it is not due to doubt as to the existence of the Flynn Effect. Rather, it is to whether a mental health expert should merely inform the court about the Flynn Effect and leave it the court to make the actual adjustment to a particular IQ score (*Id*. at 488).

The State asked Dr. Taub about an IQ score of 83 that Mr. Franqui obtained on a WAIS-R given by Dr. Jethro Toomer in 1993 (*Id.* at 475). Dr. Taub agreed that the 83 would actually be 78 if the Flynn Effect were taken into account (*Id*. at 476).

As to the WAIS-IV test administered by the State's expert, Dr. Suarez, Mr. Franqui's full-scale IQ score was 75 (*Id.* at 477). Dr. Taub noted that because the WAIS-IV was normed in 2007, this results in a one-point Flynn Effect adjustment, as the prosecutor even noted (*Id*. at 477-78). Thus, the result on the test given by Dr. Suarez was 74 when adjusted for the Flynn Effect (*Id*. at 480). This meant that the entire range of the scores obtained by Mr. Franqui on the tests administered to him over the years, corrected for the Flynn Effect, was pretty consistent (*Id*. at 514-15).

The lower court inquired of Dr. Taub about Mr. Franqui's language skills given that his native language is Spanish, and about his failure to go beyond the 7th

grade. As to the language issue, Dr. Taub assumed that all of the tests given to Mr. Franqui were in English; in fact both Drs. Toomer and Suarez interviewed Mr. Franqui in English and utilized tests in English (Id. at 549; 1218). Dr. Taub explained that although Mr. Franqui came from Cuba more than two decades before the testing was administered, he had been acculturated to United States society for at least 20 years (*Id.* at 495). Moreover, all accounts were that Mr. Franqui was fluent in English (*Id.)*. Thus, Dr. Taub was confident that the fact that English was not Mr. Franqui's native language did not impact his IQ scores (*Id*. at 496).

As for his limited schooling, Dr. Taub explained that while may be a common belief, there is no one-to-one correlation between intelligence and academic achievement (*Id.* at 499). What is taught in school is academic achievement, not intelligence (*Id*.). Studies indicate that the relationship between intelligence and academic achievement is commonly misunderstood; "[i]ntelligence only accounts for about half, at most, 60 percent, of what makes an individual academically successful." (*Id*. at 500).

Dr. Taub advised the lower court that he felt comfortable with the Flynn Effect-adjusted scores obtained by Mr. Franqui, He noted that the 83 obtained by Dr. Toomer appeared a bit of an outlier. But the lower court noted that it would be a 78 with the Flynn Effect adjustment, a score the court observed to be "in line" with the other IQ scores (*Id*. at 502).

Dr. Jethro Toomer. Dr. Toomer is a clinical and forensic psychologist and is board certified in organizational and industrial psychology (*Id*. at 522-23).[8] He was retained in March 1992 to examine Mr. Franqui in anticipation of possible penalty phase testimony (*Id*. at 526). He prepared a report on March 24, 1993, and later testified at the penalty phase in the Hialeah case (*Id*. at 527).

Dr. Toomer saw Mr. Franqui on 3 occasions in 1992 and 1993. He gave him a number of psychological tests including the Revised Beta Examination and a WAIS-R, a standardized test normed in 1978 (*Id*. at 529-30).

Dr. Toomer interviewed Mr. Franqui and his uncle, Mario Franqui Suarez, in order to collect collateral information about Mr. Franqui's developmental history (*Id.* at 533-35). Mr. Suarez told Dr. Toomer that Mr. Franqui's father was unknown, and his mother was generally absent (*Id*. at 536).[9] Mr. Suarez said that his nephew had trouble in school in Cuba and those troubles continued when he arrived in Miami, where he manifested additional difficulties in terms of functional capacity

[8] The Eleventh Circuit Court of Appeals has described Dr. Toomer as "imminently [sic] qualified" because he has a bachelor's, master's, and doctoral degrees in psychology; has been licensed to practice psychology in Florida for many years; is a Diplomate of the American Board of Professional Psychologists; was published in various medical journals; and has testified as an expert since 1975. *Mendoza v. Fla. Dep't. of Corrections*, 761 F.3d 1213, 1222 (11th Cir. 2014).

[9] Mr. Suarez testified at the penalty phase in the Hialeah case. His testimony was made part of the record of the evidentiary hearing as Court Exhibit 2 (2019-R 252-91; 623-24). But as explained later in this brief, the lower court failed to review Mr. Suarez's testimony or consider it in any way in analyzing Mr. Franqui's ID claim.

relating to education, interpersonal relationships, and isolation from family members (*Id*. at 537-38). Ultimately, Mr. Franqui dropped out of school (*Id*. at 538-39).

In diagnosing ID, a holistic evaluation of three prongs is undertaken: (1) IQ test, generally a 70 to 75, plus or minus 5 (the SEM), (2) adaptive functioning deficits, and (3) onset prior to the age of 18 (*Id*. at 541). Mr. Franqui had a score of 60 on the Revised Beta, which relies primarily on the test subject manipulating objects and symbols. It is a test used on individuals where there may be some question about fluency in English or where English is not the individual's native tongue (*Id*. at 544). In contrast to the Beta, the WAIS-R, on which Mr. Franqui obtained a full-scale score of 83, is broader in terms of areas identified in functioning and verbal skills (*Id*. at 545).

Dr. Toomer explained that the Flynn Effect is the observed increase in IQ scores on a specific IQ test that occurs over time. It is the result of a number of factors (*Id.*). Dr. Toomer has no reason to dispute Dr. Taub's calculation that the full scale 83 on the WAIS-R administered in 1993 should be adjusted due to the Flynn Effect to a 78 (*Id*. at 547).

Adaptive functioning refers to a collection of conceptual, social, and practical skills that an individual develops over time to function adequately in the environment and culture in which they find themselves (*Id.* at 549). Each person has strengths and weaknesses and one looks to deficits in adaptive functioning as

opposed to strengths or what the person can do (*Id.*). Thus, a person with ID is not always "completely helpless, babbling without comprehension" but rather can drive and get a driver's license, maintain certain kinds of employment, write letters, plan crimes[10], complain when they do not feel well, and seek medical attention (*Id*. at 551-52).

Deficits in two of the ten domains of adaptive functioning is the marker for ID (*Id.* at 556). The ten domains break down into in three broad categories: conceptual, social, and practical (*Id*.). Dr. Toomer emphasized that "the focus is not on what the individual can maximally achieve, but it's on the limitations and what this person can't achieve within that environment" (*Id.* at 557). Persons with ID function most effectively when in a regimented structured environment (*Id*. at 553-54).

Based on Mr. Franqui's uncle's accounting of Leonardo's troubles in school both in Cuba and after his arrival in the United States at the age of 9 or 10, it was evident that the onset of his low mental functioning was before Leonardo reached 18 years of age, the third prong of the test for ID (*Id*. at 558).[11] Moreover, the subpar

[10] In both criminal prosecutions that resulted in death sentences, Mr. Franqui had co-defendants; he did not act (or plan) alone (2019-R 626).

[11] Mr. Suarez was the brother of Leonardo's father, Fernando, although Leonardo did not find out until the day before the penalty phase that Fernando was not his biological father (T. Pen. Phase, No. 92-6089-B at 1583). Leonardo's mother was named Syria Rivera, who he (Suarez) met in Cuba when she was pregnant with his nephew Leonardo (*Id*. at 1584). Syria was unstable and "a person who you can

performance and his difficulties in school reflected deficits in the conceptual domain of adaptive functioning (*Id*.).[12]

Childhood abandonment and other domestic issues are factors to consider when looking at the social and practical domains (*Id*. at 559). Disarray in the home or other domestic difficulties precluded Mr. Franqui from progressing in the area of learning and obtaining the skills necessary for adequate functioning (*Id*.). Mr. Franqui's school records noted how his tumultuous family life was adversely impacting on his adjustment and functioning in the school (*Id*. at 559-60). This is evidence of deficits in adaptive functioning extant prior to the age of 18 (*Id*. at 560). Furthermore, the death of Mr. Franqui's younger brother was a trauma that can

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notice that is not normal" (*Id*. at 1587). She was a "good worker," but was also someone who "laughs at anything" and "walks tripping on things" (*Id*.). Syria had a second child, Fernando Jr., whose biological father was Fernando (*Id*. at 1588). Fernando Jr. was born with severe physical problems. When Leonardo was about 2 years old, his mother took Fernando Jr. and left the house and the family behind (*Id*.). Fernando Jr. was brought back to live with the family about a year later but without Syria (*Id*. at 1590). Leonardo was never properly attended to, was a "slow child, somewhat retarded to understand things" (*Id*. at 1591). "He was very slow always and in school the same" (*Id*.). Leonardo came to the United States in the 1980s with some family members including his brother; however, after a surgical procedure, Fernando Jr. passed away about a year after arriving in Miami (*Id*. at 1593). Leonardo would later do some work for us uncle at an auto tire shop (*Id*. at 1598). He always considered his nephew to be "retarded" and "slow in understanding" (Id. at 1600, 1609).

[12] School records introduced at the penalty phase and at the evidentiary hearing show not only Mr. Franqui's poor academic achievement, but confirmed his placement in special remedial classes *in Spanish*, classes in which he achieved unsatisfactory grades (2019-R 1310-13).

contribute to deficits in adaptive functioning. Dr. Toomer observed, "it's not just the trauma, it's the issue of whether the trauma occurs, early onset versus in terms of how individuals manage a trauma" (*Id*.). In other words, the younger the individual is who suffers the trauma, the more pronounced the symptomology of maladaptive attempts at coping (*Id.* at 561). Indeed, Dr. Toomer noted that Leonardo's uncle had testified that Leonardo became increasingly isolated and his behavior more erratic after his younger sibling's death because Leonardo's father had abandoned him and embarked on his own manner of grieving through substance abuse (*Id*.).

Dr. Toomer observed that the time leading to Mr. Franqui dropping out of school corresponded with the disruption and disarray in his home family life in the wake of his brother's death (*Id*.). This period of time was marked by a number of factors including learning that his father was unknown, the abandonment by his mother, being shuffled between different homes of different family members, and the sharp cultural transition from moving from Cuba to the United States; "all of those kinds of things impacted on his – his impaired functioning over time in those areas" (*Id*. at 561-62).[13]

[13] On cross, the State noted, and Dr. Toomer agreed, that Mr. Franqui attended school in Miami in the fifth and sixth grades and that during those 2 school years Mr. Franqui was absent only 2 days for each year. In those 2 years he was absent only a combined 4 times (2019-R 572). His grades during those two school years also reflected mostly Cs (*Id*.). However, after the death of his brother and the subsequent familial upheaval, the school records from the seventh grade show that Mr. Franqui missed more days than he went to school (*Id*. at 573). This was Dr.

Individuals with ID can have a significant other, maintain a romantic relationship, have children, and work (*Id*. at 562). It is not just the ability to form a continuous a relationship but rather "the quality of his overall interpersonal relationships, not just with a particular individual" like Mr. Franqui's relationship with Vivian Gonzalez (*Id*. at 580). There was evidence that Mr. Franqui became isolated, removed himself from familiar relationships, and would sometimes look confused (*Id.*).[14] While Mr. Franqui did work, his menial jobs did not require abstract reasoning, were repetitive in nature, and comprised "basic task-oriented kinds of jobs" (*Id.* at 562).[15]

Toomer's point, "that was the period in which [] some decompensation, deterioration began" (*Id*.). While the prosecutor tried to get Dr. Toomer to speculate about a different motivation for the absences and concomitant downfall in his grades, Dr. Toomer refused to do so. He said that that it would not be proper to resort to speculation (*Id.* at 573-74). Seemingly unhappy with this answer, the prosecutor dropped this line of questioning.

[14] Vivian Gonzalez's father, Alberto Lopez, testified in a pretrial deposition that "every once in a while, Mr. Franqui looked like kind of childish, like a child, a boy, a kid" (2019-R 241). He would race little scooters around "like if he was a kid" (*Id*.). Mr. Lopez stated "I'm not crazy. It shocked me" (*Id*. at 241-42).

[15] Dr. Toomer disagreed with the prosecutor's characterization of Mr. Franqui's work history as "consistent" and requiring a higher level of functioning (2019-R 574-75). Even the prosecutor conceded that Mr. Franqui's "work" entailed mowing grass and using a weed eater at the Miami Springs Golf Course when he worked for Michael Robert Barrechio (*Id*. at 575). Someone with Mr. Franqui's level of ID could perform repetitive tasks and "can find and move from one repetitive task to another" (*Id*. at 576). Even Mr. Barrechio, who testified at the penalty phase in the Hialeah case on behalf of the State, reported that Mr. Franqui was never asked to make any decisions during his employment. His jobs required manual, as opposed to logical or thinking skills (*Id*. at 622). Mr. Franqui did not initiate work on his own (*Id*. at 622). Mr. Barrechio's penalty phase testimony was made part of the record of

At Mr. Franqui's 1993 penalty phase, Dr. Toomer had opined that Mr. Franqui functioned in the "mentally retarded" range. At the 2017 evidentiary hearing, he testified that his opinion has not changed even given the advancements in the understanding and diagnosis of ID (*Id.* at 563).

To challenge Dr. Toomer's diagnosis, the State floated a false definition of ID, contending that Mr. Franqui had to have "severe" deficits to be ID, that ID was "about somebody who is *severely intellectually disabled*" (*Id*. at 582) (emphasis added). She tried to belittle Dr. Toomer when he would not agree with her false, non-existent false standard. When Dr. Toomer noted that the question assumed someone who "basically cannot function," the prosecutor said "That's right sir, *somebody that can't function*. And this defendant functions just fine" (*Id*. at 582-83) (emphasis added). Again, Dr. Toomer explained that the prosecutor's definition was not one that defines ID (*Id*. at 583).[16]

The State devoted a large chunk of its cross of Dr. Toomer asking about issues not germane to an ID diagnosis. Dr. Toomer was questioned repeatedly about Mr.

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the hearing as Court Exhibit 1 (*Id*. at 176-87; 624).

As to the "security guard" job, the State conceded that Mr. Franqui was fired from it (*Id*.). The only other job Mr. Franqui had was when he installed tires as his uncle's auto tire shop (*Id*. at 636).

[16] Dr. Toomer's understanding of the law is correct. "Mild levels of intellectual disability . . . remain intellectual disabilities" and States "may not execute anyone in 'the *entire category*' of [intellectually disabled] offenders.'" *Moore v. Texas,* 137 S. Ct. 1039, 1051 (2017) (quoting *Roper v. Simmons,* 543 U.S. 551. 563-64 (2005)).

Franqui's possession of a driver's license (*id.* at 583-84), and about grievances he had purportedly written in prison (*Id.* at 583). Dr. Toomer said that there was no evidence that Mr. Franqui wrote the grievance to which the prosecutor was referring or whether Mr. Franqui had assistance in writing it if one assumed that Mr. Franqui put the written words that appeared (*Id.* at 583-84). Dr. Toomer explained: "You say he's done this, but there's no basis for that, so I have no way of knowing that" (*Id.* at 584).[17]

Dr. Toomer was asked if there was any evidence that Mr. Franqui "needed assistance in any way in daily activity" (*Id.* at 585).[18] Dr. Toomer responded: "whether you need assistance or not, has nothing to do with intellectual disability. . . . The issue is whether they can do them effectively, whether they can function effectively" (*Id.* at 585-86). The prosecutor then asked about Mr. Franqui's ability to steal cars effectively "because they drove," to which Dr. Toomer responded that that was not an example of functioning effectively in society (*Id.* at 586). When

[17] The State chose not to show Dr. Toomer the particular document to which it was referring, nor did it introduce it into evidence (2019-R 629). Dr. Toomer noted that he had worked on cases where a grievance in a defendant's file had actually been written by another inmate (*Id.* at 630). Tacitly conceding the lack of proof that Mr. Franqui had written any of the grievances, the State began referring to them as "grievances that were filed *under his name*" (*Id.* at 1233) (emphasis added).

[18] This and other questions posed by the State are examples of why "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled." *Moore*, 137 S. Ct. at 1052 (citing AAIDD-11, User's Guide 25-27). The kind of stereotypes of those with ID reflected in the State's questioning of Dr. Toomer "should spark skepticism." *Id.*

asked about Mr. Franqui dropping out of school, Dr. Toomer replied that the school records revealed trauma in the home situation and erratic functioning, and that perhaps those were the reasons underlying why Mr. Franqui became a dropout (*Id*. at 589). The prosecutor retorted that just because Mr. Franqui dropped out of school "doesn't make him ***stupid or dumb*** or mentally disabled" (*Id*.).[19]

Dr. Enrique M. Suarez. Dr. Suarez is a licensed psychologist with his primary business being the field of neuropsychology (2019-R 1203). He is not board certified in any field (*Id*. at 1205). Between 1998 and 2017, he was appointed by criminal courts in 1453 cases, about 33% of his total work, usually in the area of competency to stand trial (*Id*. at 1206). In 17% of the cases he was appointed by the court to assist the defense in a criminal case (*Id*. at 1207). He had also been appointed by probate courts when ID was sometimes at issue (*Id*. at 1208).

At the State's behest, Dr. Suarez evaluated Mr. Franqui on August 31 and September 4, 2009 (*Id*.). He also reviewed specific background materials and conducted telephonic interviews of correctional officers (*Id*. at 1216).

Dr. Suarez testified that Mr. Franqui's account of his family history was consistent with what he had told Dr. Toomer and with Mr. Franqui's uncle. Mr. Franqui reported that he was born in Cuba and came to the United States in 1979 or

[19] This comment seems to be why the Supreme Court's cautioned against lay stereotypes of individuals with ID. *See supra* n.19.

1980 with his adopted family, his grandmother, adopted father and his brother (*Id*. at 1219). He said his adopted father was Fernando Franqui, and that he had no recollection of his biological parents (*Id*.). He said his mother's name was Sylvia or Siria and that she was in Cuba (*Id*. at 1220). He discussed his brother's death and spoke of how "his father began to use crack cocaine, and at one point became suicidal and also jumped out of a window" (*Id*.). His father left the house when Mr. Franqui was 13 years old. Mr. Franqui then lived with a succession of different family members and friends (*Id*. at 1221). He said that he had been physically and sexually abused but was unwilling to discuss the painful details (*Id*. at 1222).

Mr. Franqui told Dr. Suarez that at the age of 17 he met Vivian Gonzalez. Soon afterwards, they moved in together in his uncle's house (*Id*.). Mr. Franqui worked for his uncle who "would then deduct the rent from his paycheck" (*Id*.). After a year or so Mr. Franqui and Ms. Gonzalez moved to a place of their own and was living there at the time of his arrest (*Id*.). He was working in an effort to financial support his family (*Id*.).

Mr. Franqui told Dr. Suarez that he had been placed in special classes in Cuba (*Id*. at 1223). When he came to the United States, he thought he was placed in the 6th grade and promoted to the 7th grade, which he said he repeated twice and eventually was expelled due to his poor grades (*Id*.). His school records showed mostly Cs in the 5th and 6th grades, and only 4 missed days of school during those

years (*Id*. at 1224-25). In later years, he had missed a large number of school days and his grades plummeted (*Id*. at 1225-26).[20] Dr. Suarez claimed that the school records did not reflect placement in special education class (*Id*. at 1226).[21]

Mr. Franqui gave a work history that was consistent with what he had told Dr. Toomer. When he was about 17, he began working at his uncle's refrigeration repair shop and his tire shop, mopping and sweeping the floors (*Id*. at 1227). Next was a job with the City of Miami "doing lawn maintenance" (*Id*.). Then, he worked "doing security" at the Coconut Grove Marina; the "doing security" job was described by Dr. Suarez as "he worked at the docks" (*Id*. at 1228). Mr. Franqui was fired from this job due to tardiness and absences from work (*Id*.).

The State questioned Dr. Suarez about Mr. Franqui's perceived strengths. Dr. Suarez said that Mr. Franqui told him he had a driver's license (*Id*.). Dr. Suarez's understanding was "it's very statistically infrequent that you find someone with [ID] that actually has a driver license" because "it involves a lot of behaviors that are implicate[d] in adaptive functioning of people with even mild mental retardation, or intellectual disability would find very difficult" (*Id.* at 1229). Dr. Suarez did admit, however, that "a lot of people get help with" the written driver's test, including

[20] Dr. Suarez said that he saw conflicting reasons in the records as to why Mr. Franqui dropped out of school; some sources suggested it was due to poor grades, and others suggested it was due to excessive absences (2019-R 1225-26).

[21] This was incorrect testimony, as was revealed in Dr. Suarez's cross as discussed *infra*.

having another person read the questions to you;[22] but he insisted that "that's still, you know, that's a big challenge for people with intellectual disability" (*Id*.).[23]

Dr. Suarez was asked about grievances that "were filed under [Mr. Franqui's] name" (*Id*. at 1233). While they "appear to be in the same handwriting," Dr. Suarez could not testify with any certainty that Mr. Franqui wrote them or had assistance from other inmates (*Id*. at 1234). Dr. Suarez said that Mr. Franqui was also able to choose items from the prison canteen which carried over 150 items and was able to write either with or without the assistance of others, letters to a pen pal (*Id*. at 1238-39).

Dr. Suarez's only professed criticism of Dr. Taub concerned his report. Dr. Suarez found Dr. Taub's failure to interview Mr. Franqui problematic because a mental health professional is "not suppose[d] to testify on matters regarding diagnosis or conclusions about testing, which is basically a diagnosis without an interview" (*Id*. at 1242).[24] Dr. Suarez also complained about Dr. Block-Garfield's

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[22] The State did not ask Dr. Suarez if this occurred when Mr. Franqui took the written test. And Dr. Suarez did not ask Mr. Franqui if he had to take the test on multiple occasions.

[23] Dr. Suarez's understanding on this particular issue is wrong. "[M]ildly intellectually disabled individuals can obtain driver's licenses, fill out job applications, and obtain and maintain employment." *Pruitt v. Neal*, 788 F.3d 248, 268 (7th Cir. 2015).

[24] Dr. Taub, of course, did not diagnose Mr. Franqui because that was not what he had been asked to do when he was hired by counsel. Dr. Suarez's criticism does not match with Dr. Suarez's own conduct. He himself has rendered forensic opinions in capital cases without personally seeing or interviewing the defendant. *See*

report and the failure to properly identify the version of the WAIS that she gave Mr. Franqui. In 2009, Dr. Suarez had to call Dr. Block-Garfield to learn that she had in fact given Mr. Franqui the WAIS-III (*Id.* at 1243). The State tried to get Dr. Suarez to criticize Dr. Toomer for not using a Puerto Rican normed version of the WAIS, but Dr. Suarez said that the Puerto Rican version "wasn't very good at all" and admitted Dr. Toomer administered the appropriate test (*Id*. at 1245-46).

Dr. Suarez was familiar with the Flynn Effect. His understanding was that it was premised merely on the obsolescence of a testing instrument rather than describing what was observed, the increase in IQ scores on a test instrument over time (*Id*. at 1253-54). Ultimately, he conceded that the Flynn Effect "was observed, and it was there, it was measured" (*Id*. at 1254). His criticism of the Flynn Effect was its use to make actual adjustments to IQ scores on specific tests. He also had concerns regarding the publishers of the testing instruments using the Flynn Effect as justification for selling the revised testing instruments (*Id*.).

As to Mr. Franqui's score of 83 on the WAIS-R performed by Dr. Toomer in 1993, the Flynn Effect adjusted score would be 78 without also considering the SEM (plus or minus 5 points) (*Id*. at 1258). In Dr. Suarez's view, there is no SEM on a score already adjusted by the Flynn Effect (*Id*. at 1260-62). Dr. Suarez does not

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Rigertink v. State, 193 So. 3d 846 (Fla. 2016); *Reaves v. Jones*, 2015 WL 13657202 (S.D. Fla. March 3, 2005).

believe that mental health experts should make Flynn Effect adjustments to an IQ score. He believes the better approach is give the court the observed score, and then advise the Court of the Flynn Effect. He would leave to the court to decide what to do with the information.

Mr. Franqui obtained a full-scale score of 75 on the WAIS-IV that Dr. Suarez administered (*Id.* at 1264-65). Considering the SEM, the range would be 71-80 (*Id*. at 1266). Dr. Suarez also gave a number of "validity tests" which in his view Mr. Franqui failed (*Id*. at 1267-76). He gave the English language version of the MMPI, a personality test. Dr. Suarez saw Mr. Franqui's score as reflecting someone wanting to appear to be "unrealistically and abnormally virtuous" (*Id*. at 1277).

As part of his evaluation, Dr. Suarez did telephonic interviews of death row guards (*Id.* at 1280). One guard said that Mr. Franqui walks, does pull ups, and dips on the parallel bars in the recreation yard (*Id.* at 1280-81). He speaks with Mr. Franqui in English. The guard told Dr. Suarez that Mr. Franqui plays card games and has books and magazines (*Id.*). Mr. Franqui was also capable of painting the floor and walls of his cell using two colors, grey and beige (*Id*. at 1282). Another guard told Dr. Suarez that Mr. Franqui talks to other inmates about their cases and exchanges legal materials with them (*Id*.). Yet another guard, who had only been assigned to death row for about 6 months, told Dr. Suarez that Mr. Franqui plays basketball, checkers, chess and cards (*Id*. at 1284).

Dr. Suarez testified that he saw nothing to suggest that before reaching the age of 18, Mr. Franqui "ever had either a diagnosis of, or any type of support, because he was unable to function on his own" (*Id*. at 1286).[25] He said that there were no deficits in adaptive functioning, "especially in view of my interviews with the officers and what he told me about his life" (*Id*.). Mr. Franqui had friends and accomplices although "they didn't always do very nice and positive things in the community" (*Id*. at 1287). He had a wife and children and cars (*Id*.).[26] Mr. Franqui had appropriate hygiene, "he showers by himself" and "gets his own hair cut" (*Id*. at 1288). With regard to money management, Mr. Franqui "was able to pay his rent"[27] and maintain his prison canteen account (*Id*.). In short, Dr. Suarez did not believe that Mr. Franqui had any adaptive deficits "or low intelligence at all" (*Id*. at 1289).

On cross, Dr. Suarez explained that part of his most recent work experience was with a local correctional facility (Id. at 1291-92). That employment ended just

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[25] This is not the proper prong 3 analysis. *Oats v. State*, 181 So. 3d 457, 469 (Fla. 2015) (statute only requires a showing that ID "manifested" prior to age 18; "[a]ccepting the position that 'manifested' equates to 'diagnosed' would render the first two prongs . . . moot").

[26] The State saw some apparent significance to Mr. Franqui obtaining cars (2019-R 1229-31; 1287). But as Dr. Suarez admitted, Mr. Franqui's uncle gave him the first car, and his cousin gave the second car to him. Then, the other cars were simply obtained as a result of trade-ins (*Id*. at 1312-13).

[27] However, as Dr. Suarez later conceded, Mr. Franqui's uncle actually deducted the rent from his paycheck; and the cottage where Mr. Franqui lived with Ms. Gonzalez was owned by a friend of Ms. Gonzalez's father (2019-R 1309). In other words, Mr. Franqui did not pay his rent; it was deducted from his paycheck. And, he did not "own" property.

weeks before his testimony at the evidentiary hearing (Id. at 1292). Dr. Suarez has published nothing in the area of ID (*Id.*). When asked if had ever taught in the area of ID in an academic setting, Dr. Suarez responded "I think, when I taught at Baylor and subsequent to that at a community college, I taught a psychopathology course," part of which "had to do with going over intellectual disability" (*Id*. at 1292-93). This, however, was in the early 1970s (*Id*. at 1293). Dr. Suarez did contribute articles to the American Airlines magazine in the early 1990s on the topic of communication (*Id*. at 1294). He also did some work with the Tampa Bay Police Chief Association in 1987 (*Id*. at 1295). The last entry on his CV of any activity related to the area of ID was in 2010 (*Id.*).

Dr. Suarez admitted that, prior to testifying, he spoke with the prosecutor, not just about his anticipated testimony, but on the morning of his testimony about "how the case was going. She thought it was going very well" (*Id*. at 1297). The prosecutor spoke with him about the substance of Dr. Toomer's and Dr. Taub's testimony (*Id*.). But Dr. Suarez's memory failed when asked about the specifics of what was said the morning of his testimony (*Id*.) ("She just mentioned Dr. Tau[b], I forget it was something about what he felt, let me think, I don't recall exactly, but there was something about Dr. Tau[b]"). Later on, Dr. Suarez's memory again failed when asked what he and the prosecutor had discussed that morning regarding Dr. Toomer's and Dr. Taub's testimony (*Id.* at 1332-33).

Dr. Suarez's memory again failed when asked about cases in which he was hired by the defense in a capital postconviction setting (*Id*. at 1301) ("You know, I don't remember, but I think some of those were for ID") ("I don't recall how many of those were done"). His memory improved some when asked about being hired by the State and testifying in the Harry Phillips case. He recalled that he found Mr. Phillips not to be ID (*Id.* at 1301-03). He recalled "doing" the Victor Jones case but "I don't remember testifying, or what I said, but I remember doing it, yes" (*Id*. at 1302). He recalled that he found Mr. Jones not to be ID (*Id*.). Mr. Jones was a capital defendant who had been shot in the head during the course of the crime (*Id*.). He also recalled being hired by the State in the Guillermo Arbelaez capital case and finding Mr. Arbelaez not to be ID (*Id*. at 1303). He also recalled that the State hired him in the Juan David Rodriguez capital case, and he found Mr. Rodriguez not to be ID (*Id*.). With regard to the John Ferguson case, Dr. Suarez was uncertain if he was hired by the Attorney General's Office or by the State Attorney's Office to testify that Mr. Ferguson was competent to be executed (*Id*. at 1304).[28] He was also hired

[28] The published opinions in Mr. Ferguson's case reveal that in 2004, Dr. Suarez was hired by the State to testify that Mr. Ferguson was competent to proceed in his federal habeas corpus proceeding. *See Ferguson v. Sec'y Dep't. of Corrections,* 716 F.3d 1315 (11th Cir. 2013). In 2012, the Governor signed Mr. Ferguson's death warrant and proceedings were held to decide if Mr. Ferguson was competent to be executed. Dr. Suarez was called in the 2012 evidentiary hearing to testify on behalf of the State that although he had not re-examined Mr. Ferguson since 2004, his opinion in 2012 had not changed that Mr. Ferguson was not schizophrenic. That new opinion was based solely on a review of records from 2004

by the State to testify that another capital defendant, Marshall Gore, was competent to proceed in his postconviction proceedings (*Id*. at 1305). Dr. Suarez recalled that he been hired to testify in similar types of proceedings in Georgia, Colorado, and Arizona, where he did not find the criminal defendants to be ID (*Id*.).

Dr. Suarez conceded that during his clinical interview of Mr. Franqui, Mr. Franqui was cooperative and provided information about his background, the veracity of which Dr. Suarez had no reason to doubt (*Id.* at 1306). Mr. Franqui also told Dr. Suarez that when he was working for his uncle, his uncle would deduct the rent from his paycheck; and the cottage Mr. Franqui lived in with Ms. Gonzalez was owned by a friend of Ms. Gonzalez's father (*Id*. at 1309).

Dr. Suarez was asked about Mr. Franqui's school records which he had said he had thoroughly reviewed (*Id.* at 1309-10). Some of the school records, which had been introduced into evidence at the penalty phase in the Hialeah case, contained an entry "SR" (*Id*. at 1310). Dr. Suarez did not know "what that is." But when pushed to carefully review the school record, he discovered that the entry "SR" stood for "Satisfactory Progress in **Remedial Basic Skills**" (*Id*.) (emphasis added). Another entry on the school records relating to the "SR" explained:

> Students who are not achieving within the range appropriate or acceptable for their grade level may not meet the Dade County Public School's basic skill standards for promotion will receive a grade of

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to 2012 and listening to the testimony of the other experts at the evidentiary hearing. *Id*. at 1327.

satisfactory, remedial, or unsatisfactory remedial.

(*Id.* at 1310-11). This record referred to when Mr. Franqui was in the 5th grade (*Id.* at 1311). Dr. Suarez opined that "that was probably right after he came from Cuba" before fully reviewing Mr. Franqui's school records from the 6th grade (*not* "right after" Mr. Franqui came from Cuba) which had several entries of "U.R." (*Id.*). The 6th grade record explained that "U.R." signified "Unsatisfactory progress in remedial basic skills program" (*Id.*). There was also the following explanation:

> Students who are not achieving within the range of appropriate or acceptable for their grade level and may not meet Dade County Public Schools basic skill standards for promotion will receive a grade of satisfactory remedial, or unsatisfactory remedial.

(*Id.*). Another school record from 1986 said that Mr. Franqui's report card was being withheld because "student owes for textbook." There was a notation that a notice mailed to the address for Mr. Franqui was returned to the school (*Id.* at 1312).

Dr. Suarez was crossed about his testimony regarding information he got from the death row guards, Dr. Suarez said that he had called the Department of Corrections and said that he: "wanted to talk to a few people who had spent, you know, considerable time" with Mr. Franqui. Dr. Suarez said that the guards he spoke with "were the three people they chose" (*Id.* at 1317). Dr. Suarez testified that this is a practice he has undertaken in all of the capital cases in which he was hired by the State and in which he found the capital defendant not to be ID (*Id.* at 1319). Dr. Suarez was not familiar with the United States Supreme Court ruling in *Moore v.*

Texas. He said that he was familiar with the *Hall v. Florida* ruling, but he had not looked at it in a long time (*Id*.).

As to the telephonic interviews with corrections guards, Dr. Suarez on cross revealed that one of the guards said that he has only had very short conversations with Mr. Franqui, less than 5 minutes (*Id*. at 212). All of the guards told him that Mr. Franqui was able to carry his DOC identification card at all times. Of course, Dr. Suarez admitted that inmates are required to do so or they will get in trouble (*Id*. at 1321). Of all corrections settings, death row is the most restrictive and limited (*Id*.). Mr. Franqui cannot one day wake up and decide he wants to take a shower; his shower times are dictated by DOC. Mr. Franqui is handcuffed and escorted to the shower, observed while showering, and then escorted back to his cell (*Id.* at 1321-22). He has no choice in the matter; it is dictated for him.

One of the other guards had only known Mr. Franqui for six months, and the longest he has talked with him was about 5 minutes (*Id*. at 1322). Dr. Suarez had no idea what "card games" Mr. Franqui was playing (*Id*.). As for Mr. Franqui's capacity to paint the floor and walls of his cell in two colors, Dr. Suarez "assumed" that DOC provided inmates a pallet of colors to choose from when painting their cells as opposed to just being given a can of beige paint and a can of grey paint (*Id*. at 1323).

The third guard also admitted that he only had very short conversations with Mr. Franqui, maybe 5 minutes (*Id*.). He also told Dr. Suarez that Mr. Franqui and

other inmates exchange documents about their cases (*Id.* at 1324). Dr. Suarez had no idea how Mr. Franqui performed when he was reported by the guard as having played Scrabble (*Id*.). Did he actually know how the game was played? Could he spell words with more than three letters? Did he spell words correctly?

Dr. Suarez conceded that the Flynn Effect was a valid construct and that it is subject to ongoing research (*Id*. at 1335). He himself had not conducted any research into the Flynn Effect (*Id*. at 1336). He testified that some courts accept it while others do not (*Id.* at 1337). He claimed that the companies that published the testing instruments caution against using a particular number to adjust for the Flynn Effect, whereas established research performed by the AAID instructed experts to subtract .3 points per year (*Id.* at 1341).

Ultimately, Dr. Suarez agreed that the 75 obtained by Mr. Franqui on the WAIS-IV in 2009, the 75 obtained on the WAIS-III given by Dr. Block-Garfield in 2003, and the 76 obtained on the Stanford-Binet given by Dr. Block-Garfield in 2003 were "all in the same area" of consistency (*Id*. at 1350).

SUMMARY OF THE ARGUMENTS

The lower court failed to conduct the "holistic" analysis mandated by this Court when it remanded for the evidentiary hearing. It also required Mr. Franqui to prove ID by a clear and convincing evidence standard that is unconstitutional under the Eighth and Fourteenth Amendments. Not only did the court fail to consider the

three prongs of the test for ID in an interdependent "holistic" manner but it also failed to review the entire record, misstated critical facts, and did not apply the prevailing legal principles and medical community standards when it determined that Mr. Franqui has not met his burden of proving ID.

Because there has been no final determination whether Mr. Franqui is ID, his death sentences are invalid under *Hurst v. Florida*.

Mr. Franqui's death sentences are invalid under *Hurst v. State* and resentencing proceedings are warranted.

ARGUMENT

I

MR. FRANQUI'S INTELLECTUAL DISABILITY PRECLUDES HIS EXECUTION UNDER THE EIGHTH AMENDMENT. THE LOWER COURT EMPLOYED AN UNCONSTITUTIONAL BURDEN OF PROOF, ERRONEOUSLY REQUIRING MR. FRANQUI TO PROVE HE IS INTELLECTUALLY DISABLED BY CLEAR AND CONVINCING EVIDENCE. AT A MINIMUM THIS CAUSE SHOULD BE REMANDED WITH DIRECTIONS THAT THE LOWER COURT RE-ASSESS MR. FRANQUI'S CLAIM UNDER A PREPONDERANCE OF THE EVIDENCE STANDARD.

A. Introduction

This Court directed the lower court to conduct a "holistic" evaluation of Mr. Franqui's ID claim as mandated by *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Oats v. State*, 181 So. 3d 457 (Fla. 2015). *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2278-82 (2015). A "holistic" analysis demands that "all three prongs of the

intellectual disability test be considered *in tandem*" because "the *conjunctive and interrelated nature of the test* requires no single factor be considered dispositive." *Walls v. State*, 213 So. 3d 340, 346-47 (Fla. 2016) (emphasis added) (citing *Oats*, 181 So. 3d at 459, 467). Although the lower court did purport to *address* the three prongs of the ID test, it did not *perform* a "holistic" analysis. Rather, it assessed each prong independently and found that because Mr. Franqui did not prove each prong by clear and convincing evidence, he was not entitled to 3.851 relief. Merely addressing the three prongs independently is not a "holistic" evaluation.

The lower court also misapplied the law and the medical community's standards as to each independent prong. It misunderstood or overlooked Mr. Franqui's unquestionable deficits in adaptive behavior by mining the record to arbitrarily offset any deficits with a perceived adaptive strength. But a deficit is not cancelled out by a strength. A deficit is a deficit. Further, the court's order is replete with factual errors that are belied by the record. It ignored Mr. Franqui's uncle's testimony at one of the penalty phase proceedings which was introduced as evidence at the 2017 hearing. It ignored Dade County School records showing that Mr. Franqui was placed in special remedial classes in Spanish in which he obtained unsatisfactory grades; he was even left behind one year due to his poor academic performance.

Moreover, the court determined that Mr. Franqui did not prove his ID by a

standard of proof—clear and convincing evidence—that is too high and carries a significant and unacceptable risk that a person with ID, like Mr. Franqui, will be erroneously executed. For the reasons set forth below, the lower court's order should be reversed and this cause should be remanded for reconsideration under a burden of proof that is consistent with the Eighth and Fourteenth Amendments. In the alternative, the Court should remand with directions that the lower court analysis Mr. Franqui's claim in accord with *Moore v. Texas*, 137 S. Ct. 1039 (2017). When the proper burden of proof is applied and the evidence analyzed in accord with *Moore*, Mr. Franqui has shown that his death sentences cannot stand.

B. Standard of Review

Whether Mr. Franqui has established the three prongs of the test for ID is a legal conclusion subject to *de novo* review on appeal. *State v. Herring*, 76 So. 3d 891, 894 (Fla. 2011). Factual determinations subsidiary to the ultimate legal questions are reviewed under the "competent and substantial evidence" standard. *Allen v. State*, 261 So. 3d 1255, 1269 (Fla. 2019).

C. The Lower Court Imposed an Unconstitutional Burden of Proof

In its written closing, the State urged the lower court to place the burden on Mr. Franqui to establish that he suffered from ID by clear and convincing evidence (2019-R 682). Mr. Franqui asked to reply to the State's memorandum, arguing, *inter alia*, that the clear and convincing burden was too high and created an "unacceptable

risk" that Mr. Franqui will be executed due to his ID (*Id*. at 889). The lower court never ruled on Mr. Franqui's motion but rather made clear it was applying the higher standard (*Id.* at 922). The lower court erred in imposing an unconstitutional burden of proof and in disallowing Mr. Franqui the right to be heard on the issue.

Below, the State agreed that Fla. R. Crim. P. 3.203 governs this proceeding (*Id*. at 653). But Rule 3.203 is silent on the evidentiary burden. This is why, after the State filed its written closing memorandum in which it argued that the burden was on Mr. Franqui to prove ID by clear and convincing evidence or, at a minimum, by a preponderance of the evidence,[29] Mr. Franqui sought leave to file a reply in order to address this crucial issue. Yet the State bristled at Mr. Franqui's request, chiding him for even making it (2019-R 899) ("The purpose of written closing argument is for each party to offer proposed findings and conclusions to the court based on the evidence from the evidentiary hearing and the applicable authorities. It is not an opportunity for counsel to re-argue claims that were not raised in its simultaneous written closing, including what purports to be a challenge to Defendant's burden of

[29] *See* 2019-R 682 ("Even if the burden were preponderance of the evidence, Franqui has failed to meet that burden"). The lower court did not make an alternative determination that Mr. Franqui did not meet the lower preponderance burden, thus leaving open the question whether he could prevail under a lower burden. *See, e.g. Raulerson v. Warden*, 2019 WL 2710051 at *15 n.1 (11th Cir. June 28, 2019) (Jordan, J., concurring in part and dissenting in part) ("Because I believe that Georgia's beyond-a-reasonable-doubt standard is unconstitutional, I would remand Mr. Raulerson's substantive intellectual disability claim to the district court for an evidentiary hearing under the preponderance-of-the-evidence standard").

proof at an intellectual disability evidentiary hearing").

Without permitting Mr. Franqui to respond to the State's argument, the lower court adopted a burden of proof not found in Rule 3.203 and inconsistent with governing law. Not only is the clear and convincing burden of proof an unconstitutionally high and unreasonable burden in the context of ID, as explained below, Mr. Franqui was deprived of his right to be heard after the State invoked a burden of proof that is inconsistent with the governing constitutional standards. *See Huff v. State*, 622 So. 2d 982 (Fla. 1993); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). The touchstone of due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quotation omitted).

This Court has not refrained from addressing whether the clear and convincing standard is constitutional but it has instead disposed of cases in which the issue was raised on other grounds. *See Quince v. State*, 241 So. 3d 58, 63 (Fla. 2018); *Dufour v. State*, 69 So. 3d 235 (Fla. 2011); *Phillips v. State*, 984 So. 2d 503 (Fla. 2008); *Jones v. State*, 966 So. 2d 319 (Fla. 2007); *Burns v. State*, 944 So. 2d 234 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045 (Fla. 2006); *Nixon v. State*, 2 So. 3d 137 (Fla. 2009). Thus, the question remains open. Burdens of proof, like standards of review, matter. *See State v. J.P.* 907 So. 2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in any constitutional

analysis; it is often the most crucial. In this case, it has made all the difference."). Given the importance of the issue and the fact that the lower court found that Mr. Franqui failed to meet the clear and convincing evidence burden as to the first prong of the ID test *by one IQ testing point* coupled with its failure to perform the requisite "holistic" evaluation, this case presents an appropriate vehicle to address the burden of proof once and for all.

The lower court applied the clear and convincing evidence standard found in Fla. Stat. §921.137 (4),[30] and Mr. Franqui submits that this standard violates not only the Eighth Amendment[31] but also the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has explained: "[t]he function of a standard of proof, as that concept is embodied is the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks [s]he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979)

[30] Aside from Florida, only Arizona imposes a clear and convincing evidence burden on a defendant seeking to establish ID. *See* Ariz. Rev. Stat. § 13-753 (2011). Although Colorado, Delaware, and Indiana passed statutes requiring clear and convincing evidence for *Atkins* claims, Delaware's statute was struck down, Colorado no longer enforces the death penalty, and the Indiana Supreme Court has held that a clear-and-convincing standard was unconstitutional under *Atkins* and *Cooper v. Oklahoma*, 517 U.S. 348 (1996). *See Pruitt v. State,* 834 N.E.2d 90, 103 (Ind. 2005).

[31] *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S. Ct. 628 (2016); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas,* 139 S. Ct. 666 (2019).

(quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. Burdens of proof "often drive[] the result," *Raulerson v. Warden*, 2019 WL 2710051 at *18 (11th Cir. June 28, 2019) (Jordan, J., concurring in part and dissenting in part), and can be "decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Because a fundamental constitutional right is at issue, any burden of proof must not "create an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990. *See also Moore*, 137 S. Ct. at 1044 (striking factors used in Texas to determine intellectual disability because they "creat[e] an unacceptable risk that persons with intellectual disability will be executed"); *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent").

This Court should look to *Cooper* to guide its assessment.[32] *See Raulerson*, 2019 WL 2710051 at *17 (Jordan, J., concurring in part and dissenting in part) ("Where a fundamental constitutional right is involved—and the Eighth Amendment

[32] This Court analyzed *Cooper* when rejecting a challenge to the clear and convincing burden of proof in sanity-to-be-executed cases. *See Medina v. State*, 690 So. 2d 1241 (Fla. 1997). But a sanity to be executed claim is a very different proceeding from ID, with different constitutional concerns.

right of an intellectually-disabled defendant not to be executed is such a right—*Cooper* provides the governing precedent under the Due Process Clause"). In *Cooper*, the Supreme Court explained that competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Cooper* at 1376 (citing *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975)). The *Cooper* Court also distinguished cases, like *Patterson v. New York*, 432 U.S. 197, 201-02 (1977), involving the determination and allocation of the burden of proof in state-created defenses. *See Cooper*, 517 U.S. at 367-68 ("[U]nlike *Patterson*, which concerned procedures for proving a statutory defense [*i.e.* extreme emotional disturbance], we consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right"). [33]

[33] Several states have relied on *Cooper* to analyze their states' procedures for determining ID. *See, e.g. Pennsylvania v. Sanchez*, 36 A.3d 24, 70 (2011); *Pruitt v. State*, 834 N.E.2d 90, 1203 (Ind. 2005); *State v. Williams*, 831 So. 2d 835, 859 (La. 2002); *Murphy v. State*, 54 P.3d 556, 573 (Okla. Crim. App. 2002); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. 2004). The Indiana Supreme Court overturned its precedent requiring defendants to prove ID by clear and convincing evidence. *See Pruitt*, 834 N.E.2d at 103. The precedent had disregarded *Cooper* because "execution of the [intellectually disabled] had not yet been held to violate the Federal Constitution." *Id*. at 101. Once *Atkins* established the constitutional nature of the right, however, *Cooper* applied and barred the state from requiring the defendant to prove his disability by clear and convincing evidence. *Id*. at 101-03 ("The reasoning

Mr. Franqui urges this Court to decide this issue and determine that the clear and convincing evidence standard burden of proof is too high, imposes a significant risk of an erroneous determination that a defendant is not ID, and violates Due Process and the Eighth Amendment.[34] Just as "[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability," *Hall,* 134 S. Ct. at 2001, so too does a State risk executing a defendant

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of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation . . . . [T]he implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law").

[34] States rejecting a clear and convincing standard have determined that no state interest justified the higher burden. *See Sanchez*, 36 A.3d at 70 ("[W]e are persuaded that a different allocation or standard of proof [than preponderance] are not necessary to vindicate the constitutional right of mentally retarded capital defendants recognized in *Atkins*, or to secure Pennsylvania's 'interest in prompt and orderly disposition of criminal cases'"); *Pruitt*, 834 N.E.2d at 103 ("We do not deny that the state has an important interest in seeking justice, but we think the implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence."); *Howell v. State*, 151 S.W.3d 450, 465 (Tenn. 2004) ("[W]ere we to apply the statute's 'clear and convincing' standard on light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional. . . . [Because] the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest. . . . The balance, under these circumstances, weighs in favor of the petitioner and justifies applying a preponderance of evidence standard at the hearing"); *Williams*, 831 So. 3d at 859-60 ("Clearly, in the *Atkins* context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded (life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded").

with ID by requiring him to prove his ID by clear and convincing evidence. This Court should remand to the lower court for reconsideration of its decision using an appropriate burden that does not impose a significant risk of an erroneous determination that Mr. Franqui does not suffer from ID. This is particularly true when the decision whether Mr. Franqui will live or die depends in large part on the lower court's determination that Mr. Franqui did not meet the clear and convincing evidence standard on the first prong because his lowest score was a 71 (2019-R 928) ("Even when applying the SEM to the various IQ exams administered to the Defendant over the years (75, 75, 76, 79, 83, and 92),[35] the lowest IQ score Franqui would receive would be a 71.[] Mr. Franqui has not shown *by clear and convincing evidence*, that his intellectual functioning is two standard deviations below the norm of 100") (emphasis added).

D. Mr. Franqui is Intellectually Disabled

i. The Lower Court's Order is Replete with Factual and Legal Errors

Without conducting a "holistic" analysis, the lower court determined that Mr. Franqui did not establish, by clear and convincing evidence, that he had ID (2019-R 922). It recognized that Mr. Franqui was contending that its analysis must be guided

[35] Mr. Franqui *never* obtained a full-scale IQ score of 92 on any test administered by any doctor who has evaluated him (2019-R 928). Nor did he obtain "numerous higher IQ test scores" outside of the range for ID even when considering the SEM (Id. at 924 n.3).

by the Supreme Court's decisions including *Moore v. Texas*, 137 S. Ct. 1039 (2017),[36] especially as to the adaptive behavior prong; indeed, the lower court acknowledged that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*" (2019-R 923) (citing *Moore*, 137 S. Ct. at 1050)).[37] In contrast, the lower court noted that the State was arguing that the Court should consider Mr. Franqui's strengths in determining deficits (2019-R 923). Ultimately the lower court decided that it would use the criteria set forth in the DSM-V in considering Mr. Franqui's claim (*Id*.).[38] Aside from the one reference to *Moore* at the beginning of its order, the lower court did not again cite to or refer to *Moore* again, nor did it cite to, refer to, or quote from any of the Supreme Court's decisions setting forth the proper analysis for an ID claim. It is as if those cases did not exist.

[36] After Moore's case was remanded, the Texas Court of Criminal Appeals determined that Moore did not suffer from ID. After granting certiorari review again, the Supreme Court reversed the Texas court's determination due to its failure to adhere to its prior opinion and the appropriate guidelines for analyzing an ID claim. *Moore v. Texas,* 139 S. Ct. 666 (2019). This Court's analysis, too, must be guided by both *Moore* decisions.

[37] For this proposition, the *Moore* Court referred to the AAIDD Manual and the Diagnostic and Statistical Manual-V [DSM-V]. *See* 2019-R 923 (AAIDD states that "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); (DSM-V states that inquiry should focus on "[d]eficits in adaptive functioning"; "deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits").

[38] But the court cherry-picked those parts of the DSM-V it chose to follow. It declined to apply the Flynn Effect (2019-R 927). Yet the DSM-V states: "Factors what may affect test scores include practice effects and the 'Flynn effect,' (i.e. overly high scores due to out-of-date test norms").

It is also as if those cases setting forth the proper parameters for conducting the requisite "holistic" analysis did not exist notwithstanding the fact that the lower court asked for, and Mr. Franqui provided, copies of the relevant cases for its review (2019-R 767-886).

To some degree, the lower court may have been confused by some seemingly conflicting language used by this Court when discussing "holistic" evaluations. For example, the lower court determined that Mr. Franqui did not establish the first prong because, in its view, the lowest score he achieved was a 71, which exceeded a score of 70 (2019-R 928). This conclusion appears to be drawn from opinions issued by this Court (both pre-*Hall* and post-*Hall*). *See, e.g. Wright v. State,* 213 So. 3d 881, 885 (Fla. 2017) ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled"); *accord Salazar v. State,* 188 So. 3d 799, 812 (Fla. 2016); *Nixon v. State,* 2 So. 3d 137, 142 (Fla. 2009).

But a "holistic" analysis requires consideration of the first prong in an interrelated fashion ***along with*** the evidence as to the other two prongs. *See Hall*, 134 S. Ct. at 1994 ("the medical community accepts that all of this evidence [on all three prongs] can be probative of intellectual disability, including for individuals who have an IQ test score above 70"); *id*. at 2001 (ID test is a "conjunctive and interrelated assessment" and "a person with an IQ score above 70 may have such

severe adaptive problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). The Court in its 2015 decision in *Oats* correctly noted that "these factors are interdependent" and that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." *Oats*, 181 So. 3d at 467-68. The subsequent decisions in *Wright* and *Salazar* do not reference the language in *Oats* and have sowed confusion.

First prong. The lower court first addressed the testimony of Dr. Taub, who was tasked by Mr. Franqui's counsel to review only the scores achieved by Mr. Franqui on the two tests (the WAIS-III and the Stanford-Binet IV) administered in 2003 by Dr. Block-Garfield. Mr. Franqui obtained a full-scale IQ score of 75 on the WAIS-III (*Id*. at 924). Dr. Taub testified that, considering the standard error of measurement (SEM),[39] Mr. Franqui's IQ score could fall under 70 but was most likely "between 70 and 80" (*Id*. at 925). If the Flynn Effect were to be applied to Mr. Franqui's full-scale IQ score of 75 on the WAIS-III given by Dr. Block-Garfield in 2003, the score would be adjusted down by two points to reflect a score of 73 (*Id*. at

[39] The lower court referred to the SEM as Dr. Taub's "hypothesis" or "theory" (2019-R 925). The SEM is neither; it is a recognized aspect to intelligence testing that must be considered when evaluating a defendant's IQ scores. *Hall v. Florida*, 134 S. Ct. 1986 (2014). Despite denigrating Dr. Taub's explanation of the SEM, the lower court acknowledged that the State's expert agreed with Dr. Taub (2019-R 927).

924-25). As for the Stanford-Binet IV, Mr. Franqui's full-scale score of 76 would be adjusted to a 71 with a Flynn Effect adjustment (*Id*.).

The lower court also addressed the testing given by Dr. Toomer in 1992 and 1993. The court disregarded the score obtained on the Revised Beta Test (a 60) because it was not a test that was recommended for determining ID (*Id*. at 928 n.9). Dr. Toomer reported that Mr. Franqui obtained a full-scale score of 83 on the WAIS-R test administered in 1993 (Id. at 926). An 83, adjusted for the SEM, would result in a score of 78 on the low end; it would also result in a 78 with a Flynn Effect adjustment (*Id*. at 926 n.7).[40]

The lower court next addressed the testing done by the State's expert, Dr. Suarez. Dr. Suarez used the most current test available, the WAIS-IV, and Mr. Franqui achieved a full-scale score of 75 (*Id.* at 927). Dr. Suarez opined that "taking the SEM into account, the Defendant's score ranged from 71-80" (*Id*.). The court noted that Dr. Suarez did not believe that an IQ score should be adjusted for the Flynn Effect but even if it were, Mr. Franqui would, in his opinion, still not be in the range of scores to qualify as ID (*Id.*).

The lower court never reached any firm conclusion about Mr. Franqui's true

[40] Literature demonstrates that individuals with ID score higher on the WAIS-R than on the Stanford-Binet IQ test. *See* Herman H. Spitz, *Disparities in Mentally Retarded Person's IQs Derived from Different Intelligence Tests*, 90 Am. J. of Mental Deficiency, 588, 589 (1986). This was certainly the case with Mr. Franqui (2019-R 924-25).

IQ score. All it did was reject the use of the Flynn Effect to adjust Mr. Franqui's IQ scores (Id. at 927-28).[41] The court did note that even when applying the SEM to the various scores achieved by Mr. Franqui over the years, "the lowest IQ score Franqui would receive would be a 71" (Id. at 928).[42] Roger Cherry had an IQ score of 72. After *Hall*, that did not mean he could not be found to be ID. *Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016). Here operating under the understanding that there was still a magical cut-off score for determining ID and failing to perform a "holistic" analysis, the lower court concluded that "Mr. Franqui has not shown, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100" (*Id.*).

An IQ of 71 is not a per se disqualifying score. "Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and Florida "may not

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[41] The lower court felt constrained by this Court's decision in *Quince v. State*, 241 So. 3d 58 (Fla. 2018), to not consider the Flynn Effect (2019-R 927-28). But this reliance is misplaced. In *Quince*, the Court found competent and substantial evidence to support the lower court's refusal to apply the Flynn Effect. *Quince*, 241 So. 3d at 62. Mr. Franqui does not know why Mr. Quince failed to demonstrate the medical community's acceptance of the Flynn Effect. But Mr. Quince's failure to make the requisite showing cannot be used here, where Mr. Franqui made such a showing. None of the experts denied the existence of the Flynn Effect, and the Court is required to apply the medical community's standards, as *Hall* and both *Moore* decisions clearly hold.

[42] As noted above, the lower court's recitation of some of the scores is factually incorrect. First, Mr. Franqui never obtained a full-scale IQ score of 92 on any test (2019-R 928). Second, Dr. Taub testified that Mr. Franqui's true IQ was "between 70 and 80" (*Id*. at 925). Thus, 71 is not the lowest IQ as the lower court erroneously wrote; 70 is, as even Dr. Suarez acknowledged (*Id*. at 1263).

execute anyone in 'the entire category of [intellectually disabled] offenders." *Moore,* 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). Florida defines ID as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18." Fla. R. Crim. P. 3.203 (b) (emphasis added). "Significantly subaverage general intellectual functioning" is understood as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *Id.* Two or more standard deviations from the mean score on an IQ test, which is 100, indicates that an IQ "approaching 70" or under is consistent with ID. *See Hall,* 134 S. Ct. at 2000-02; *Hall v. State*. 201 So. 3d 634-35 (Fla. 2016). Considering that it is the prevailing clinical standard to afford a five-point SEM to the tested individual due to the "statistical fact" that imprecision inherently exists in IQ testing, an IQ score of 75 or below is consistent with a diagnoses of ID. *See id.* As the Supreme Court clarified in *Hall v. Florida,* an IQ test's "standard error of measurement 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.'" *Moore, v.* 137 S. Ct. at 1049.

In *Hall v. State*, 201 So. 3d 628 (Fla. 2016), this Court determined that Freddie Lee Hall was ID and ineligible to be executed. The Court noted the various scores he had obtained over the years on recognized IQ testing instruments: on a WAIS-R

administered in 1986, Mr. Hall's score was an 80.[43] On a WAIS-III administered in 1995, Mr. Hall's score was a 74.[44] On another WAIS-III administered in 2002, Mr. Hall's score was 71. And on a WAIS-IV administered in 2008, Mr. Hall's IQ score was a 72.[45] Despite the fact that none of the scores reflected a score of 70 or below, the Court concluded that the various scores did not preclude a finding of intellectual disability: "when determining the eligibility for the death penalty of a defendant who has an IQ test score *approaching 70*, Florida courts may not bar the consideration of other evidence of deficits in intellectual and adaptive functioning." *Hall,* 201 So. 3d at 634-35.

In *State v. Herring*, 76 So. 3d 891 (Fla. 2011), this Court initially rejected Ted Herring's claim of intellectual disability because he did not obtain a score on an IQ test "below 70": he scored an 83 on the Wechsler Intelligence Scale for Children (WISC) administered in 1972 and an 81 on a 1974 WISC. *Id.* at 893 n.4. He obtained a 72 on a WISC-Revised in 1976. *Id*. On a 2004 WAIS-III, Herring obtained a full-scale score of 74. *Id*. Even adjusting the scores for the Flynn Effect, this Court

[43] On a WAIS-R given by Dr. Toomer in 1993, Mr. Franqui achieved a full-scale IQ score of 83, a score within the same statistical range as the 80 obtained by Mr. Hall (2019-R 926 & n.7).

[44] On a WAIS-III administered by Dr. Block-Garfield in 2003, Mr. Franqui achieved a full-scale IQ score of 75, a score within the same statistical range as the 74 obtained by Mr. Hall (2019-R 924).

[45] On a WAIS-IV administered to Mr. Franqui by Dr. Suarez in 2009, Mr. Franqui achieved a full-scale IQ score of 75, a score within the same statistical range as the 72 obtained by Mr. Hall (2019-R 1264-65).

rejected Herring's ID claim because "the scores do not fall below 70." *Id*. However, in light of *Hall v. Florida*, the Court reversed itself and vacated Herring's death sentence because he "has IQ scores *under 75* from tests administered both before and after age 18 and he has previously established deficits in adaptive functioning and significantly subaverage intellectual functioning." *Herring v. State*, 2017 WL 1192999 (Fla. 2017) (emphasis added). There were no new scores at issue in *Herring*; the lowest score he obtained on an authorized test (the WAIS-III from 2004) was a 74—well in line with the scores obtained by Mr. Franqui on even more updated testing instruments, *i.e*., the WAIS-IV.

And as noted *supra*, Roger Cherry, who also has had his death sentence vacated in light of *Hall v. Florida*, obtained full-scale IQ test scores of 72—also well in line with Mr. Franqui's scores. *See Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016).

Mr. Franqui's test scores are in line with—and in some cases are lower than—those at issue in *Hall*, *Herring*, and *Cherry*. A different result should not obtain here.

Second Prong. The second prong of the test for ID is addressed to deficits in adaptive functioning. The lower court explained that both Drs. Toomer and Suarez provided testimony as to the three general domains which experts look to when assessing this prong: the conceptual domain, the social domain, and the practical domain (Id. at 929-38). The lower court said that Mr. Franqui had not established this second prong by clear and convincing evidence.

Rather than being guided by the Supreme Court's abundant decisional law, the lower court stapled a chart from the DSM-V to its order, indicating that it "described what adaptive behavior would be expected in the three domains" (*Id*. at 929).[46] Not one case, much less a case from the Supreme Court, is cited, mentioned, or applied by the lower court in its section addressing deficits in adaptive functioning.

The lower court's disregard for the record (both the evidentiary hearing testimony and the entire record in Mr. Franqui's cases)[47] and the Supreme Court's

[46] The attachment from the DSM-V relied on by the court references four levels of severity for ID: mild, moderate, severe, and profound (2019-R 943-45). It is not clear that the lower court understood that the Eighth Amendment prohibited the execution of a defendant with ID in any of these categories of severity. "Mild levels of intellectual disability . . . remain intellectual disabilities" and States "may not execute anyone in 'the *entire category*' of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551. 563-64 (2005)).

[47] Following the hearing there was discussion between the parties and the lower court about the court's access to and review of the prior proceedings in both of Mr. Franqui's cases. Mr. Franqui stated his position: "Our position is that the Court does need to have to full record from both cases from beginning to now" (2019-R 1372). Initially, the lower court appeared loathe to review the record (Id. at 1372-73) ("The COURT: So, what are you suggesting, because I am sitting here, I have reviewed the Supreme Court Mandate, and my only edict is to determine whether or not Mr. Franqui was intellectually disabled, that's my roll [sic]"). The State agreed with Mr. Franqui's position (*Id*. at 1373) ("I think he's right. Judge, I think you have to take into account the defendant's action during the trial; and therefore you need to familiarize yourself"). Ultimately the court stated on the record that it would be "happy to review . . . [w]hatever it is you want me to review," but wanted the parties to tell it "what you would like me to review, or just point me in the direction, because I don't know" (*Id*. at 1373-74). But the court also said "please don't' make me read an entire record without at least focusing me in on what you think is important," which Mr. Franqui's counsel assured they would do in their

instruction on how to analyze the adaptive deficits prong is evident in its order. As to the conceptual domain,[48] the court's first sentence states: "No evidence was presented regarding the Defendant's preschool experience, except that his mother was absent and he did not know his father" (Id. at 929). This is incorrect. Dr. Suarez, the state's expert, testified that Mr. Franqui himself confirmed that he had been placed in special classes in Cuba until he ultimately came to the United States in 1979 or 1980 (*Id*. at 1219, 1223). Dr. Toomer explained that Mr. Franqui's related that Mr. Franqui had trouble in school in Cuba and those troubles continued when he arrived in the United States (*Id*. at 537). Mr. Franqui continued to manifest additional difficulties in terms of functional capacity relating to education, interpersonal relationships, and isolation from family members (*Id*. at 538). There ultimately came a time when Mr. Franqui dropped out of school (*Id*. at 538-39).

Based on the court's blanket statement that "no evidence" was presented about Mr. Franqui's preschool experience, it is clear that the court did not review the record. Mr. Franqui's uncle, Mario Sanchez-Franqui, testified at the Hialeah penalty phase that he was the brother of Leonardo's father, Fernando, although Leonardo did not find out until the day before the penalty phase that Fernando was not his biological father (T. Pen. Phase, No. 92-6089-B at 1583). Leonardo's mother was

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closing memo (*Id*. at 1374).

[48] The conceptual domain concerns deficits in academic skills involving reading, writing, math, time, and money (2019-R 929).

unstable and "a person who you can notice that is not normal" (*Id*. at 1587). She was a "good worker" but was also someone who "laughs at anything" and "walks tripping on things" (*Id*.). Leonardo was never properly attended to, was a "slow child, somewhat retarded to understand things" (*Id*. at 1591). "He was very slow always and in school the same" (*Id*.). Mr. Sanchez-Franqui always considered his nephew to be "retarded" and "slow in understanding" (Id. at 1600, 1609).

Clearly, the testimony of Dr. Toomer and Mr. Sanchez-Franqui is ample—and unrefuted—evidence of deficits in the Conceptual Domain that was completely overlooked by the lower court. The lower court does not appear to have understood how to evaluate the information and certainly did not adhere to the teachings of the Supreme Court cases.[49] The court wrote that "deficits in adaptive functioning must be *directly related* to an intellectual impairment," and that while it was it was not insensitive to the "losses Franqui suffered 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), *his adaptive deficits as a minor appear to be a result of behavioral or psychological issues rather than an intellectual disability*" (*Id*. at 930, 940) (emphasis added). The court clearly misinterpreted or failed to heed the law. There is no "nexus" between adaptive deficits and the deficits

[49] The State's expert, Dr. Suarez, was not even familiar with *Moore v. Texas*, and disagreed that he was guided by what the Courts say "in terms of how we evaluate the issues" (2019-R 1319).

in IQ from prong 1. This was one of the criticisms leveled at the Texas court in *Moore*, which had found that "Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related." *Moore*, 137 S. Ct. at 1051. However, the Supreme Court rejected that analysis as inconsistent with the medical community, which views childhood academic failures and trauma as "*risk factors* for intellectual disability." *Id.* (emphasis in original).[50] In other words, the Texas court, like the lower court in Mr. Franqui's case, viewed those few factors it decided to mention from Mr. Franqui's childhood not as "factors [] to explore the prospect of intellectual disability further" but instead as reasons "to counter the case for a disability determination." *Id. Accord Wright v. State,* 256 So. 3d 766, 775 (Fla. 2018) (defending its adherence to *Moore* because, *inter alia*, "we did not rely on ID risk factors as a foundation to counter an ID determination"); *Moore v. Texas*, 139 S. Ct. 666, 671 (2019) (noting that Texas court had again "departed from clinical practice" by requiring Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability rather than "emotional problems").

The lower court also referred to Mr. Franqui's school records but

[50] Even the State urged the lower court to consider Mr. Franqui's self-reported child abuse and poor scholastic achievement "as risk factors for intellectual disability as explained in *Moore*" (2019-R 706). But the court paid little heed to the State's candid admission.

misrepresented them and Dr. Toomer's testimony. The court wrote that Dr. Toomer acknowledged that Mr. Franqui was an average "C" student (2019-R 930). This is a misleading and inaccurate statement. What Dr. Toomer actually testified on cross was that he agreed with the prosecutor's question that *he recalled testifying* at Mr. Franqui's penalty phase that Mr. Franqui was an average C student (2019-R 572-73).[51] However, Dr. Toomer also testified at the evidentiary hearing that Mr. Franqui's school records reflected Ds and Fs and that he dropped of "trauma in the home situation, in the home environment, and erratic functioning" (*Id*. at 589).[52] The lower court also chose not to mention Dr. Toomer's testimony about his discussion with Mr. Franqui's uncle, who told him that Mr. Franqui was never properly attended to, was a "slow child" and "somewhat retarded to understand things" when he was a child in Cuba (*Id.* at 619).

Most significantly, the lower court wrote that there was no evidence that Mr.

[51] Dr. Toomer was being generous in his non-confrontational manner with the prosecutor asking this question because his penalty phase testimony reveals no such testimony. At the penalty phase in the Hialeah case, Dr. Toomer testified consistently with his evidentiary hearing testimony that Mr. Franqui's school records overall reveal "a pattern of very poor performance, very low grades" and "what stands out, is that his performance or lack thereof corresponds to the traumatic periods on his life" (T. Pen. Phase Case No. 92-6089 at 1483).

[52] Indeed, Dr. Suarez agreed that Mr. Franqui was hardly an average "C" student (2019-R 1226) (noting that in 7th grade, Mr. Franqui obtained an A grade, one C, two Ds, and two Fs in the first grading period; one C, one D, and four Fs in the second grading period; one D and 5 Fs in the third grading period, and 6 Fs in the fourth grading period).

Franqui was ever in special classes as a child. This reflects a further failure by the court to review the record; indeed, this is also what the Dr. Suarez had believed before on cross he was shown specific portions of the school records (*Id* at 1309-10). Some of the school records, which had been introduced into evidence at the penalty phase in the Hialeah case, contained an entry "SR" (*Id*. at 1310). Dr. Suarez did not know "what that is" but a careful review of the document revealed that the entry "SR" stood for "Satisfactory Progress in Remedial Basic Skills" (*Id*.). Another entry on the school records relating to the "SR" explained:

> Students who are not achieving within the range appropriate or acceptable for their grade level may not meet the Dade County Public School's basic skill standards for promotion will receive a grade of satisfactory, remedial, or unsatisfactory remedial.

(*Id*. at 1310-11). This record referred to when Mr. Franqui was in the 5th grade (*Id*. at 1311). Dr. Suarez said "that was probably right after he came from Cuba" without also having carefully reviewed Mr. Franqui's school records from the 6th grade (*not* "right after" Mr. Franqui came from Cuba) which reveal several entries "U.R." (*Id.*). "U.R." refers to a designation "Unsatisfactory progress in remedial basic skills program" (*Id*.). Under this designation appears the following explanation:

> *Students who are not achieving within the range of appropriate or acceptable for their grade level*, and may not meet Dade County Public Schools basic skill standards for promotion will receive a grade of satisfactory remedial, or ***unsatisfactory remedial***.

(*Id*.). Another school record from 1986 revealed an entry that Mr. Franqui's report card was being withheld because "student owes for textbook"; another entry contained a statement to the effect that something was sent to an address for Mr. Franqui but was returned back to the school (*Id*. at 1312).

It is clear that Dr. Suarez, who has never found a defendant to be ID during his prolific experience as an expert testifying for the State in capital proceedings,[53] did not carefully review the record in Mr. Franqui's case; but neither did the lower court. As the State elicited in its redirect of Dr. Suarez, Mr. Franqui actually was in remedial classes *in Spanish,* his native tongue (*Id*. at 1354). That he was placed in remedial classes *in Spanish* utterly undercuts Dr. Suarez's immediate attempt to explain away the fact by retorting that this remedial class with "right after" Mr. Franqui arrived from Cuba and presumably was not yet conversant in English. Dr. Suarez's immediate reaction to favor the State was also exhibited when he was asked, on redirect, whether Mr. Franqui was ever held back in school; Dr. Suarez answered "no" (*Id*. at 1355). However, on re-cross, Dr. Suarez was shown the school records for the 1985-86 school year that contained an entry stating "**Not promoted, summer school required**" (*Id*. at 1365). The lower court never once mentions these

[53] Unlike Dr. Toomer, Dr. Suarez is not board certified in any field; and, unlike Dr. Taub, Dr. Suarez is not published in the area of ID or ID testing instruments (2019-R 1292). After offering that he had prior experience in an academic setting in the area of ID, in reality Dr. Suarez's puffery was exposed after he admitted he had only two short teaching stints in the early 1970s (*Id*. at 1293).

facts that exposed the bias of, and the factual frailty in, Dr. Suarez's conclusions.

The thrust of the remainder of the lower court's analysis of the second prong centered on ignoring the record or scouring it to find a "strength" to offset or cancel out the deficits. For example, the court noted that when Mr. Franqui worked for his uncle at the tire store, "his uncle paid his bills instead of giving him money" (*Id*. at 936). Rather than conceding this as a deficit, as Dr. Toomer did and as the law requires, the court found no deficit because "Franqui worked for his uncle for only a short time" (*Id*.). The court acknowledged Mr. Franqui's "erratic behavior" after his young brother died was a "deficit in adaptive behavior," but nonetheless shrugged it off as merely "short term" (Id. at 935 & n.10). The court noted that when Mr. Franqui worked at the golf course his job was repetitive and did not require conceptual skills (in other words, evidence of an adaptive deficit in the Practical Domain), yet rather than accepting that factor as an adaptive deficit, as the law requires, the court looked to testimony from his supervisor that "when he finished one task, he would go perform another, without being told to do so" (*Id*. at 936). But this is not what the supervisor actually said; in reality, Mr. Barrechio testified that Mr. Franqui never initiated anything new on his own accord (Id at 185). All Mr. Franqui did was to complete a task that had already been started and only if Barrechio "could not be found" (*Id.*). Additionally, the court wrote that there was "no testimony Franqui was ever fired from a job" (*id*.), yet it chose not to mention

Dr. Suarez's testimony that he *was* fired from his job at the marina (*Id*. at 1228).

The lower court also unduly emphasized Mr. Franqui's alleged "skills" he exhibited while in the structured environment of death row despite the Supreme Court's now-twice admonition that such information is of limited—if any—relevance to an ID determination. *Moore*, 137 S. Ct. at 1050 ("In addition, the CCA stressed Moore's improved behavior in prison . . . Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is") (citing DSM-V, at 38; AAIDD-11 User's Guide 20); *Moore*, 139 S. Ct. at 671 (the length and detail of court's discussion of prison behavior "is difficult to square with our caution against relying on prison-based development"). The court also unduly stressed that Mr. Franqui's crimes "belie" adaptive deficits (2019-R 937).[54] This, too, is contrary to medical standards. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (while "the underlying facts of Brumfield's crime might arguably provide reason to think Brumfield possessed certain adaptive skills," persons with ID may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation"). The court trafficked in lay stereotypes about persons

[54] In fact, the lower court concluded that Mr. Franqui's crimes were the "most telling" evidence of his lack of adaptive deficits in the conceptual domain (2019-R 931). *See also id*. at 937 ("Franqui's crimes also belie a claim of a deficit in the practical domain").

with ID; it endorsed Dr. Suarez's view that "it is uncommon for someone who is [ID] to possess a driver's license" (2019-R 936). But "mildly intellectually disabled individuals can obtain driver's licenses, fill out job applications, and obtain and maintain employment." *Pruitt v. Neal*, 788 F.3d 248, 268 (7th Cir. 2015).

In short, the lower court misapplied the law and, in many cases, made significant factual errors. That, combined with the fact that the court imposed an unconstitutional burden of proof, establish that the lower court's order must be reversed with directions that the evidence in support of Mr. Franqui's ID claim be assessed under the proper burden of proof and in a manner consistent with the law.

Third prong. The lower court also said that Mr. Franqui failed to prove, by clear and convincing evidence, that the onset of his intellectual and adaptive deficits manifested prior age 18 (2019-R 938). But the court's order evinces its misunderstanding of the law and the proof needed to establish this third prong. Indeed, the cases cited by the court all refer to the second prong, focusing on the lack of adaptive deficits presented in those cases, not the third (Id. at 938-40). There is no mention of any evidence relevant to the third prong in the part of the order purporting to address it.[55]

[55] The State's post-hearing memo did not address the third prong because in its view Mr. Franqui had not met the first two prongs (2019-R 707 n.12). In other words, the State encouraged the lower court to not perform the holistic evaluation this Court ordered.

All that is required to satisfy the third prong is "evidence of the disability during the developmental period." *Oats,* 181 So. 3d at 468. *See also Brumfeld*, 135 S. Ct. at 2282 (third prong simply requires defendant demonstrate that his "intellectual deficiencies manifested while he was in 'the developmental stage'—that is, before he reached adulthood"). The issue is decidedly ***not*** whether Mr. Franqui has "concurrent" deficits after the developmental stage of his life, "suffered from any adaptive deficits as an adult" or whether he has exhibited any deficits "in society" or "while incarcerated" (2019-R 940-41). This is because the third prong is addressed to distinguishing a person with ID, the symptoms of which had to have shown themselves during the developmental period, from other conditions that may cause a person's intelligence and functioning to decline in later life, like dementia. *Oats*, 181 So. 3d at 469.

In discussing the third prong, the lower court made no attempt to address the abundant evidence that Mr. Franqui's deficits manifested prior to age 18. No mention is made of his school records. No mention is made of the fact that he was place in special remedial classes (in Spanish no less). No mention is made of the fact that he was held back a year in school. No mention is made of the fact that Mr. Franqui was also placed in special classes while a young child in Cuba. No mention is made of the fact that, according to his uncle, Mr. Franqui, as a young child in Cuba, was never properly attended to, was a "slow child, somewhat retarded to

understand things" (T. Pen. Phase, No. 92-6089-B at 1583), and "very slow always and in school the same" (*Id*.). Mr. Sanchez-Franqui always considered his nephew to be "retarded" and "slow in understanding" (*Id*. at 1600, 1609).

Because the lower court either misunderstood the law or felt emboldened not to meaningfully address the copious evidence from Mr. Franqui's developmental years by the State's failure to argue the third prong in its post-hearing memo, Mr. Franqui was deprived of the "holistic" evaluation mandated by this Court. There is no finding that Mr. Franqui did not meet the third prong because, in actuality, the lower court did not address it despite believing that it had.

ii. Conclusion

This Court remanded for an evidentiary hearing and for the lower court to conduct a "holistic" evaluation of all the evidence to determine if Mr. Franqui's death sentences were constitutional. No "holistic" evaluation was conducted. An unconstitutional burden of proof was imposed on Mr. Franqui. Mr. Franqui is intellectually disabled. This cause should be remanded for the "holistic" evaluation intended by this Court under a burden of proof consistent with the Eighth and Fourteenth Amendments.

II[56]

HURST V. FLORIDA APPLIES AND INVALIDATES MR. FRANQUI'S DEATH SENTENCES BECAUSE THERE HAS BEEN NO FINAL DETERMINATION OF WHETHER HE IS INTELLECTUALLY DISABLED AND THUS INELIGIBLE FOR EXECUTION.

A. Introduction

On June 12, 2001, § 921.137, Fla. Stat. (2001), was enacted. It provided: "A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled." The statute required a defendant who intended to assert ID as a defense to give notice of his intention to offer such evidence at the penalty phase. The statute further provided that before the judge could impose a death sentence, he or she had to determine whether the defendant was ID. *See* § 921.137 (4) ("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."). The statute also provided: "This section does not apply to a defendant who was sentenced to death before June 12, 2001."

On June 20, 2002, the United States Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002). Therein, the Supreme Court wrote:

[56] This argument and the one set forth in Argument III, *infra*, are meant to supplement the briefing already before the Court which has yet to be addressed. *Franqui*, 211 So. 3d at 1027 n.2.

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a[n] [intellectually disabled] criminal.

Id. at 321. *Atkins* held that "executing a person with an intellectual disability contravenes the Eighth Amendment." *Oats v. State*, 181 So. 3d 457, 466 (Fla. 2015).

After *Atkins* issued, this Court adopted Fla. R. Crim. P. 3.203. *Amendments to Fla. R. Crim. P. and Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). Rule 3.203 incorporated the legislatively enacted definition of ID. *Id*. at 564 ("the Legislature created section 921.137, Florida Statutes, which bars the imposition of death sentences on [intellectually disabled] persons and establishes a method for determining which capital defendants are [intellectually disabled"). Rule 3.203 then provided the manner by which capital defendants were entitled to assert ID as a bar to execution. *Id*. at 565-66 ("The first category was applicable to [ID] claims that arose in all trials that began after the effective date of the rule—future cases. The second category applied to all trials that began on or before the effective date of the rule but where a sentence had not been imposed and affirmed on direct appeal on or before the effective date of the rule—nonfinal cases. The final category applied to all trials in which a prisoner had been convicted of first-degree murder and sentenced to death and where the conviction and sentence had been affirmed on direct appeal

on or before the effective date of the rule—final cases.").[57]

In *Zack v. State*, 911 So. 2d 1190 (Fla. 2005), this Court heard an appeal from the denial of a 3.851 motion that had only challenged trial counsel's effectiveness in failing to inform his intellectually disabled client that he would be cross-examined by the State when he testified. The motion had not pled an ID claim under Rule 3.203. On appeal, Zack asserted his ID as precluding the imposition of a death sentence. This Court ruled that Zack's claim fell under Rule 3.203 and should be addressed under that rule. *Id.* at 1202.

In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), an ID bar-to-execution claim was first raised while an appeal from the denial of a successive 3.851 motion was pending in this Court. Cherry had filed another 3.851 motion in the wake of *Atkins*. The State moved this Court to relinquish jurisdiction so that the circuit court could hear the claim. After Rule 3.203 went into effect, this Court abated Cherry's appeal and "relinquished jurisdiction to the circuit court for a determination of [ID] pursuant to rule 3.203." *Id.* at 705. After conducting an evidentiary hearing, the circuit court denied Cherry's claim solely on the basis of the IQ score of 72, even though the two court-appointed mental health experts agreed that Cherry was ID.

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[57] As a matter of procedure, Rule 3.203 provided that when the defendant gave notice that he intended to assert ID, the judge should hear the evidence and make a determination pre-trial. *See Amendments to Fla. R. Crim. Pro. And Fla. R. App. Pro*, 875 So. 2d at 567 (Cantero, J., concurring) ("the rule, as adopted, provides for the determination of mental retardation to be made, in most cases, before trial.").

On appeal, this Court relied upon of the language in §921.137 and affirmed: "Because the circuit court applied the plain meaning of the statute, it did not err in its conclusion that Cherry failed to meet this first prong." *Cherry*, 959 So. 2d at 713. This Court's opinion in *Cherry* shows that §921.137 governs even in cases that were final before June 12, 2001.[58] Thus, § 921.137 (8) has been treated as a nullity.

In *In re Amendments to Fla. R. Crim. P.*, 26 So. 3d 534 (Fla. 2009), this Court amended Rule 3.203 "to remove obsolete references to time periods in 2004, while leaving intact the requirement that a motion for a determination of [ID] as a bar to imposition of the death penalty shall be filed not later than ninety days prior to trial or as ordered by the court."

B. Mr. Franqui's Death Sentences Are Not Final Unless and Until This Court Affirms the Lower Court

Under Florida's statutory scheme, when a defendant raises an ID bar to execution and makes a prima facie showing that he might be ID, a death sentence may not be imposed unless the judge conducts an evidentiary hearing and concludes that the defendant failed to prove ID. If, after an evidentiary hearing, the judge denies the ID claim and imposes a death sentence, this Court hears an appeal. The death sentence in those circumstances is not final until this Court affirms the circuit court's denial of the ID claim.

[58] This Court denied Cherry's direct appeal in 1989. *Cherry v. State*, 544 So. 2d 184 (Fla. 1989).

In 2017, this Court determined that an evidentiary hearing was required on Mr. Franqui's ID claims. *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017). Under §921.137, Mr. Franqui cannot be subject to a death sentence until a judge has heard the evidence of ID and rejects the defense under constitutionally appropriate standards.[59] Further, any death sentence is not final until this Court has reviewed the judge's rejection of the ID defense.

In *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), Card was convicted of murder committed on June 3, 1981, and his conviction and death sentence were affirmed on direct appeal. *Card v. State*, 453 So. 2d 17 (Fla. 1984). Card's conviction and death sentence were final on November 5, 1984, when the United States Supreme Court denied his certiorari petition. *Card v. Florida*, 469 U.S. 989 (1984). This Court later affirmed the denial of Card's 3.850 motion, and two petitions for a writ of habeas corpus. *Card v. State*, 497 So. 2d 1169 (Fla. 1986); *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987). A successive 3.850 motion which was summarily denied presented a claim that after the jury had recommended death, the judge had the State draft the sentencing order defense counsel's knowledge. On appeal, this Court remanded for an evidentiary hearing. *Card v. State*, 652 So. 2d 344, 345 (Fla. 1995).

On remand, Card prevailed and the circuit court ordered a new penalty phase

[59] The ID claim must be assess under a constitutional burden of proof. *See* Argument I, *supra*.

proceeding; the State did not appeal. This Court did not consider Card's death sentence final until the new penalty phase was complete, a sentencing order in compliance with the statute entered, and the direct appeal concluded. *Card v. State*, 803 So. 2d 613 (Fla. 2001). Because the United States Supreme Court did not deny certiorari review until June 28, 2002, this Court determined that Card's death sentence was not final until that date. *Card,* 219 So. 3d at 48.

Under the same logic, Mr. Franqui's death sentence is not final unless and until this Court affirms the order at issue in this appeal. *See* Rule 3.203 (e). This is consistent with the logic of and holding in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), a case where a defendant's direct appeal from his burglary conviction had been dismissed in 1996, but the appellate court in 2002 granted the defendant the right to file an out-of-time appeal. The Supreme Court held that the burglary conviction was not final until the out-of-time appeal was denied. *Id.* at 120.

This is Mr. Franqui's appeal of the circuit court's rejection of his ID defense after this Court held that he had made a prima facie showing of ID such that an evidentiary hearing and written findings were required. Under §921.137 and Rule 3.203, this is the direct review of the denial of Mr. Franqui's ID defense. This Court must judge the circuit court's denial on the basis of current law. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (Fla. 1987).

When this Court remanded for an evidentiary hearing in Mr. Franqui's case,

it relied on *Hall v. Florida*, 134 S. Ct. 628 (2016), and *Oats v. State*, 181 So. 3d 457 (Fla. 2015).[60] *Franqui*, 211 So. 3d at 1030-32. In other words, this Court did not look to the governing law as of the date that Mr. Franqui's death sentences became final. And since this Court remand Mr. Franqui's case, the Supreme Court has issued *Moore v. Texas*, 137 S. Ct. 1039 (2017). Surely, it governs in this appeal. Indeed, the State has conceded that it does. *See* 2019-R 1136 ("The State is in no way suggesting at all that this court could not look at any precedent or the court should not consider the current medical conditions cited by *Moore v. [Texas]* or any other Supreme Court cases").

As to whether Mr. Franqui was entitled to a jury determination of his ID defense in 2017, this Court must look to *Hurst v. Florida*, 136 S. Ct. 616 (2016). In fact, that is precisely what this Court did in *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2017), when it concluded that the right to trial by jury does not include a defendant's intellectual disability defense. *Id*. at 1130 ("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.").

Mr. Franqui contends that this Court's ruling in *Oats v. Jones* erred in its

[60] This Court also cited *Walls v. State*, 213 So. 3d 340 (Fla. 2016), as determining that *Hall v. Florida* applied retroactively. *Franqui*, 211 So. 3d at 1031.

reading of *Hurst v. Florida*. When a defendant makes a prima facie showing of ID, a death sentence cannot be imposed unless the presiding judge enters written findings of fact. *See* Rule 3.203 (e). This requirement implicates the holding in *Hurst. Hurst*, 136 S. Ct. at 624 ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding."). While this Court concluded otherwise in *Oats v. Jones*, the very fact that this Court rejected the claim on the basis of its own reading of *Hurst v. Florida* shows that *Hurst v. Florida* is the governing law as to Mr. Franqui's death sentences. His death sentences are not final, and will not be until this Court's direct review of the rejection of his ID claim is completed.

Accepting this Court's ruling in *Oats v. Jones* does not change the fact that this appeal constitutes the direct appeal of a trial judge's rejection of an ID defense and the determination that Mr. Franqui is eligible for a death sentence. In *Hooks v. Workman,* 698 F.3d 1148 (10th Cir. 2012), Hooks' death sentence had become final in 1996. The Oklahoma state courts had denied collateral relief and Hooks' federal habeas petition was pending in federal district court when the decision in *Atkins v. Virginia* issued. Shortly thereafter, Hooks' petition was denied and he appealed to the Tenth Circuit Court of Appeals. When Hooks filed a second application for postconviction relief in the Oklahoma state courts alleging that his execution would

violate the Eighth Amendment under *Atkins,* the Tenth Circuit held his federal appeal in abeyance. Hooks' *Atkins* claim was heard on the merits by the state courts and his motion for collateral relief was denied in an unpublished order by the Oklahoma Court of Criminal Appeals. Hooks then pursued his *Atkins* claim in federal court. When it reached the Tenth Circuit, that court held that Hooks's *Atkins* claim was "`postconviction' only in the strict chronological sense" because it was "the first designated proceeding" at which he could raise an ID claim. *Hooks*, 698 F.3d at 1183.

The evidentiary hearing on Mr. Franqui's ID claim was a "postconviction" hearing only in the chronological sense. Functionally, the proceeding was the pre-trial hearing provided for under Rule 3.203. *See Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). Functionally, Mr. Franqui's death sentences are not final until this Court determine his current appeal because *Hurst v. Florida* is now the law.

C. Mr. Franqui's Death Sentences Are Invalid Under *Hurst v. Florida*

Because Mr. Franqui's death sentences are not final until the direct review of his ID defense is completed, *Hurst v. Florida* governs. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Under *Hurst v. Florida*, Mr. Franqui was entitled to have the jury

determine whether the State had proven the existence of sufficient aggravators to justify a death sentence, and whether those aggravators outweighed the mitigators. In *Hurst v. Florida*, the Sixth Amendment was violated because the judge alone made the findings. *Hurst,* 136 S. Ct. at 622. This same defect is present in Mr. Franqui's cases. Because the juries here cases did not unanimously recommend death, the death sentences cannot stand. A remand for further proceedings is required.

III

MR. FRANQUI'S DEATH SENTENCES ARE INVALID UNDER *HURST V. STATE* AND RESENTENCING PROCEEDINGS ARE WARRANTED

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court, over Justice Canady's dissent, held that the statutorily defined facts "necessary for the jury to essentially convict a defendant of capital murder . . . are also elements that must be found unanimously by the jury." *Id* at 53-54. A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law, not a procedural rule. The analyses used to determine when a new procedural rule is to be applied retroactively do not apply to the judicial decisions construing statutes setting forth substantive criminal law. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[B]ecause *Teague[v. Lane*, 489 U.S. 288 (1989)] by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court

decides the meaning of a criminal statute enacted by Congress.").

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the United States Supreme Court indicated that substantive rulings regarding the scope of a criminal statute should be applied retroactively: "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms. . . " *Id*. at 351-52 (citation omitted). "Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Id*. "A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." *Id*. at 354.

In *Richardson v. United States*, 526 U.S. 813, 817-18 (1999), the Supreme Court was called upon to construe a criminal statute, a construction that was subsequently found by the circuit courts to be a change in substantive law that applied retrospectively. "By deciding that the jury had to agree unanimously on each of the offenses comprising the 'continuing series' in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law." *Santana-Madera v. United States*, 260 F.3d 133, 138 (2nd Cir. 2001) (citing *Bousley*,

523 U.S. at 620)). *See Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002).

Under the Due Process Clause, a judicial decision construing a statute in an unanticipated way must apply retrospectively to the either the date the statute was enacted or to the point in time that the meaning of the statutory language evolved. *See Fiore v. White*, 531 U.S. 225 (2001); *Bunkley v. Florida*, 538 U.S. 835 (2003); *In re Winship*, 397 U.S. 358 (1970). When a court construes a statute and identifies **the elements of a statutorily-defined criminal offense, the ruling constitutes substantive law** and dates to the statute's enactment. *Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) (**"This case does not raise any question concerning the possible retroactive application of a new rule of law**, . . . because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. **It merely explained what § 924 (c) had meant ever since the statute was enacted**."). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).

Mr. Franqui is mindful of this Court's opinion in *Foster v. State*, 258 So. 3d 1248 (Fla. 2018). There, this Court overlooked—if not disregarded—the express language in *Hurst v. State* regarding labeling: "These statutes and the rule of procedure illustrate that the *Hurst* penalty phase findings are not elements of the

capital felony of first-degree murder." *Foster*, 258 So. 3d at 1252. Despite nitpicking as the label, this Court said that the statutorily required facts were: "findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred." *Id*.

The label attached to the required fact finding is not significant; what matters is how the statutorily-identified facts function. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").

To be clear, Mr. Franqui's claim is not premised upon "new capital procedural statutes." Mr. Franqui's claim is premised upon this Court's ruling in *Hurst v. State*, construing the capital statute in effect since before 1991 and the requirement that before a judge could imposed a death sentence, the statute required him to find that the statutorily identified facts had been proven. Under *Fiore v. White*, the statutory construction in *Hurst v. State* based on the plain language of the statute dates to the enactment of the statutory language. In fact, this Court in *Hurst v. State* noted that the sentencing statute "in the past required, and continues to require, additional

factfinding that now must be conducted by the jury." *Hurst*, 202 So. 3d at 53 (citing Parker v. Dugger, 498 U.S. 308 (1991)).

In *Lebron v. State*, 799 So. 2d 997, 1019-20 (Fla. 2001), this Court found that consideration of an aggravator enacted after the murder was occurred was improper because "**it is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed**." *Id*. (citing *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989) (emphasis added). In *Smart v. State*, 114 So. 3d 1048, 1049 (Fla. 1st DCA 2013), the court relied on *Lebron* to hold that it is the law on the date of the criminal offense that governs as to what offense was committed and as to what punishment can be imposed. The firmly established law relied on in *Lebron* is consistent with the due process requirement that a criminal statute must give fair warning as to what conduct constitutes a criminal offense. *See Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). It is also consistent with the Ex Post Facto Clause of the United States Constitution and with the Savings Clause of the Florida Constitution.

The Ex Post Facto Clause, Article 1, § 10 of the United State Constitution forbids the states (including Florida) from applying legal changes in the law retroactively when doing so would operate to a criminal defendant's disadvantage. The Supreme Court explained the logic behind the Ex Post Facto Clause in *Weaver*

v. Graham, 450 U.S. 24, 28-29 (1981): "the Framers sought to assure that legislative Acts give fair warning of their effect." [61]

Article X, section 9 of the Florida Constitution contained what was commonly referred to as the Savings Clause. Prior to passage of Amendment 11 on November 6, 2018, Article X, section 9 of the Florida Constitution, i.e. the Savings Clause, provided: "**Repeal of criminal statutes**.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." It has been part of the Florida Constitution since 1885. In 2015 this Court explained that the purpose of the "Savings Clause" is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime. *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015).

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court construed a criminal statute enacted in 1986 to include an element that courts had not anticipated. Justice Alito in his dissent expressed his concern that the statutory construction adopted in *Rehaif* means that those who have been convicted and imprisoned under the statute can now challenge their convictions, even if the conviction is final and the challenge has to be presented in habeas petition:

> Those for whom direct review has not ended will likely be entitled to a new trial. Others may move to have their

[61]The Supreme Court observed "the Ex Post Facto Clause does not merely protect reliance interests. It also reflects principles of 'fundamental justice.'" *Peugh v. United States*, 569 U.S. 530, 545, 546 (2013).

> convictions vacated under 28 U.S.C. § 2255, and those within the statute of limitations will be entitled to relief if they can show that they are actually innocent of violating § 922 (g), which will be the case if they did not know that they fell into one of the categories of persons to whom the offense applies. Bousley v. United States, 523 U.S. 614, 618–619, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998). If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts, in a great many cases, may be required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past.

Rehaif, 139 S. Ct. at 2213 (Alito, J., dissenting). Justice Alito's citation to *Bousley* is telling. He sees the ruling in *Rehaif* as dating back to the 1986 enactment of the statute at issue. And he sees that opening the door to habeas petitions challenge convictions that have become final. *See Fiore v. White*.

The Due Process Clause places limits on the use of retroactive analysis when the case law at issue concerns substantive law. These limits were explained in *Bunkley v. Florida*. There, this Court had issued a decision changing substantive criminal law. The Supreme Court found that due process was not satisfied by the Court's use of the retroactivity analysis set out in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), to rule that the change in substantive law was not retroactive.

On June 4, 2019, in an appeal pending before this Court, the State of Florida acknowledged that the *Witt* retroactivity analysis set out in *Witt v. State* was not applicable to issues arising from a judicial decision announcing an unanticipated

construction of a criminal statute, as is the situation here. *See* Reply to Response to Order to Show Cause at 6, *Reed v. State*, Case No. SC19-714 ("*Witt* limits retroactivity analysis to decisions that are 'constitutional in nature,' thereby excluding statutory interpretation decisions from its ambit."). The State's concession in *Reed* means that *Witt* does not provide the proper analysis of whether the statutory construction set forth in *Hurst v. State* governs as to the proper construction of the statute at the time of Mr. Franqui's case.

Finally, should be noted that the Supreme Court has recently granted certiorari review in *McKinney v. Arizona*, _ U.S. _, 2019 WL 936074 (June 10, 2019). There, the Arizona Supreme Court had ruled it's the conviction's the finality date that matters for retroactivity purposes. *State v. McKinney*, 426 P.3d 1204 (Ariz. 2018). This is in stark contrast to this Court's handling of its ruling in *Hurst v. State.* It has found its decision in *Hurst v. State* required a death sentence vacated and a new penalty phase ordered even though the conviction was final in 1984. *Card v. Jones*, 219 So. 3d 47 (Fla. 2017).

CONCLUSION

In conclusion, in light of these arguments and those already briefed by Mr. Franqui in both of his cases, Mr. Franqui submits that his death sentences must be vacated at this time.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2019, I filed the foregoing pleading on this Court's electronic filing server, which will serve all opposing counsel of record in this case.

/s/ Todd G. Scher
TODD G. SCHER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14-point Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ Todd G. Scher
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