IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-830

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

The State will rely on the Statement of Case and Fact contained in its initial answer brief with the following additional:

On November 25, 2002, more than a month after he filed his supplemental motion for post conviction relief asserting that he was retarded, Defendant obtained a court order for Dr. Trudy Block-Garfield to evaluate him for retardation through *ex parte* contact with the trial court. (PCR-SR. 326-42, 404) On March 4, 2003, Dr. Block-Garfield issued her report. (PCR-SR. 404-09)

In the report, Dr. Block-Garfield stated that she had reviewed Defendant's school records and documents regarding Dr. Toomer's evaluation of Defendant, interviewed Defendant and administered both the WAIS-R and the Stanford-Binet IQ tests. *Id.* She stated that Defendant obtained a verbal IQ of 79, a performance IQ of 74 and a full scale IQ of 75 on the WAIS-R. After actually calculating the standard error of measure regarding this score, she stated that Defendant's IQ likely fell between 71 and 80. *Id.* She reported that Defendant obtained a full scale IQ of 76 on the Stanford-Binet. *Id.* She also determined that Defendant did not have significant deficits in adaptive functioning as an adult. *Id.*

After this report was received, the lower court entered its

order denying Defendant's motion for post conviction relief without addressing the claim that Defendant was retarded. (PCR. 752-60) Defendant appealed that order without attempting to obtain an order on this claim. (PCR. 764) Instead, Defendant waited more than two years and then sought a relinquishment from this Court to resurrect the claim. On November 30, 2007, this Court entered an order granting the motion "only to the extent that jurisdiction [] is relinquished [] to allow the trial court to enter an order." On February 21, 2008, the lower court entered its order denying the claim. (PCR-SR. 363-66)

In his initial brief in this appeal, Defendant claimed that he was entitled to an evidentiary hearing on retardation, arguing that the fact that the evidence on which he based his claim had been rejected as incredible at trial should be ignored, that he had been deprived of the opportunity to develop additional evidence to support his claim and that he had presented sufficient facts to infer the claim even though he had not actually plead the elements of retardation. Initial Brief of Appellant, FSC Case No. SC05-830, at 9-38. The State responded that Defendant had waived this claim by not following the procedures set out in Fla. R. Crim. P. 3.203(d)(4)(C) and by not taking any of the numerous opportunities he had to develop his claim in a facially sufficient manner. Brief of Appellee,

FSC Case No. SC05-830, at 36-48. The State also pointed out that Defendant never actually pled the elements of retardation and that the fact that he relied on information that had already been rejected as incredible should not be ignored. *Id.*

After considering these briefs and oral argument, this Court entered an order, on July 16, 2009, relinquishing jurisdiction for an evidentiary hearing on the retardation claim. *Franqui v. State*, 14 So. 3d 238, 239 (Fla. 2009). That order specifically provided:

> In making a determination of whether [Defendant] is mentally retarded, the circuit court shall consider the requirements set forth in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), including the following requirement:
>
> > [The defendant] must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, [the defendant] must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.
>
> *Id.* at 711.

Id. The order also specifically provided that transcripts of proceedings regarding the relinquishment proceedings were to be completed within 30 days after the lower court entered its order on this claim and that the record on appeal was to be completed

within 20 days of the filing of the transcripts. *Id.*

On July 23, 2009, the State filed a motion asking the lower court to set the procedure for having Defendant evaluated. (PCR-SR. 377-79) In this motion, the State pointed out that under the rule, the tests that could be presented regarding intellectual functioning were limited by the administrative code, that the administrative code had only specified two IQ tests (the WAIS and Stanford-Binet) and that the Revised Beta IQ test was not a qualifying test under the rule. *Id.* It then pointed out that if Defendant had another expert and test, a report needed to be provided and that if he did not, two experts needed to be appointed. *Id.* It observed that the practice effect would precluded the party whose expert evaluated Defendant second from obtaining a reliable IQ score if the first expert used both the WAIS and Stanford-Binet. *Id.* As such, it requested that the trial court preclude either party's expert from using both tests if two experts were being appointed. *Id.*

That same day, the State also filed a motion seeking disclosure of Defendant's medical records from the Department of Corrections (DOC) and the local jail. (PCR-SR. 380-82) Additionally, the State moved to compel Defendant to provide it with the reports, test data and notes from any mental health evaluations since 1998, any reports, test data and notes from

any expert retained regarding this motion and the published validity and reliability data and documents showing that the Revised Beta was an individually administered IQ test necessary to admit that test under the rule and administrative code. (PCR-SR. 383-85)

In a consolidated response to these three motions, Defendant conceded that the State was entitled to his medical records from the jail and DOC. (PCR-SR. 386-91) Regarding information from evaluations since 1998, Defendant asserted that he did not have one in his possession, that he had received conflicting information from his prior post conviction counsel in this case regarding whether an evaluation had been completed and that he had asked those attorneys to check their files for information regarding the prior evaluation. *Id.* Regarding information from experts regarding this motion, Defendant asserted that he had none at the time but agreed that such information should be exchanged when it was generated. *Id.* He averred that he did not have the information necessary to admit the Revised Beta, suggested that the State should be responsible for locating such information and stated that he would provide the information if he located it. *Id.* Regarding the evaluation procedures, Defendant asserted that two experts should be appointed but averred that the lower court should not involve

itself in precluding an expert from using both the WAIS and Stanford-Binet because the practice effect would only be implicated if the same test was repeated during a brief time period and concerns about the reliability of the test results could be addressed at the evidentiary hearing. *Id.*

At a status hearing on July 30, 2009, the trial court granted the State's motion regarding the medical records. (PCR-SR. 392) It also granted the State's motion to compel regarding information about experts regarding the motion as it became available. (PCR-SR. 368) It ordered Defendant to provide the information necessary to make the Revised Beta admissible if Defendant elected to attempt to admit the results of that test at the hearing. *Id.*

Regarding the information since 1998, Defendant insisted that he had no reports or data to provide the State. The State explained that it had selected that date because it was the year that the last of the trial proceedings regarding Defendant's four criminal cases had concluded such that it had information regarding evaluations before that year. It requested that the lower court order Defendant's present counsel to consult with Defendant's prior post conviction counsel in both this case and Defendant's other capital case to determine whether evaluations had been completed and require Defendant to produce the

information regarding these evaluations. Defendant stated that his prior post conviction counsel regarding this case had been consulted and believed that an evaluation had been conducted but that prior counsel had been unable to locate a report or recall the name of the expert who would have conducted the evaluation. As such, Defendant averred that he was unable to provide information about the evaluation. The State then pointed out that Defendant should be able to ascertain the name of the expert by checking the billing records submitted to the Comptroller's Office. The lower court then ordered Defendant to check the billing records, determine the name of the expert, contact the expert and provide the information that the expert had regarding the evaluation.

Regarding the evaluation procedures, Defendant contended that the trial court should not dictate the form of the evaluation to be conducted, particularly as he had not yet determined which expert he would suggest. The State responded that it was only attempting to preclude one expert from giving both the WAIS and Stanford-Binet, as it would then preclude the expert who conducted his evaluation second from obtaining a test result that was not subject to attack based on the practice effect. The lower court agreed with the State that each expert should limited to giving only one of the two approved IQ tests

and asked if the State had any expert it would be suggesting. The State responded that it would be suggesting Dr. Enrique Suarez if he was allowed to use the WAIS. Defendant indicated that he had yet to decide whom to suggest. As such, the lower court indicated that it would appoint Dr. Suarez to administer the WAIS and permit Defendant additional time to suggest an expert to administer the Stanford-Binet. Defendant subsequently suggested Dr. Heather Holmes. As such, the lower court entered an order appointing Dr. Suarez and Dr. Holmes to evaluate Defendant for retardation and requiring Dr. Suarez to use the WAIS and Dr. Holmes to use the Stanford-Binet. (PCR-SR. 394) It also ordered Defendant transported back to Dade County so that the evaluations and evidentiary hearing, which it set for September 15-17, 200, could be completed expeditiously, which it set for September 15-17, 2009. (PCR-SR. 393)

On August 17, 2009, Defendant informed the State by email that he had located the report of Dr. Block-Garfield who had previously evaluated Defendant for retardation and provided a copy of that report. He stated that he had determined not to go forward with Dr. Holmes' evaluation and would await the results of Dr. Suarez's evaluation.

At the next status hearing held on August 25, 2009, Defendant informed the lower court of his decision to withdraw

the request for the appointment of Dr. Holmes and to proceed based on the report of Dr. Block-Garfield. The State indicated that it had no objection to Defendant withdrawing his request for the appointment of an expert but stated that if he was permitted to do so, it would change the provision under which the experts were appointed from Fla. R. Crim. P. 3.203(c)(3) to Fla. R. Crim. P. 3.203(c)(2). It then stated that under Fla. R. Crim. P. 3.203(c)(2), the appointment of an expert for the State was at the State's option and that it would be withdrawing its request to have Dr. Suarez evaluate Defendant. Defendant objected to the State being allowed to proceed without Dr. Suarez having evaluated Defendant. After considering argument on this point, the lower court stated that it would vacate the appointment of Dr. Holmes but would require Dr. Suarez to continue with his evaluation of Defendant using the WAIS-IV IQ test. (PCR-SR. 370)

The lower court set another status hearing for September 3, 2009. It ordered Defendant to provide the State with a witness list by that time.

At the September 3, 2009, the State reported that Dr. Suarez had spent almost an entire day evaluating Defendant but still had one additional test to complete. (PCR-SR. 445-47) It indicated that Defendant had obtained a full scale IQ of 75 on

the WAIS-IV that Dr. Suarez had administered, that it still did not have a witness list from Defendant and that Defendant had indicated that he wanted to depose Dr. Suarez. (PCR-SR. 447-48) Defendant indicated that he could not determine what witnesses he might call until he saw Dr. Suarez's report and that he did not believe there was sufficient time to depose all of the witnesses before the September 15, 2009 scheduled starting date for the hearing. (PCR-SR. 448-49) After considering argument regarding these issues, the lower court indicated that it wanted the parties to begin scheduling depositions of the experts and other potential witnesses, with the understanding that the depositions could be cancelled if the witnesses would not be called, that it would reset the hearing until September 17, 2009, and that it would hold an additional status hearing on September 9, 2009. (PCR-SR. 449-56)

On September 9, 2009, Defendant filed a motion to declare this Court's interpretation of the definition of retardation unconstitutional. (PCR-SR. 396-400) In this motion, Defendant acknowledged that Dr. Block-Garfield and Dr. Suarez had obtained IQ scores that were above 70, which precluded a determination that he was retarded under *Cherry*. *Id.* He then argued that *Cherry* somehow violated *Atkins v. Virginia*, 536 U.S. 304 (2002), and asked the lower court to declare *Cherry* unconstitutional.

Id.

At the hearing that afternoon, the lower court indicated that it had received the pleading and asked if the State was prepared to respond. (PCR-SR. 458-60) The State responded that this Court had already rejected Defendant's argument in *Nixon v. State*, 2 So. 3d 137 (Fla. 2009), that the lower court was bound to reject this argument by *Nixon* and that it was bound to reject the claim by *Cherry*. (PCR-SR. 460-61) The lower court agreed with the State and inquired what it should do. (PCR-SR. 461-63) Defendant responded that the lower court could summarily deny the motion based on the report. (PCR-SR. 463) The State responded that the parties would have to stipulate to the reports before the lower court could act on them and pointed out that the reports would show a failure of proof not just on the first element of retardation but on the other two elements as well. (PCR-SR. 463-64) Defendant agreed that the stipulation would cover the entirety of the report but stated that he did not feel it was necessary to attempt to prove the other prongs since he was going to fail the first. (PCR-SR. 464)

The State then indicated that Dr. Suarez had yet to complete his report as he was still looking at information on adaptive functioning. (PCR-SR. 465-66) The lower court stated that it would use the hearing set for September 17, 2009, for

the purpose of accepting the stipulations and ensuring that Defendant was personally aware of what had occurred. (PCR-SR. 465) It ordered Dr. Suarez to complete his report by September 15, 2009, and Defendant to inform the State by September 16, 2009, whether he would be stipulating to the reports or presenting evidence. (PCR-SR. 467) It denied the motion to declare *Cherry* unconstitutional and accepted Dr. Block-Garfield's report into evidence by stipulation. (PCR-SR. 467-48)

On September 15, 2009, Dr. Suarez issued his report and an addendum to his report, finding that Defendant did not meet any of the three elements of retardation. (PCR-SR. 412-39) He noted that Defendant's full scale IQ was a 75 and that the 95% confidence interval for this score placed Defendant's IQ between 71 and 80. *Id.* He further noted that the result of the symptom validity tests he administered all showed that Defendant was malingering. *Id.* He also outlined the evidence from the records and interviews he conducted that showed that Defendant did not have deficits in adaptive functioning and that Defendant never had intellectual or adaptive functioning deficits. *Id.*

At the hearing on September 17, 2009, the lower court indicated that it had received and reviewed all of the reports and that they indicated that Defendant could not meet his burden

of proof on any of the elements of retardation. (PCR-SR. 471-77) It then spoke to Defendant personally and ensured that he understood his attorney's decision and was not objecting. (PCR-SR. 477-81) During this discussion, the State ensured that Defendant understood that he was having an evidentiary hearing on his claim but that it was being truncated by a stipulation to the reports. (PCR-SR. 478-79) The parties then stipulated the reports into evidence, and Defendant expressly agreed that he had no additional evidence to offer regarding the second and third elements of retardation. (PCR-SR. 481-82) The lower court accepted the stipulation and denied the claim. (PCR-SR. 482-83) In its written order, the lower court found that Defendant had not proven any of the elements of retardation. (PCR-SR. 440-42)

After doing so, the lower court informed the court reporter who was present of the requirement to complete the transcripts within 30 days. (PCR-SR. 483) Defendant indicated that he would ensure that designations were completed for all of the hearings and provided. (PCR-SR. 483-84)

When the State requested that the lower court ordered Defendant returned to prison, Defendant asked that he be permitted to remain so that it would be easier for his attorneys to see him, and the State responded that Defendant had

previously been involved in an attempt to escape from prison and that it had just received additional, similar information about Defendant's behavior in the jail. (PCR-SR. 485-86) The lower court then refused Defendant's request to delay his departure. (PCR-SR. 486-87)

Despite having promised to file designation, Defendant did not do so. As a result, the record was not completed on a timely basis. Instead, this Court was required to order Defendant to show cause regarding he had not ensured compliance with this Court's order on January 6, 2010. Defendant then responded that he had assumed that he did not need to take action to ensure the record was completed after the hearing before the lower court at which he had promised to file designations. This appeal follows.

SUMMARY OF THE ARGUMENT

This issue that Defendant presents is not properly before this Court because a decision on the issue would not affect the outcome of this case. Not only is Defendant's IQ too high to qualify him as retarded but also Defendant failed to prove either of the other elements of retardation. Further, the claim is meritless.

ARGUMENT

THIS CASE DOES NOT PRESENT A BASIS TO RECONSIDER A CHALLENGE TO THE CONSTITUTIONALITY OF THE DEFINITION OF RETARDATION, WHICH IS, IN ANY EVENT, MERITLESS.

As his only issue in this appeal, Defendant asks this Court to reconsider its prior determination that the plain language of §921.137, Fla. Stat. and Fla. R. Crim. P. 3.203 require a defendant to prove that he has an IQ of 70 or below in order to satisfy the first prong of retardation. He seems to suggest that this Court should do so because this interpretation is somehow allegedly violative of *Atkins*. However, this issue is not properly before this Court, as any decision on the issue Defendant presents would not affect the fact that Defendant completely failed to prove the other two elements of retardation. Moreover, the claim is meritless.

As this Court has long recognized a litigant must show that his rights will be directly affected by a decision on a constitutional issue before it will consider the claim in a litigant's case. *State v. Hill*, 372 So. 2d 84, 85-86 (Fla. 1979); *State ex rel. Hoffman v. Vocelle*, 31 So. 2d 52, 57 (Fla. 1947); *Steele v. Freel*, 25 So. 2d 501, 502-03 (Fla. 1946). Here, Defendant cannot make that showing in this case.

As this Court has held, a defendant must prove all three elements of retardation before he will be found to be retarded.

Cherry, 959 So. 2d at 711, 714; *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007). As the lower court found, Defendant not only failed to establish that his IQ was low enough to satisfy the first element but also Defendant failed to present evidence showing that he met the other two elements. (PCR-SR. 440-42) Moreover, this is the only conclusion that was possible on the record. The only evidence presented to the lower court was the reports that were stipulated into evidence. In her report, Dr. Block-Garfield found not only was Defendant's IQ too high but also that Defendant did not have significant deficits in adaptive functioning as an adult. (PCR-SR. 404-09) She offered no opinion regarding whether the elements she found not to exist were present before the age of 18. *Id.* Dr. Suarez direct found that all three elements were lacking. (PCR-SR. 412-39)

In this appeal, Defendant only challenges the constitutionality of requiring him to show that he had an IQ of 70 or below. However, even if this Court were inclined to do accept Defendant's position, the order denying his claim would still be subject to affirmance given his failure to prove the other two elements of retardation. Thus, a decision on the issue Defendant presents will not affect his rights. As such, Defendant cannot properly present this issue. *Hill*, 372 So. 2d at 85-86; *Vocelle*, 31 So. 2d at 57; *Steele*, 25 So. 2d at 502-03.

The lower court affirmed.

Even if Defendant could properly present this issue, the lower court should still be affirmed. As Defendant acknowledges, this Court directly considered the challenge to *Cherry* that Defendant is making in *Nixon* and rejected it. *Nixon*, 2 So. 3d at 142-44. Since Defendant has merely reiterated the claim that was rejected in *Nixon*, the denial of the motion should be affirmed.

Even if the issue was still open for debate, there would still be no basis for this Court to reconsider this issue. In *Atkins*, the Court did not include the clinical definitions of retardation in the portion of its opinion analyzing the law. Instead, it quoted those definitions only in the fact section of the opinion. *Atkins*, 536 U.S. at 309 n.3. When it came to doing its legal analysis, the Court made no attempt to suggest that he was requiring the use of this definition. Instead, it stated:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to

> enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416-417, 106 S.Ct. 2595.

Id. at 317. The Court then immediately dropped a footnote, acknowledging that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*." *Id.* at 317 n.22. Thus, the Court indicated that it was fully aware that the States were not using the clinical definitions and yet still allowed the States to use their statutory definitions. In fact, doing so is entirely consistent with the holding that the primary source for determining the means of the Eighth Amendment is to look to legislative consensus. *Id.* at 312-13. As such, Defendant's suggestion that *Atkins* requires the acceptance of an IQ score above 70 is meritless.

This is particularly appropriate as reliance on clinical definition of retardation would lead to the same result. In the Diagnostic and Statistical Manual, the allowance of the diagnosis of retardation in someone with an IQ above 70 was based on consideration of the standard error of measure or 95% confidence interval for the IQ score and required a showing of significant deficits in adaptive functioning. AMERICAN PSYCHIATRIC ASSN., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-42 (4th Ed. Text Rev. 2000) (hereinafter DSM-IV-TR). Here, as the reports

of the experts show, the calculation of the actual 95% confidence interval yielded a range of 71-80, and Defendant did not have significant deficits in adaptive functioning. (PCR-SR. 404-09, 412-39) As such, even including the caveats in the DSM would not assist Defendant. The denial of the claim should be affirmed.

Moreover, Defendant's assertions about the purpose of *Atkins* merely reinforce that the rejection of the claim. As Defendant notes, the *Atkins* court looked at the lack of leadership ability and ability to plan in justifying an exemption for mental retarded individuals from execution. *Atkins*, 536 U.S. at 318. As this Court held in affirming the application of CCP to this crime, Defendant engaged in planning. *Franqui v. State*, 669 So. 2d 1312, 1323-24 (Fla. 1997). Moreover, the testimony of Pablo Abreu showed that Defendant was a leader who recruited him to assist in the crime and directed his actions. (T. 2692-2712) Since Defendant was a leader in planned criminal activity, the portions of the rationale of *Atkins* on which Defendant relies also supports rejection of this claim. The lower court should be affirmed.

Further, this case provides a prime example of why this Court should enforce strict standards of pleading and proof regarding this claim. When Defendant first asserted that he was

entitled to relief under *Atkins*, he did not even allege that he met the clinical definitions. Instead, he asserted that he met either the first or second element disjunctively and never mentioned the third element. (PCR-SR. 326-42) Moreover, the claim was based entirely on testimony that had already been rejected as incredible. *Id.* Despite these pleading deficits, Defendant was able to obtain an evaluation for retardation through an ex parte communication with the lower court. (PCR. SR. 404) When that report produced an opinion that Defendant was not retarded not only because his IQ scores were too high but also because he did not have deficits in adaptive functioning, Defendant elected not to file a motion in accordance with Fla. R. Crim. P. 3.203. By doing so, Defendant avoided the requirement under that rule that Defendant disclose the report that was adverse to his position. Fla. R. Crim. P. 3.203(c)(3).[1] Defendant then appealed the order denying his other post conviction claims without obtaining an order on the *Atkins* claim. Under established precedent, Defendant waived this claim by doing so. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Rivera v. State*, 913 So. 2d 769 (Fla. 5th DCA 2005).

[1] This Court has previously rejected the claim that only certain reports needed to be attached pursuant to this provision in an unpublished order. *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006).

Having successfully kept the unfavorable report from the State, Defendant then waited until after the judge who had entered the order permitted the evaluation removed himself from the case before resurrecting the claim years later on appeal. At that point, he insisted that he had never been allowed to develop the factual basis for his claim, while not disclosing that he had been given this opportunity through the evaluation by Dr. Block-Garfield.

After this Court relinquished jurisdiction, Defendant still did not disclose the unfavorable report. Instead, he asserted that while an evaluation may have been done, he did not have possession of a report and could not contact the expert who conducted the evaluation because her name had been forgotten. It was only through the State's persistence in pointing out that the name of the expert would be disclosed through a review of the billing records that Dr. Block-Garfield's unfavorable report was disclosed. Moreover, once the report was disclosed, Defendant elected not to pursue anymore expert opinions through an expert he suggested. Instead, he asserted that he was going to rely on Dr. Block-Garfield. Yet, Defendant successfully insisted that the State should be required to seek a rebuttal opinion from Dr. Suarez, even though there was nothing to rebut.

Once it became clear that Dr. Suarez would not be of

assistance to the defense, Defendant then challenged the constitutional of the definition of the first element of retardation. When that proved unsuccessful, Defendant then elected to stipulate to reports that found no proof of any element of retardation. By doing so, Defendant avoided having Dr. Block-Garfield questioned about the discrepancy between the 75 she obtained on the WAIS-R and the 83 Dr. Toomer had previously obtained on the same test. Moreover, he avoided having her questioned about her failure to conduct symptom validity testing, which when performed by Dr. Suarez showed that Defendant was malingering, indicating that the 75 IQ score obtained are probably underestimates of Defendant's true intelligence.

As a result of all of these actions and Defendant's failure to pursue this appeal on a timely basis, Defendant has managed to keep the post conviction litigation in this matter pending for 12 years. Thus, this case provides a prime example of why strict pleading and proof requirements should be imposed. The lower court should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Todd Scher**, 5600 Collins Avenue, #15-B, Miami Beach, Florida 33240, this ___ day of May 2010.

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CERTIFICATE OF COMPLIANCE

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

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