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

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
141 NE 30th Street
Wilton Manors, FL 33334
Tel: 305-984-8344
martymcclain@comcast.net
Counsel for Defendant

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
1722 Sheridan Street, Suite 346
Hollywood, FL 33020
Tel: 754-263-2349
TScher@msn.com
Counsel for Defendant

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REPLY TO STATEMENT OF CASE AND FACTS

Appellee's "Statement of the Case and Facts" reproduces portions of the direct appeal opinion in the North Miami case (Answer Brief ["AB"] at 2-4), but makes no mention of the Hialeah case, the other case in which Mr. Franqui was sentenced to death; both cases were consolidated for the evidentiary hearing. *See Franqui v. State*, 211 So. 3d 1026, 1027, 1032 n.6 (Fla. 2017). As Mr. Franqui noted in his Initial Brief, he was relying on the relevant procedural history of both cases as set forth in the Court's 2017 opinion (Initial Brief ["IB"] at 1). It was at the Hialeah penalty phase where information was presented in connection with the issues in the instant proceeding; for example, Dr. Toomer and Mr. Franqui's uncle, Mario Franqui Sanchez, testified at the Hialeah penalty phase; Mr. Franqui's school records from the Dade County Public School system were also introduced into evidence during the Hialeah penalty phase.[1]

Citing the Court's opinion affirming the denial of Mr. Franqui's initial 3.851 motion in the North Miami case, Appellee writes, in the parenthetical "describing"

[1] The Appellee complains that Mr. Franqui "never requested to admit the school records into evidence for substantive purposes" at the evidentiary hearing (AB at 50). However, the State has waived any complaint by not objecting when Mr. Franqui questioned Dr. Toomer about the school records. *See Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State"). Both parties referenced the school records at the hearing, and, moreover, the records were introduced into evidence during the Hialeah penalty phase—again without objection from the State (Trial T. 1473-74 in Hialeah case).

the holding, that the Court found trial counsel "not deficient and Dr. Toomer's testimony was not credible" (AB at 4) (citing *Franqui v. State*, 965 So. 2d 22 (Fla. 2007)). This misrepresents the Court's opinion. What the Court *actually* wrote was that trial counsel in the *North Miami* case reasonably declined to present Dr. Toomer at the *North Miami* penalty phase because the trial judge in the *Hialeah* case had questioned the bases of Dr. Toomer's opinions about statutory mitigation and whether Mr. Franqui was "mentally retarded."[2] *Id.* at 30-31. This Court never make any independent credibility determination about Dr. Toomer.[3]

ARGUMENT I

A. Clear and convincing evidence burden of proof.

Mr. Franqui has consistently challenged the constitutionality of the clear and convincing burden of proof (2019-R 888-90; 903-04; 947-53; IB at 31-38; ROA in

[2]The 1993 Hialeah penalty phase occurred well before the advances in diagnosis of ID, and the IQ scores on more advanced testing presented below were unavailable in 1993.

[3] Indeed, the Court had no issue with Dr. Toomer's credibility when rejecting an ineffectiveness claim based on trial counsel's failure to present the testimony of another expert witness, Dr. Brad Fisher, at the Hialeah penalty phase. The Court noted Dr. Fisher's testimony "would have been offset by the fact that his testimony was contrary to Dr. Toomer's on a key element in mitigation in Franqui's penalty phase case—that Franqui had substantial mental deficits." *Franqui v. State*, 59 So. 3d 82, 99 (Fla. 2011). In other words, Dr. Toomer was "credible" enough in his testimony about "Franqui's difficulties and deprivations early in life and about his mental deficits," *id*. at 99, to justify the Court's conclusion that failure to call a different expert was reasonable.

Case No. SC15-1441 at 29). Appellee avoids directly addressing his Fourteenth Amendment challenge, focusing only on the Eighth Amendment challenge to the extent that it appears to even understand it.

1. Eighth Amendment challenge.

The Appellee sets up strawmen and plays fast and loose with case holdings, but reality controls these proceedings, and "the State cannot dictate reality by fiat." *Hardwick v. Sec'y, Fla. Dep't of Corr.,* 803 F.3d 541, 555 (11th Cir. 2015). Mr. Franqui is not arguing that the clear and convincing burden "diminishes the force of the medical community's consensus in *Moore* and *Hall*" (AB at 22).[4] Nor is he arguing that *Moore* and *Hall* somehow alter this Court's appellate standard of review (*Id.*).[5] The Appellee is confusing evidentiary burdens of proof with appellate standards of review. *See M.H. & A.H. v. Dep't of Children and Family Services,* 977 So. 2d 755, 762 (Fla. 2d DCA 2008) (a court employing the "competent and substantial evidence" standard as a burden of proof exhibits "a fundamental misapprehension of the entirely distinct functions of evidentiary standards of proof

[4] *See Moore v. Texas*, 137 S.Ct. 1039 (2017); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

[5] Appellee writes that in *Glover v. State*, 226 So. 3d 795, 809 (Fla. 2017), this Court "reiterated" that "clear and convincing evidence is the standard," implying that the Court had ruled it constitutional (AB at 22). This is made up of whole cloth. *Glover* had ***nothing*** to do with the clear and convincing burden of proof; in fact, the term "clear and convincing" does not even appear in the opinion.

and appellate standards of review").[6]

What Mr. Franqui *is* arguing is that a State imposing a clear and convincing burden "risks executing a person who suffers from" ID just as does a State "that ignores the inherent imprecision of [IQ] tests." *Hall*, 134 S. Ct. at 2001; *see also id.* at 1990-95 (manner in which this Court defined ID "disregards establishes medical practice" and thus "creates an unacceptable risk that persons with intellectual disability will be executed"); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (striking factors used in Texas to determine ID because they "creat[e] an unacceptable risk that persons with intellectual disability will be executed").

Citing to *Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019), the Appellee contends that the Eleventh Circuit "approve[d] of the clear and convincing evidence standard" for establishing ID (AB at 23). This is a flagrant misrepresentation of *Raulerson*. In his appeal from the denial of his §2254 petition, Raulerson, a death row inmate, raised a Fourteenth Amendment challenge to Georgia's law requiring a defendant, at a jury trial, to prove ID under a beyond-a-reasonable doubt standard, as well as a claim that he was "actually innocent" of the death penalty because he is ID. *Id*. at 996, 1004. After rejecting the challenge to the burden of proof,[7] the court

[6] It appears that the lower court, too, may have confused the two concepts. *See* 2019-R 937 (referring to "little, if any, competent evidence" to suggest deficit in practical domain relating to family support).

[7] Applying the deferential standards of 28 U.S.C. §2254(d)(1), the *Raulerson* court held that because "[n]o decision of the Supreme Court *clearly establishes* that

determined that Raulerson could only prevail on his substantive ID claim if he successfully rebutted, by clear and convincing evidence, the presumption of correctness attached to the jury's rejection of his ID claim. *Id*. at 1006 (citing 28 U.S.C. §2254(e)(1)).[8] In other words, *Raulerson* is a straightforward application of the federal habeas statute's limitation on overcoming a finding of fact by a state court. **In no way** did *Raulerson* "approve" a clear and convincing burden like Florida's (AB at 23).

2. Fourteenth Amendment challenge

Relying principally on *Cooper v. Oklahoma*, 517 U.S. 348 (1996), Mr. Franqui argued that the clear and convincing burden violated due process (IB at 34-38). Largely dodging the issue, Appellee insists that states are only required to develop "appropriate ways to implement *Atkins*'s constitutional restriction" (AB at 23), implying that the clear and convincing burden was an appropriate legislative response to *Atkins* with no attendant due process implications.

Atkins did not authorize a State to fashion procedures untethered to the Due Process Clause. For example, when the Supreme Court banned the execution of the

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Georgia's burden of proof for intellectual disability violates the Due Process Clause," relief was not available to Raulerson. *Raulerson*, 928 F.3d at 1004 (emphasis added) . This Court's review is *de novo* and not restricted by §2254(d)(1).

[8] 28 U.S.C. §2254(e)(1) provides that a federal court must presume correct any factual finding made by a state court, a presumption which can only be rebutted by clear and convincing evidence.

insane in *Ford v. Wainwright*, 477 U.S. 399 (1986), leaving to the States the development of "appropriate ways to enforce the constitutional restriction," it made clear that due process limited the states' options in executing that task. *Ford*, 477 U.S. at 413-16 (plurality op.) (applying 28 U.S.C. §2254(d)(2)'s "full and fair hearing" requirement to state procedures); *id*. at 424 (Powell, J., concurring in part and concurring in judgment) (noting that §2254(d)(2)'s protection "is no different from the protection afforded by procedural due process").[9]

Only be eschewing *Cooper* can the Appellee avoid its indisputable application to Mr. Franqui's challenge to the clear and convincing burden. *But see Pruitt v. State*, 834 N.E.2d 90, 101 (Ind. 2005) (finding clear and convincing standard for proving ID inconsistent with *Cooper*; "[t]he reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation"). *Cooper* directly addressed the burdens of proof a State may acceptably use to protect a fundamental constitutional right, holding that evidentiary burdens used to "guarantee[]s a fundamental constitutional right" violate due process when they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Cooper*, 517 U.S. at

[9] *Accord Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (Justice Powell's concurring opinion in *Ford* "clearly established" that "a prisoner must be accorded an 'opportunity to be heard'" and a "fair hearing" on the question of sanity to be executed).

355 (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). Applying this standard, the *Cooper* Court struck Oklahoma's requirement that a defendant show by clear and convincing evidence that he is incompetent to stand trial. *Id*. at 356-69.

Relying on historical and contemporaneous practice, along with fundamental fairness, the Court first determined Oklahoma's standard lacked "any roots in prior practice." *Id*. at 356. Second, the standard was also rare in contemporaneous practice; only four states used it. *Id*. at 360-61. Finally, Oklahoma's rule did not exhibit "`fundamental fairness' in operation" because it "impose[d] a significant risk" that the defendant may be required to face trial and conviction despite bring incompetent. *Id*. at 362-63. On the other hand, the risk to the State of an erroneous determination of incompetency was small, "subject to correction in a subsequent proceeding," and "the State [could] detain the incompetent defendant" for the time necessary to ensure this occurred. *Id*. at 365. Because the rule did not have historical support and was unfair in practice, the Supreme Court held it insufficiently protected the fundamental right not to be tried while incompetent. This same analysis establishes that Florida's burden on proving ID is unconstitutional.

3. A Remand is Appropriate

This case is unlike others raising, but not resolving, challenges to the clear and convincing standard. For example, in *Dufour v. State*, 69 So. 3d 235 (Fla. 2011), the Court rejected constitutional challenges to the clear and convincing burden

because the trial court, analyzing the evidence under *both* the clear and convincing *and* preponderance standards, determined that Dufour failed to meet *either* test, and this Court decided that competent and substantial evidence supported the lower court's conclusions *under the lower standard*.[10] But here, the lower court here reached no conclusions under a lower standard or made any factual determinations that would be dispositive under a lower burden of proof;[11] this Court should not

[10] *Accord Trotter v. State*, 932 So.2d 1045, 1049 n.5 (Fla. 2006) (finding it unnecessary to address challenge to clear and convincing standard "because the trial court concluded that Trotter was not mentally retarded [under] *either*" standard); *Burns v. State*, 944 So.2d 234, 249 n.13 (Fla. 2006) ("We do not need to address claims of unconstitutionality, however, because the circuit court noted that Burns failed to establish mental retardation by either clear and convincing evidence *or* by a preponderance of the evidence.") (emphasis added); *Nixon v. State*, 2 So. 3d 137, 145 (Fla. 2009) ("We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under *either* the clear and convincing evidence standard *or* the preponderance of the evidence standard") (emphasis added); *Jones v. State*, 966 So.2d 319, 329-30 (Fla. 2007) (Court did not need to address the claim because the trial court found that "Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence").

[11] For example, in *Quince v. State*, 241 So. 3d 58 (Fla. 2018), the Court rejected a challenge to the clear and convincing burden by concluding independently that Quince's ID claim failed even under a preponderance standard. *Id*. at 63. However, in *Quince*, the lower court had made a finding, upheld by this Court, that Quince's three scores (79, 79, 77), did not meet even the first prong. *Id*. at 60-61. *Accord Phillips v. State*, 984 So.2d 503, 509 n.11 (Fla. 2008). Here, the lower court made no such finding; in fact, it declined to make any definitive finding about Mr. Franqui's scores except to summarize the testimony and observe that his lowest score was 71 (2019-R 928). This score is qualitatively different than those at issue in *Quince* and prevents the Court from reaching any conclusion under a lower standard without first affording the lower court an opportunity to re-evaluate all of the evidence with full knowledge of the proper burden of proof.

substitute its own judgment for that of the lower court about whether Mr. Franqui can meet a lower burden without first allowing the circuit court to re-assess the facts under the appropriate burden.

B. Mr. Franqui is Intellectually Disabled

1. Lack of Holistic Analysis

Appellee appears flummoxed by what a holistic evaluation entails, insisting that it involves evaluating each prong of the ID test separately rather than considering them in tandem, as long as the court "addresses" each prong (AB at 28). As Mr. Franqui noted in his Initial Brief (IB 39-41), there is support for this notion in cases like *Wright v. State*, 213 So. 3d 881, 895 (Fla. 2017) ("[i]f the defendant fails to prove any one of these components, the defendant will not found to be intellectually disabled").

But *Wright* is wrong; evidence as to *all three prongs* must be considered in an "interdependent" fashion, *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015), "including for individuals who have an IQ test score above 70." *Hall*, 134 S. Ct. at 1994. *Accord Walls v. State*, 213 So. 3d 340, 346-47 (Fla. 2016) ("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") (emphasis added). This Court should recede from *Wright* and other cases that sanction the practice of rejecting a finding of ID if one prong is not

established.[12] "[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." *Hall*, 134 S. Ct. at 2001. This is why all of the factors are "interdependent"; if "one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs." *Oats*, 181 So. 3d at 467-68.

The lower court failed to comply with *Hall*, *Walls*, and *Oats*. Although it purported to address each prong, it did not consider them interdependently or in tandem but rather independently and singularly. It determined that prong one was not satisfied without any consideration of the other prongs. *See* 2019-R 928 ("Even when applying the SEM to the various IQ exams administered to the Defendant over the years, . . . the lowest IQ score Franqui received 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") (footnote omitted).[13] A remand is warranted to allow the lower court to conduct a proper holistic analysis.

[12] The Court should also recede from the language in *Foster v. State*, 260 So. 3d 174 (Fla. 2018), that suggests that "even after *Hall*, a failure to prove one prong of the intellectual disability test is a failure to prove the claim." *Id*. at 179 n.7. This takes Florida back to its pre-*Hall* regime.

[13] It could also be that the lower court failed to find the first prong due to the high clear and convincing evidence burden imposed on him. *See* Section A, *supra*.

2. Prong One

The Appellee agrees with the lower that, accounting for the SEM, Mr. Franqui's lowest score on recognized testing instruments was a 71 (AB at 30; 2019-R 927-28),[14] but it does not meaningfully address most of Mr. Franqui's arguments. For example, the Appellee does not contest the fact that Dr. Taub[15] testified that, considering the SEM, Mr. Franqui's IQ score was most likely "between 70 and 80" (2019-R 925), a determination with which Dr. Suarez, the State's expert, *did not disagree* (*Id*. at 1263). The lower court did not address this testimony from either Dr. Taub or Dr. Suarez, and thus was not in any position to reject their agreed testimony that Mr. Franqui's IQ score could be as low as a 70, not a 71. There are no facts to contravene this testimony, nor did the lower court credit one expert over the other about Mr. Franqui's scores. *See Dufour v. State*, 69 So. 3d 235, 247-48 (Fla. 2011) ("Here, the circuit court did not completely discredit the reliability of the IQ scores. Although the circuit court noted the concerns with malingering and set forth specific issues with each expert's evaluation, the court ultimately stated that it

[14] In his Initial Brief, Mr. Franqui challenged the lower court's "finding" that Mr. Franqui had obtained an IQ score of 92 on any test (IB at 38 n.35, 43 n.42). The Appellee never defends the lower court's "finding," which clearly must be rejected as lacking any factual support.

[15] Appellee points out that Dr. Taub "is not board certified in Forensic Psychology" (AB at 30 n.10), but neither is Dr. Suarez, the State's expert (2019-R 1203-05).

found *some* credibility to the testimony supporting each score") (emphasis in original).[16] Whether Mr. Franqui has established this prong with either of these scores is a legal question subject to *de novo* review. *Id*. at 246.

Even if Mr. Franqui's true score was 71 rather than 70, this is not a per se disqualifying score because "[m]ild levels of intellectual disability . . . nevertheless remain intellectual disabilities" and Florida "may not execute anyone in 'the entire range of [intellectually disabled] offenders.'" *Moore v. Texas*, 137 S. Ct. 1029, 1051 (2017) (quoting *Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). But because of the Appellee's stubborn adherence to the pre-*Hall* view of prong one—that the number alone dictates whether prong one is met—it fails to engage at all with any of Mr. Franqui's arguments that his IQ score, like those of Roger Cherry, Freddie Hall, and Ted Herring, more than qualify him for a finding of ID.

Finally, the Appellee argues that the lower court correctly rejected the Flynn Effect (AB at 32-33). But unbiased experts are instructed to consider a variety of factors in their clinical judgment in assessing an IQ score, including the SEM, practice effect, and norm obsolescence (the Flynn Effect). *See* American Association

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[16] Like the trial court in *Dufour*, the lower court here summarized the experts' testimony, noting that malingering testing was administered to Mr. Franqui. But it ultimately relied on the validity of the IQ tests in concluding that "the lowest score Franqui would receive would be a 71" (2019-R 928). The lower court made *no finding* that the tests (or some of the tests) were not valid except for observing it was not relying on the 60 on the Revised Beta Test because it "is not the recommended test in determining IQ" (*Id*.).

on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11), at 36-38. "[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." *Id*. at 37. Thus, "[b]oth the [AAIDD-11] and this User's Guide recommend that in cases in which a test with aging norms is used as part of a diagnosis of [intellectual disability], a corrected Full Scale IQ upward of 3 points per decade of the norms is warranted." Users's Guide to AAIDD-11 at 23. The lower court failed to heed these instructions, resulting in an erroneous determination that Mr. Franqui had not met the first prong of the IQ test.

3. Prong 2

The Appellee largely ignores Mr. Franqui's challenges as to the adaptive deficit prong, brazenly asserting that the lower court "analyzed the record on appeal and the specific portions of the record that Appellant entered into evidence and pointed to in his closing argument" (AB at 36). This is simply untrue. The lower court never discussed the evidence from Mr. Franqui's uncle, who testified at the Hialeah penalty phase, about Leonardo's upbringing in Cuba; nor did it evaluate the school records, which established that Mr. Franqui was in special remedial classes (in Spanish) when he arrived to the United States, a fact that Dr. Suarez was unaware of when he so quickly dismissed any evidence that tended to contradict his own views. The Appellee's desire for the Court to "infer" what the lower court meant

when it ignored critical evidence (AB at 37), is an acknowledgment of fatal deficiencies in the lower court's order.

4. Prong 3

The lower court's order made no mention of any of the abundant (and unrefuted) evidence that Mr. Franqui's deficits manifested prior to age 18. It was uncontested that Mr. Franqui was placed in remedial special classes in Cuba and in the United States. The lower court did not address this point, a point Appellee wishes to ignore by arguing (wrongly) that the school records were either not in evidence or did not identify *why* Mr. Franqui was placed in remedial classes (AB at 50). The school records say what they say. If the State had evidence to undermine the Dade County Public School system's decision to place Mr. Franqui in remedial classes, it had its opportunity to present it during the evidentiary hearing. It did not do so and cannot now claim the school records are lacking in specific content.

ARGUMENT II AND ARGUMENT III OF THE ANSWER BRIEF

A. Introduction

In Argument II of his Initial Brief, Mr. Franqui argued his death sentences violated *Hurst v. Florida*, 136 S. Ct. 616 (2016). Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), his death sentences are not currently final within the meaning of the Due Process Clause. Before his death sentences are final for purposes of *Griffith*, he must lose his first appeal of right from the trial court's denial of his ID claim, *i.e.*

this appeal.

In Argument III of his Initial Brief, Mr. Franqui presented the separate and distinct claim that this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), construing §921.141, constituted a change in Florida's substantive criminal law. The 2016 change in Florida's substantive law has been held to govern the adjudication of whether the commission of a first-degree murder in 1981 was accompanied by the statutorily identified facts necessary to render a death a permissible sentence for a defendant convicted of first-degree murder. *Hurst v. State* was a change in Florida's substantive law that been held to govern at a proceeding to determine what sentence may be imposed on defendants convicted of a first-degree murder committed prior to Mr. Franqui's offenses. Argument III asserted that the Due Process Clause requires the substantive law changes announced in *Hurst v. State* to apply evenly. Since this Court has held it governs as to the sentence James Card is to receive for a 1981 murder, it must govern as to the sentence that can be imposed on Mr. Franqui.

The Appellee avoids discussing Mr. Franqui's claim that *Hurst v. State* made a change to Florida's substantive law by failing to understand the difference between substantive law and procedural rules. This failure leads the State to contend that what matters as to Mr. Franqui's substantive law argument is *when* a death sentence becomes final, not the law in effect the crime is committed. The State thus deals with

Argument III by treating the *Hurst v. State* claim as concerning a change in a procedural rule, instead of a change in substantive law. Thus, its Argument III appears to be more about *Hurst v. Florida* than *Hurst v. State*.[17]

B. The *Hurst v. Florida* claim is before this Court

The Appellee asserts that Argument II of the Initial Brief is not properly before this Court because it was not presented below (AB at 57). Its objection to consideration of the merits of Argument II is built upon a willful blindness to Mr. Franqui's case history and to the practice of this Court when a decision issues from the United States Supreme Court that may undermine the constitutionality of a death sentence while a collateral challenge to the sentence was already pending in this Court.

Mr. Franqui's current appeal follows from this Court decision in Case Nos. SC15-1441 and SC15-1630, remanding for an evidentiary on his ID claim. A review of the records in Case Nos. SC15-1441 and SC15-1630 shows that this Court directed the parties to brief Mr. Franqui's *Hurst v. Florida* claim in Case Nos. SC15-

[17] In essence, the State makes four arguments in what it labeled as "Argument II" and as "Argument III." It argues: 1) Mr. Franqui's *Hurst v. Florida* argument is not properly before this Court; 2) *Hurst v. Florida* does not govern because under the state law definition of finality, Mr. Franqui's death sentence was final by the time *Hurst v. Florida* issued; 3) *Hurst v. Florida* itself does not give Mr. Franqui a right to have the ID issue tried to a jury, and 4) the law on the date a death sentence becomes final, not the law on the date of the homicide, controls as to what facts must be found to authorize the imposition of a death sentence.

1441 and SC15-1630, even though the claim had not existed when his 3.851 motions were pending in the trial court. After the *Hurst v. Florida* claims were briefed, this Court chose not to rule on the claim, instead remanding the ID claim for evidentiary development.

Mr. Franqui's appeals in Case Nos. SC15-1441 and SC15-1630 arose from the denial of his successive 3.851 motions premised on *Hall v. Florida*, 572 U.S. 701 (2014). On January 12, 2016, the Supreme Court issued *Hurst v. Florida*. Prior to that date Mr. Franqui had no occasion to raise a claim based on *Hurst v. Florida*.

The two appeals had separate briefing schedules because the State successfully opposed Mr. Franqui's motion to consolidate the appeals as they both argued that his ID barred a death sentence. In Case No. SC15-1441, the Initial Brief was filed on November 23, 2015, and the Answer Brief on December 4, 2015. On December 29, 2015, this Court granted an extension until January 19, 2016 for the filing of the Reply Brief.[18] After *Hurst v. Florida* issued, the time for the filing of the Reply Brief was extended to February 5, 2016, because Mr. Franqui's counsel was ordered to submit supplemental briefing in another pending capital appeal set for imminent argument. When the Reply Brief in Case No. SC15-1441 was filed on February 5, 2016, it did not reference to *Hurst v. Florida*.

[18] The extension for the Reply Brief was largely due to the issuance of this Court's decision in *Oats v. State* on December 17, 2015.

In Case No. SC15-1630, the Initial Brief was filed on November 23, 2015, and the Answer Brief on December 14, 2015. On January 5, 2016, the time for filing the Reply Brief was extended to January 29, 2016, with a second extension granted until February 25, 2016, due to the pendency of a death warrant. The Reply Brief included an argument, never objected to by the State, captioned: "ADDITIONAL ARGUMENT NOT PREVIOUSLY AVAILABLE" (RB at 23), contending that Mr. Franqui had a right to have a jury trial on his ID claim under *Hurst v. Florida*.

Meanwhile in Case No. SC15-1441, Mr. Franqui had, on February 18, 2016, asked to file a supplemental brief in light of *Hurst v. Florida*. Without waiting for a response, this Court granted the request and ordered briefing on *Hurst v. Florida*'s impact on Mr. Franqui's death sentence—an issue that not been raised in the trial court).

On March 18, 2016, in Case No. SC15-1630, Mr. Franqui moved for the supplemental briefing to raise a claim under *Hurst v. Florida*, a claim not raised in the trial court because the decision had not issued at the time. The Court granted the motion the day it was filed and issued a briefing schedule.

Pursuant to the orders this Court entered in Case Nos. SC15-1441 and SC15-1630, Mr. Franqui's challenges to his death sentences under *Hurst v. Florida* were briefed by the parties. In fact, the State's motion to strike the supplemental Initial Brief filed in Case No. SC15-1630 was denied by this Court on April 19, 2016.

The Appellee's current position that a *Hurst v. Florida* claim must first be raised in the trial court before this Court can consider it was squarely rejected by this Court in both Case Nos. SC15-1441 and SC15-1630, and those rulings were not outliers. In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and in numerous other collateral appeals, this Court addressed and decided *Hurst v. Florida* claims not first presented to the trial court.[19] In direct appeals, this Court also decided *Hurst v. Florida* claims not first presented to the trial court.[20] In fact, this Court never required any of the death-sentenced appellants with appeals pending when *Hurst v. Florida* issued to return to the trial court and present their claims before this Court would entertain them.[21]

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[19] *See Hojan v. State*, 212 So. 3d 982 (Fla. 2017); *Durousseau v. State*, 218 So. 3d 405 (Fla. 2017); *Ault v. State*, 213 So. 3d 670 (Fla. 2017); *Baker v. State*, 214 So. 3d 530 (Fla. 2017); *Gaskin v. State*, 218 So. 3d 399 (Fla. 2017); *Heyne v. State*, 214 So. 3d 640 (Fla. 2017); *Hodges v. State*, 213 So. 3d 863 (Fla. 2017); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017); *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017); *McMillian v. State*, 214 So. 3d 1274 (Fla. 2017); *Robards v. State*, 214 So. 3d 568 (Fla. 2017); *Smith v. State*, 213 So. 3d 722 (Fla. 2017); *Jones v. State*; 231 So. 3d 374 (Fla. 2017)

[20] *See Johnson v. State*, 205 So. 3d 1285 (Fla. 2016); *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016); *Jackson v. State*, 213 So. 3d 754 (Fla. 2017); *Bradley v. State*, 214 So. 3d 648 (Fla. 2017); *Brookins v. State*, 228 So. 3d 31 (Fla. 2017).

[21] In *James v. State*, 615 So.2d 668 (Fla. 1993), this Court did not require Mr. James to first present the circuit court with his claim premised upon *Espinosa v. Florida*, 505 U.S. 1079 (1992), a decision which issued while his 3.850 appeal was pending. In *Morgan v. State*, 515 So.2d 975 (Fla. 1987), this Court did not require Mr. Morgan to first present the circuit court with his argument that his death sentence violated *Hitchcock v. Dugger*, 481 So.2d 393 (1987), which issued while his appeal was pending.

When this Court consolidated and remanded Mr. Franqui's cases for an evidentiary hearing, it expressly left the *Hurst v. Florida* claim unresolved. *Franqui*, 211 So. 3d at 1027 n.2. The limited remand did not grant the trial court jurisdiction to hear the *Hurst v. Florida* claim over which this Court had accepted jurisdiction when it ordered briefing. As to this Court's statement that it had decided to decline to address the claim "at the present time," *id*., the fact that the *Hurst v. Florida* issue was outside the scope of the remand can only mean that this Court retained jurisdiction over the unresolved claim. This is how this Court has proceeded on a number of prior occasions.[22] This Court advises the parties when it remands a case without reserving issues. *See Hoffman v. State*, 613 So. 2d 405, 406 (Fla. 1992) ("We find that it would be premature to address the other issues raised by Hoffman. We do not reach these issues, but our determination in this regard is without prejudice for Hoffman to raise them anew below and in any subsequent appeal").

Mr. Franqui agrees with the Appellee that this Court's remand was limited to

[22] *See Muehleman v. Dugger*, 623 So.2d 480, 482 (Fla. 1993) (Court relinquished jurisdiction for public records litigation and "reserve[d] ruling" on the remaining issues raised in appeal); *Walton v. Dugger*, 634 So.2d 1059, 1062 (Fla. 1993) ("we relinquish jurisdiction to the trial court to reexamine Walton's public records request consistent with the directives set forth above and, pending resolution of that issue, we reserve ruling on the remaining issues raised by Walton before this Court"); *Smith v. State*, 708 So.2d 253, 254 (Fla. 1998) ("We temporarily relinquished jurisdiction to the trial court for the purpose of 'getting the facts' relevant to the alleged ex parte communications. Smith subpoenaed Judge Tyson for the purpose of taking his deposition.").

the ID issue (AB at 57). Thus, the trial court was without jurisdiction to hear the *Hurst v. Florida* claims that had been briefed in this Court, and those claims remain in reserve with this Court. The Appellee's contention that this Court is not authorized to hear Argument II is contrary to this Court's well-established jurisprudence, to the record in Mr. Franqui's cases, and to common sense.

C. What constitutes finality is a matter of constitutional law

The Appellee argues that if Argument II *is* properly before the Court, Mr. Franqui's death sentences are final even though whether he can receive a death sentence is the question in this appeal. The Appellee's argument boils down to this statement: "Appellant continues to be sentenced to death; accordingly, a postconviction determination that he is not intellectually disabled does not alter the determination of 'finality' in his case" (AB at 58).

What matters as to finality, the State says, is whether Mr. Franqui "continues to be sentenced to death." But *every* death sentenced individual who has a direct appeal pending before this Court "continues to be sentence to death" while the direct appeal remains pending. Just because a death sentence has been imposed and is in place for some period of time does not mean that the death sentence is final within the meaning of the Due Process Clause.

Finality is a line drawn by the Due Process Clause. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Changes in procedural rules are required to be uniformly applied

in all criminal prosecutions that have yet resulted in a final judgment and/or sentence. The State believes that finality is defined by state law, but the distinction between what is and is not final exists to ensure that criminal prosecutions comport with due process. A conviction is not final until: 1) the finder of fact has made the factual findings necessary to determine the defendant's guilt and punishment pursuant to the governing substantive criminal law; and 2) any resulting judgment and sentence are subject to direct review by the appropriate appellate court. On one side of finality is the criminal process constitutionally guaranteed, and on the other side is a quasi-civil proceeding for challenging the outcome of the criminal process. *See Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) ("A postconviction proceeding is not part of the criminal process itself but is instead a civil action designed to overturn a presumptively valid criminal judgment."). The criminal process is not complete until a defendant has his first appeal of right to challenge the determination of the facts on which his conviction **and sentence** rest. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991).[23]

When an appellate court remands a criminal sentence for resentencing due to calculation errors in a sentencing guideline scoresheet, finality is postponed. *Hope v. State*, 797 So. 2d 1252, 1253 (Fla. 2001); *Fleming v. State*, 139 So. 3d 902 (Fla.

[23] For an explanation of the difference between direct and collateral review, see *Wall v. Kholi*, 562 U.S. 545, 551-52 (2011).

1st DCA 2006). When a cognizable sentencing error is discovered in collateral proceedings that requires a recalibration of the scoresheet, the sentence, which had been final, is no longer final and remains that way until the necessary facts are found by the fact finder and the guaranteed appellate has concluded. *State v. Anderson*, 905 So. 2d 111, 118 (Fla. 2005) (error in the scoresheet discovered after the resulting sentence had become final and presented in a rule 3.850 warranted a resentencing "[b]ecause it is essential for the trial court to have the benefit of a properly calculated scoresheet when deciding upon a sentence.").

The resolution of Mr. Franqui's ID claim is not meaningfully different from the preparation of a properly calculated sentencing guideline scoresheet. It is part of the criminal process, and thus subject to an appeal of right before it is final within the meaning of the Due Process Clause. The appellate review of the trial court's order concluding that Mr. Franqui had failed to show that he is ID is occurring in this appeal—his one and only appeal of the trial court's rejection of his claim following the evidentiary hearing. For his death sentences to even be authorized, it is essential for the trial court have properly concluded that Mr. Franqui had failed to establish his ID. Surely, a proper determination of Mr. Franqui's ID is just as essential to his sentence as a properly calculated scoresheet. This appeal is not an extra layer of collateral review but rather the one and only direct appeal of the determination that his death sentences may be constitutionally imposed. *See*

Coleman v. Thompson; *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Evitts v. Lucey*, 469 U.S. 387 (1985).

D. Is it for a jury to decide intellectual disability

Mr. Franqui acknowledged that this Court, in *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2015), rejected his argument that the ID issue should be determined by a jury (IB at 65). He not only contended that this Court misread *Hurst v. Florida*, but also that this Court's reliance on *Hurst v. Florida* to reject his argument was itself an acknowledgment that *Hurst v. Florida* governed the case. Thus, Mr. Franqui argued, he is entitled to the benefit of *Hurst v. Florida* (IB at 66).

The Appellee defends *Oats v. Jones* but fails to address the impropriety of cherry-picking aspects of *Hurst v. Florida* that this Court used to reject one of Mr. Franqui's arguments, while holding that he is not entitled to get the benefit of the aspects of that decision that are favorable. If *Hurst v. Florida* was the law at the time of the ID ruling in Mr. Oats' case in 2015, then it was the law governing the 2017 evidentiary hearing in Mr. Franqui's case, and it is the law governing his death sentences, which are not final until this appeal is over. *Hurst v. Florida* was violated when the juries returned non-unanimous advisory death recommendations without making the factual findings necessary to authorize the imposition of a death sentence.

E. Finality is not pertinent matter to a change in substantive law

In Argument III of his Initial Brief, Mr. Franqui argued that the statutory construction of §921.141 announced in *Hurst v. State* was a change in Florida's substantive criminal law. He noted that the retroactivity analyses used to evaluate whether new procedural rules warranted retroactive application were not appropriate when a judicial decision announced an unanticipated construction of a statute setting forth substantive criminal law. Mr. Franqui even noted that the State's representative in *Reed v. State*, Case No. SC19-714, had conceded that the retroactivity analysis set out in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), could not be used if the judicial ruling at issue involved the construction of a criminal statute (IB at 74-75). When a judicial decision changes substantive criminal law by adding an element to a criminal offense or requiring an additional fact before the range of punishment can be increased, the constitutional implications generally require retroactive application.

Rather than addressing Mr. Franqui's reliance on *Hurst v. State* as a change in Florida's substantive criminal law, the Appellee simply treats it as solely announcing a procedural rule subject to a *Witt* analysis. Not one case cited by the Appellee analyzes *Hurst v. State* as announcing a change in Florida's substantive criminal law. Since the Appellee does not address the actual issue raised by Mr. Franqui in his Argument III there is no need to further address the content of Argument III of the Answer Brief.

Respectfully Submitted,

/s/ *Todd G. Scher*
TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
1722 Sheridan Street, Suite 346
Hollywood, FL 33020
Tel: 754-263-2349
TScher@msn.com
Counsel for Defendant

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
141 NE 30th Street
Wilton Manors, FL 33334
Tel: 305-984-8344
martymcclain@earthlink.net
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 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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