IN THE SUPREME COURT OF FLORIDA

Case No. SC15-1441

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, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Franqui's motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

" V. R." – volume and page number of record on direct appeal to this Court;

"PCR-1." – volume and page number of record on appeal to this Court following the appeal of the denial of Mr. Franqui's first Rule 3.851 motion;

"Supp-PCR-1" – volume and page number of supplemental record on appeal to this Court following the appeal of the denial of Mr. Franqui's first Rule 3.851 motion;

"PCR-2" – volume and page number of record on appeal to this Court following the appeal of the denial of Mr. Franqui's second Rule 3.851 motion (the instant appeal);

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Franqui requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. 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 and the stakes at issue.

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STATEMENT OF THE CASE

Mr. Franqui, along with co-defendants Pablo San Martin and Pablo Abreu, was charged by Indictment issued in January, 1992, with one count of first-degree murder and related offenses arising from the death of Raul Lopez in a shooting occurring in Miami, Florida, on December 6, 1991. Along with co-defendant Pablo San Martin,[1] Mr. Franqui proceeded to trial in September, 1993, and the jury returned guilty verdicts for one count of first-degree murder, two counts of attempted first-degree murder, attempted robbery, two counts of grand theft, and unlawful possession of a firearm while engaged in a criminal offense. At a joint penalty phase, the jury returned a death recommendation for the murder of Raul Lopez by a vote of 9-3.

On November 4, 1993, the trial court imposed the death penalty on Count I, consecutive terms of life imprisonment as to Counts II and III, a consecutive 15 years term of imprisonment on Count IV, a consecutive 5 year term of imprisonment on Counts V and VI, and a 15 year consecutive term of imprisonment on Count VII.

In sentencing Mr. Franqui to death, the trial court found four aggravating circumstances: (1) prior violent felony, *see* § 921.141(5)(b), Fla. Stat. (1995);

[1] Abreu negotiated a plea with the State, and ultimately testified for the State at the penalty phase.

murder committed during the course of an attempted robbery, *see id.* § 921.141(5)(d); (3) murder committed for pecuniary gain, *see id.* § 921.141(5)(f); and (4) the murder was committed in a cold, calculated, and premeditated manner. *See id*., § 921.141(5)(I). The court found no statutory mitigating circumstances but did find two non-statutory mitigating factors: (1) Mr. Franqui had a poor family background and deprived childhood, including abandonment my his mother, the death of his mother, and being raised by a man who was a drug addict and alcoholic, and (2) Mr. Franqui was a caring husband, father, brother, and provider.

On direct appeal, this Court affirmed[2] Mr. Franqui's convictions and sentences,[3] with the exception of the convictions for attempted first-degree murder.

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[2] Two justices dissented from the affirmance of Mr. Franqui's convictions because of harmful Confrontation Clause violations.

[3] On direct appeal, Mr. Franqui raised the following issues: (1) the trial court failed to grant severance and erred in admitting at the joint trial the non-testifying co-defendant's post-arrest confessions; (2) the trial court erred in failing to exclude portions of Mr. Franqui's confession because the State did not first present sufficient evidence of corpus delicti; (3) the trial court abused its discretion by prohibiting voir dire examination of the jury relative to specific mitigating circumstances and in denying the defense access to the jury questionnaires; (4) the trial court erred in sentencing Mr. Franqui to death in that (a) the court erred in finding that the murder was committed in a cold, calculated and premeditated manner (CCP) without any pretense of moral or legal justification, (b) the jury instruction on CCP aggravating circumstance was unconstitutionally vague, (c) the court erred in failing to credit certain mitigating evidence offered at the penalty phase, (d) death is a disproportionate sentence, and (3) the court erred in prohibiting the defense from informing the jury of the court's power to impose consecutive sentences and the likelihood of lifelong imprisonment as an alternative to the death penalty, as well as in failing to so instruct the jury upon its own

Franqui v. State, 699 So. 2d 1312 (Fla. 1997), *cert. denied*, 118 S. Ct. 1337 (1998), *and* 118 S. ct. 1582 (1998) [hereinafter *Franqui I*].[4]

On January 15, 1999, Mr. Franqui, through state-appointed counsel, filed a verified motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 (PCR37-129). A verified amended motion was filed on April 18, 2000 (PCR136-179), and alleged various claims for relief: (1) the cumulative impact of trial counsel's failure to object to prosecution comments and closing argument at both the guilt and penalty phases (PCR138-151); (2) failure to call experts at the penalty phase and violations of *Ake v. Oklahoma* at both the guilt and penalty phases (PCR151-152); (3) the failure to move for a change of venue (PCR152-156); (4) the deprivation of an adequate adversarial testing at the penalty phase due to various failings by defense counsel (PCR156-160); (5) the failure to call Mr. Franqui's wife at the motion to suppress and at trial on the issue of his putative confession (PCR160-164); (6) a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), regarding State witness Pablo Abreu (PCR164-169); (7) his right to interview jurors (PCR167-169); (8) non-compliance by state agencies with public records demands (PCR169-173); (9) the failure to object to the diminution of the

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inquiry.

[4] Both Mr. Franqui and the State sought certiorari review of this Court's disposition on direct appeal.

jurors' sense of responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (PCR173-174); (10) the jury received unconstitutional instructions on aggravating circumstances (PCR174-175); and (11) failure to grant severance at both the guilt and penalty phases (PCR175-176). As an exhibit to the amended motion, Mr. Franqui filed an affidavit from Fernando Fernandez (PCR357-359). Mr. Franqui also adopted as part of his motion an affidavit of co-defendant Pablo Abreu, filed in connection with co-defendant Pablo San Martin's Rule 3.850 proceeding, in which Abreu purported to recant part of his penalty phase testimony in Mr. Franqui's case (PCR-357). On July 6, 2000, the State filed its response to the amended motion (PCR180-348).

A hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), was conducted on January 8, 2001 (PCT244-274). At the *Huff* hearing, Mr. Franqui's counsel adopted the claim raised by San Martin with regard to the recantation by Abreu and prosecutorial misconduct related to Abreu; the State acknowledged that because it had conceded the need for an evidentiary hearing on San Martin's claim, it had "no objection to Mr. Franqui joining that evidentiary hearing" (PCT256). *See also* PCT268 ("basically we've agreed to have an evidentiary hearing on that claim [of Abreu's recantation of his penalty phase testimony] for both Mr. San Martin and Mr. Franqui").

On January 7, 2002, the trial court issued its order following the *Huff*

hearing (PCR478-487). The court summarily denied all of the claims, save the claim relating to Abreu and Mr. Franqui on which the State had conceded the necessity for an evidentiary hearing.

On October 18, 2002, Mr. Franqui filed a supplement to his amended Rule 3.850 motion, alleging a claim based on *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and one based on *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (PCT316-17). On October 30, 2002, the State filed a response to these claims.

On March 31, 2005, the lower court entered an order denying relief to Mr. Franqui (PCR754-759); by separate order, the court denied the *Ring* claim raised in a supplemental pleading (PCR752-753). On April 29, 2005, a Notice of Appeal was filed (PCR764).[5]

When new collateral counsel obtained the record on appeal, he realized that the lower court had not entered a written order disposing of Mr. Franqui's *Atkins* claim. Accordingly, counsel moved this Court for a relinquishment to the trial court so that such a written order could be entered. The Court relinquished jurisdiction and, on February 21, 2008, the lower court entered its order summarily denying the *Atkins* claim.

After briefing and oral argument, the Court entered an order dated July 16,

[5] Following the denial by the lower court, prior registry counsel moved to withdraw from their representation of Mr. Franqui and the undersigned was appointed to handle Mr. Franqui's appeal (PCR761-62; 769).

2009, reversing the summary denial of Mr. Franqui's *Atkins* claim and remanding for an evidentiary hearing (Supp. R. P373). Following the formal relinquishment, a series of motions were filed and ruled on by the trial court: the State filed a motion to set procedures for mental health evaluations (Supp. R. P377-79), a motion for order for Defendant's Medical Records (Supp. R. P380-82), and a Motion to Compel Production of Materials, including any reports of prior mental health examinations performed on Mr. Franqui (Supp. R. P383-85). Mr. Franqui submitted a consolidated response to these motions (Supp. R. P386-90). At that time, Mr. Franqui's counsel informed the court and the State that he was attempting to ascertain whether any mental health examinations had been performed on Mr. Franqui during the initial Rule 3.851 proceedings and, if so, whether any report from any such evaluation had been generated (Supp. R. P388).[6] The trial court granted the motion to obtain copies of Mr. Franqui's medical records (Supp. R. P392), and entered an order appointing the State's preferred expert, Dr. Enrique Suarez, to conduct mental retardation testing on Mr. Franqui (Supp. R. P394-95).

Mr. Franqui's counsel subsequently confirmed that Mr. Franqui had been evaluated by Dr. Trudy Block-Garfield, at the behest of prior collateral counsel,

[6] As he informed the lower court, Mr. Franqui's new counsel had not been involved in the earlier Rule 3.850 litigation in this case (Supp. R. P388).

and that a report had been generated as a result of that evaluation (Supp. R. P396). That testing revealed that Mr. Franqui had a full scale IQ score of 75 utilizing the WAIS-R testing instrument (Supp. R. P397, 404). Dr. Block-Garfield's report, filed in the lower court, also noted that Dr. Block-Garfield was "aware that current thinking is to raise the IQ level for mental retardation to approximately 75" but that at the current time, a full scale IQ score of 75 is not considered to fall within the range of mental retardation (Supp. R. P408-09). Dr. Suarez, the State's mental health expert, conducted his evaluation of Mr. Franqui utilizing the WAIS-IV testing instrument, and also concluded, like Dr. Block-Garfield, a full scale IQ score of 75 which, as Dr. Suarez noted in his report, was "not sufficient for him to be deemed mentally retarded" under Florida law (Supp. R. P429).

Based on the reports of both Dr. Block-Garfield and Dr. Suarez, Mr. Franqui's counsel filed a Notice to Court with Accompanying Motion to Declare as Unconstitutional the Florida Supreme Court's Interpretation of Mental Retardation (Supp. R. P396-400), acknowledging that, in this Court's view as stated in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), Mr. Franqui "cannot make out a prima facie case showing mental retardation as a matter of law under Florida's definition of same" (Supp. R. P397). He also conceded that the only way that the lower court could entertain Mr. Franqui's claim of mental retardation was to conclude that this Court's interpretation of mental retardation as setting a cutoff

score of 70 was unconstitutional, and Mr. Franqui accordingly moved the court to declare that *Cherry* violated the Eighth Amendment right as announced in *Atkins* (Supp. R. P399). At a hearing on this motion, the trial court entertained argument on Mr. Franqui's motion and denied the motion to declare *Cherry* unconstitutional under *Atkins*, ruling:

> THE COURT: Well, I think, then, the logical question is, if we don't meet the first prong, if there's nothing to indicate that the first prong can be met, assuming for argument's sake, which – I will deny your motion as unconstitutional Florida Supreme Court's interpretation of mental retardation as decided in Cherry, C-H-E-R-R-Y, and Nixon, N-I-X-O-N, because there doesn't seem to be anything to indicate Mr. Franqui would even qualify for further hearing under Atkins.

(Supp. R. P462-63).

At the final hearing on this matter on September 17, 2009, the State and the defense stipulated to the introduction of the reports of Dr. Block-Garfield and Dr. Suarez and that the experts would testify consistent with their reports (Supp. R. P481-82). The court orally ruled that Mr. Franqui did not meet the requirements as set forth in this Court's decision in *Cherry*, that the claim of mental retardation was denied, and again made clear that Mr. Franqui's prior request to declare *Cherry* unconstitutional under *Atkins* was also denied (Supp. R. P483). The trial court subsequently entered a written order (Supp. R. P442), and supplemental briefing was submitted to this Court after jurisdiction was returned.

On January 6, 2011, the Court issued its opinion affirming the denial of postconviction relief. *Franqui v. State*, 59 So. 2d 82 (Fla. 2011) [hereinafter *Franqui II*]. The Court recognized Mr. Franqui's argument that because his "scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution," he argued that "by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002)." *Franqui II* at 92. The Court analyzed *Atkins* and its other decisions on this issue, and concluded that "a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process." *Franqui II* at 92. As the Court decided:

> Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that under current Florida law Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

Franqui II at 94. A timely motion for rehearing was filed, and denied on April 11, 2011. Mandate issued on April 27, 2011.

Mr. Franqui thereafter timely filed a Petition for Writ of Habeas Corpus in

the United States District Court for the Southern District of Florida. *See Franqui v. Sec'y Fla. Dep't of Corrections,* Case No. 11-22858-CIV-GRAHAM. That petition was denied, and an appeal taken to the United States Court of Appeals for the Eleventh Circuit. *See Franqui v. Florida,* Case No. 14-14278-P. The sole issue pending in that appeal in Mr. Franqui's claim of intellectual disability under the Eighth Amendment. That appeal is still pending in the Eleventh Circuit as of the time of the filing of this Initial Brief.

In the meantime, while his appeal was pending in the Eleventh Circuit, Mr. Franqui filed a new motion in the circuit court below pursuant to Fla. R. Crim. P. 3.851 alleging his entitlement to an evidentiary hearing and to relief in light of the Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014) (PCR-2 at 11-48). The State responded to the motion (PCR-2 at 49-74), and following a case management hearing (PCR-2 at 77-89), the lower court entered an order summarily denying the motion (PCR-2 at 75-76). A timely notice of appeal was filed (PCR-2 at 90-91). This Initial Brief follows.

STATEMENT OF THE FACTS

A. Guilt Phase

Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida (TR1717-18, 1994). After Cabanas, Sr., suffered an unrelated robbery in August, 1991, he, his son, and a friend, Raul

Lopez, routinely went to the Republic National Bank together for security reasons every Friday to get the cash to run the business (TR1718-20, 1994-96). The Cabanas' carried two 9 millimeter handguns and Lopez carried a .32 caliber weapon (TR1751, 1753, 1857).

On December 6, 1991, the Cabanas' and Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew approximately $25,000, which he carried in a special bag, and left in a vehicle driven by his son. Lopez followed (TR1720-23, 1746, 1997). On the way back to their business, the Cabanas' were boxed in at an intersection by the drivers of two trucks, both Chevy Suburbans. The occupants of one of the vehicles, wearing masks, exited and began shooting at them. Cabanas, Sr., returned fire (TR1724-28, 1999).

Neither of the Cabanas' saw Lopez during the firefight or the occupants of the second vehicle (TR1727-28, 1744, 2009). Although he thought one person, also masked, exited that vehicle, he did not know if that person was armed (TR1744-45). No demands were made for the money and no property was taken (TR1745, 1749-50, 2009). The shooters never approached the Cabanas' vehicle but clearly tried to kill Cabanas, Jr. (TR1749, 2009). No one said anything (TR1750).

The Cabanas' were unharmed, but Lopez was found lying shot outside his vehicle, his door shut, and with no traces of blood inside (TR1730-32, 1844-45).

The passenger door was open (TR2006). When the police arrived, Lopez was conscious and breathing (TR1983).

The Suburbans, subsequently determined to have been stolen, were found abandoned (TR1735, 1761, 1764). Three spent .9 millimeter shell casings were found on the ground outside one of the vehicles (TR1765, 1788). Another casing, a projectile, and a stocking were recovered from the inside (TR1790-91, 1796). Both Suburbans suffered bullet damage (TR1792, 1805). One of the Suburbans was riddled with thirteen bullet holes (TR1773). The Cabanas' Blazer had ten bullet holes (TR1846). One bullet hole was found in the passenger door of Lopez's pickup (TR1881).

No .32 caliber casings were recovered (TR1879). No fingerprints were obtained linking Mr. Franqui to the crime (TR1973). No witness was able to identify Mr. Franqui as a participant (TR1973-74). Evidence at the scene suggested that Lopez's pickup had struck the back of the Cabanas' Bronco at low speed (TR1987-1890).

The police (Miami Police Detectives Greg Smith and Jerry Crawford) questioned Mr. Franqui on January 18, 1992, at the Metro-Dade Police headquarters (TR1890). Later during this interview, Hialeah Police Department Detectives Nabut and Nazario came into the interview room (TR1903). After executing a written *Miranda* waiver form, Mr. Franqui initially denied to Nabut

any involvement "in their investigation" (TR1904-05, 1915). The Hialeah detectives then showed Mr. Franqui two photographs, one of the bank and one of the Suburbans and it was at this time that Mr. Franqui said something to the effect "You got me, I'm not going to lie to you, I will do this like a man, and then proceeded to say that he was involved in this particular case" (TR1905, 1916). Some of the discussion between Mr. Franqui and the Hialeah detectives took place in Spanish, and Detective Smith acknowledged he did not speak any Spanish (TR1906). Thereafter, according to Detective Albert Nabut, Mr. Franqui gave an informal statement (during was Nabut called a "preinterview") followed by a formal recorded one (TR1916).

According to Nabut, Mr. Franqui purportedly explained during the "preinterview" that he had learned through a Fernando Fernandez about the Cabanas' check cashing business and that he and his co-defendants had planned to rob the Cabanas' for three to five months (TR1916-17). He described the use of the stolen Suburbans, the firearms used, and related details of the plan. According to Mr. Franqui, Abreu left a getaway vehicle at the site where the Suburbans were abandoned off the Palmetto Expressway (TR1918-1920). He described the gun battle and admitted firing in the direction of the man (Lopez) in the truck behind the Cabanas' (TR1921). According to Nabut, Mr. Franqui stated that it was Abreu and San Martin who commenced the gun battle, and then Lopez opened fire

(TR1921). Mr. Franqui then ducked and pointed back in the direction of the gun battle and fired his weapon in that direction (TR1921). Over objection, the State introduced into evidence Mr. Franqui's recorded statement (TR1922-25; 1930-63).

Mr. Franqui consistently denied any intention of shooting anyone (TR1953, 1970). He consistently described that Lopez had fired upon him first (TR1971). He claimed to have been surprised at Lopez's presence (TR1972).

Co-Defendant Pablo San Martin also confessed orally to Detective Michael Santos (TR2096-2104). San Martin admitted initiating the robbery attempt and shooting his weapon at the Blazer but not the pickup truck. He could not tell if Mr. Franqui fired his gun (TR2102-03). San Martin said that the weapons had been thrown off a bridge into the water in Miami Beach (TR2104).

Detective Albert Nabut also interviewed San Martin on January 21, 1991, about the whereabouts of the weapons. San Martin confessed that he had thrown them into the river near his home and drew maps describing their location (TR2118-20). The weapons were later found by a police diver (TR2123, 2132).

Medical examiner Valerie Rao testified that Lopez died from a single gunshot wound to the chest which traveled internally to the abdomen, causing fatal internal bleeding (TR2044, 2050-51, 2062). The autopsy, however, was conducted by an unlicensed (in the United States at least) resident pathologist from Denmark who reflected in his protocol the existence of a non-existent exit wound (TR2065).

Surgeon Michael Hellinger testified that a bullet was removed from Lopez's abdomen (TR2165). Firearms expert Robert Kennington matched as "consistent" the projectile removed from the victim to the .357 caliber purportedly carried by Mr. Franqui which was recovered from the Miami River (TR2203-2206). He also matched to the .357 a projectile recovered from the passenger mirror of one of the Suburbans and a projectile found in the hood of the Blazer (TR2207-08, 2212). The three projectiles at issue were also consistent with the millions of .38 or .357 caliber handguns Smith & Wesson made over the past 50 years (TR2244, 2246).

Kennington's analysis of Lopez's .32 caliber weapon revealed that it had not been fired (TR2063). The identification of Lopez was established by stipulation (TR2063).

B. Penalty Phase

Craig Van Nest, a driver/deliveryman for an automobile parts supply business, described an armed robbery he suffered in January, 1992, committed by Mr. Franqui, Pablo San Martin, and a third party (TR2534-46). During the offense, Van Nest was abducted and hit over the head (TR2539-41). Detective Boris Mantecon related Mr. Franqui's confession to the crime and his recovery and surrender of the weapon used in the crime (TR2563-67). The State introduced certified copies of Mr. Franqui's convictions for armed kidnaping and armed robbery (TR2579).

Republic National Bank security guard Pedro Santos described an attempted robbery committed by a lone gunman on November 29, 1991, who demanded his surrender of a money bag and fired at him when he refused to give it up (TR2580-2590). Lead investigator Ralph Nazario subsequently took statements from both Mr. Franqui and San Martin and both suspects confessed (TR2596-99, 2605-14). Mr. Franqui followed San Martin and another party in a "safe" car to be used for the getaway after the stolen car occupied by San Martin was abandoned (TR2615). San Martin admitted being the gunman, using the same weapon used in the Lopez robbery/murder (TR2600). The State introduced documentary proof of Mr. Franqui's convictions for aggravated assault with a firearm and attempted robbery with a firearm (TR2621).

Co-defendant Pablo Abreu, San Martin's cousin, testified for the State (TR2690 *et seq.*). Abreu attributed the plan to rob the Cabanas to Mr. Franqui, who described the second vehicle containing an armed bodyguard, about whom Mr. Franqui said "It would be better for him to dead first than [me]." Mr. Franqui supplied to weapons (TR2700). Mr. Franqui shot at Mr. Lopez (TR2708).

The court took judicial notice of Mr. Franqui's convictions in this case for first-degree murder, two counts of attempted first-degree murder, and armed robbery (TR2750).

Detective Nick Fabrigas testified for the defense, and related that Abreu, in his initial statement, had confessed that the robbery had been planned, but that the shooting of Lopez was unintentional (TR2753). He had stated that the pickup truck driven by Lopez had appeared suddenly (TR2754).

Alberto Gonzalez, Mr. Franqui's father-in-law, described the love Mr. Franqui had for his daughter, Vivian (TR2777). Mr. Franqui was a "good kid" who was an "excellent husband" and "marvelous" with their two children (TR2777-79). Mr. Franqui was a "good worker" who had established a loving relationship with other members of his family (TR2780-81). Although he described his son-in-law as sometimes immature, he never suspected his involvement in criminal activity (TR2781).

Mario Franqui Suarez, Mr. Franqui's uncle, described Mr. Franqui's mother as "unstable" and "not normal" (TR2860). Mr. Franqui suffered from poor eyesight and was "slow" or "retarded" (TR2864-73). After coming to the United States in 1980, Mr. Franqui's brother underwent surgery but died two months later (TR2865). Thereafter, Mr. Franqui's father began to drink excessively and use crack cocaine (TR2866-67). He was briefly hospitalized for his substance abuse after he threw himself out of a window (TR2867). He was no longer able to care for his son (TR2868).

Mr. Franqui was also injured in an automobile accident in which he suffered several fractures of the hip and leg and received a metallic implant (TR2869). By the age of fifteen, Mr. Franqui's family had disintegrated and he was living on the street. He moved in with Suarez for a short time and then lived with Suarez's sons (TR2872). Suarez described his nephew as pleasant, helpful, respectful (TR2871-72, 2874). He did not use drugs or alcohol, and was devoted to his children (TR2872-73).

Psychologist Jethro Toomer interviewed 23 year old Leonardo Franqui and found him to have come from a dysfunctional family in which nurturing was lacking (TR3111-13). Mr. Franqui did poorly in school, dropped out in the 8th grade, and was raised by his uncle whom he thought was his father (TR3112-14, 3117, 3123). His mother abandoned him and was basically missing (TR3114, 3117). Mr. Franqui was extremely close to his younger brother who dies, and his death was highly traumatic for him (TR3118-19). He was abandoned not only by his mother but by his brother and father as well (TR3118-20).

Mr. Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired (TR3115-16, 3131). Dr. Toomer confirmed Mr. Franqui's involvement in a serious accident which left him hospitalized for six months (TR3125-26). In Dr. Toomer's opinion, Mr. Franqui was not a leader (TR3214).

Mr. Franqui had an IQ of less than 60 and was mentally retarded (TR3135). Dr. Toomer opined, in his expert opinion, that Mr. Franqui was suffering from an extreme mental or emotional disturbance at the time of the crime, a statutory mitigating circumstance (TR3138). Mr. Franqui's emotional and cognitive age was below his chronological age (TR3139). He was a devoted husband and caring parent (TR3143). He expressed remorse (TR3144). Dr. Toomer diagnosed Mr. Franqui as suffering from borderline personality disorder (TR3209).

Psychiatrist Charles Mutter testified for the State in rebuttal (TR3220 *et. seq.*). Mr. Franqui told him that he had no weapon but was merely present at a "getaway man" (TR3236-37). After speaking with Mr. Franqui on one occasion for approximately an hour and fifteen minutes, Dr. Mutter found no evidence of organic impairment or borderline personality disorder, and concluded he was not suffering from an extreme mental or emotional disturbance at the time of the offense (TR3242-43, 3246, 3283). He agreed that Mr. Franqui had impaired intelligence and might have had mild brain damage (TR3291, 3295).

In rebuttal, the State called Robert Barrechio, Mr. Franqui's employer at the City of Miami Gold Course where Mr. Franqui did maintenance work in 1991. Mr. Franqui was a good employee who showed initiative, made his own decisions, and understood his instructions (TR3350). He did not appear to Barrechio to be

mentally deficient (TR3351). However, his duties were to carry out maintenance assignments, and he was not called upon to made decisions (TR3355).

SUMMARY OF THE ARGUMENT

Subsequent to the Supreme Court's decision in *Hall v. Florida*, Mr. Franqui filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851. That motion was summarily denied. This Court should reverse and remand for an evidentiary hearing because Mr. Franqui must be given a fair opportunity under *Hall* and the Eighth Amendment to establish his ineligibility for execution because of his intellectual disability. The lower court's order is inconsistent with the requirements of *Hall.* It also misinterpreted its own earlier order denying Mr. Franqui's claim premised on *Atkins v. Virginia* and this Court's decision affirming that order. There is no dispute that Mr. Franqui's IQ score is 75, and Mr. Franqui should be afforded an evidentiary hearing to establish the other two prongs of the test for intellectual disability because *Hall* informs not only the first prong (IQ score) but also dictates that the medical community standards must be evaluated in addressing the second prong (adaptive functioning) and the third prong (age of onset).

ARGUMENT

IN LIGHT OF *HALL V. FLORIDA* AND THE EIGHTH AMENDMENT, MR. FRANQUI SHOULD BE GIVEN A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS HIS EXECUTION, AND THE LOWER COURT'S ORDER SUMMARILY DENYING HIS RULE 3.851 MOTION SHOULD BE REVERSED WITH DIRECTIONS TO HOLD AN EVIDENTIARY HEARING.

A. Introduction

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court ruled that the Eighth Amendment categorically bars the execution of mentally retarded individuals. As the Court put it, "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. The Court based its judgment, in part, on the fact that "the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 315-16. The *Atkins* Court further noted that while mentally retarded persons

frequently know the difference between right and wrong and are competent to stand trial, "by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *Id.* at 318. While there is "no evidence that they are more likely to engage in criminal conduct than others," there is "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan." *Id.* Because of their diminished capacity and culpability, the Court concluded that neither of the two rationales supporting capital punishment – retribution and deterrence – properly applies to mentally retarded individuals. *Id.* at 319-20. The Court also discussed how the reduced capacity of mentally retarded individuals provides a second justification for categorically exempting them from the death penalty:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, [] but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21 (footnote omitted) .

In response to *Atkins*, in 2004 this Court set forth the procedures for adjudicating a claim of intellectual disability in Fla. R. Crim. P. 3.203. That rule provided in pertinent part:

> As used in this rule, the term "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the department of Children and Family Services in rule 65G-4.302 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Fla. R. Crim. P. 3.203(b). In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), this Court interpreted the rule:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM [Standard Error of Measure]. Thus, the language of the statute and the corresponding rule are clear.

Cherry, 959 So. 2d at 712-13. Thus, the Court held that Florida law required the IQ score to be 70 or lower and that well-accepted scientific concepts such as the Standard Error of Measure and/or the Flynn Effect could not be employed to show that an individual with an IQ score above 70 was in fact mentally retarded (or as now referred to, intellectually disabled) within the meaning of *Atkins v. Virginia*.

On May 27, 2014, the United States Supreme Court rendered its decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), in which it concluded that this Court's interpretation of the rule and *Atkins*, as articulated in *Cherry,* was unconstitutional. The Supreme Court determined that use of a rigid requirement that a capital defendant must have an IQ score of 70 or lower in order to argue intellectual disability precluded his or her execution violated the Eighth Amendment. The Supreme Court explained that such a rigid rule deprived capital defendants in Florida with scores above 70 "a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. ct. at 2001.

This Court's prior rejection of Mr. Franqui's claim rested entirely on its earlier decision in *Cherry v. State*, 959 So. 2d 702 (Fla 2007):

> Recognizing that Franqui's scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution, Franqui's counsel argued below and now argues on appeal that by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S.

> 304, 122 S. ct. 2242, 153 L.Ed. 2d 335 (2002). He asks the Court to revisit *Cherry* and *Nixon [v. State,* 2 So. 3d 137 (Fla. 2009)] to determine if we have misapplied the holding in *Atkins* by setting a bright-line, full scale IQ of 70 or below as the cut-off score in order to meet the first prong of the three-prong test for mental retardation. He contends that *Atkins* approved a wider range of IQ test results that can meet the test for mental retardation. Therefore, the issue presented is solely a question of law subject to de novo review. As explained below, a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process.
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> Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that under current Florida law Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

Franqui II at 92-94.

In *Hall,* the Supreme Court held that the rigid rule adopted by this Court in *Cherry v. State* (and relied on specifically by this Court in denying Mr. Franqui's claim) violated the Eighth Amendment:

> It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score"). The Florida statute,

> as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. **Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause**.

Hall, 134 S. ct. at 2001 (emphasis added). The United States Supreme Court did not stop there. It further explained:

> Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U.S., at 308, n. 3, 122 S. ct. 2242. **Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design** but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.
>
> The death penalty is the gravest sentence our society may impose. **Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world.** The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Id. (emphasis added) .

The *Hall* Court rejected this Court's use of a bright-line cutoff and refusal to consider the standard error of measure ("SEM") in evaluating claims of intellectual disability. The *Hall* Court, citing the admonition in the DSM that "'IQ test scores are approximation of conceptual functioning . . .,'" held that "an individual with an IQ test score 'between 70 and 75 or lower,' . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S. Ct. at 2000. *Hall* reasoned that "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 1993. To "determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies . . . ." *Id*. Observing that its reliance on medical consensus to determine the scope of Eighth Amendment Protection under *Atkins* was significant, the Supreme Court explained:

> [t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Id. at 1993. The Supreme Court in *Hall* conformed the Eighth Amendment standard to what "the medical community accepts." *Id*. at 1994-95. It rejected the bright-line IQ score cutoff because it failed to comport with medical community

standards and the scientifically recognized SEM. Under *Hall*, statutes defining the *Atkins* bar cannot operate in a way as to trump the medical community's standards. *Hall* establishes that the medical community's standards regarding intellectual disability govern a court's inquiry because of the nature of the medical diagnosis at issue.

Thus, the United States Supreme Court rejected both this Court's adoption of the rigid requirement that the IQ score must be 70 or lower, and its refusal to consider "the views of those who design, administer, and interpret the IQ test." Yet, this Court's adoption of the requirement of a 70 or less IQ score and the refusal to consider "the views of those who design, administer, and interpret the IQ test" were the expressed basis for the circuit court's first order denying Mr. Franqui relief and this Court's later decision denying Mr. Franqui's claim under *Atkins v. Virginia*. This standard has been held to violate the Eighth Amendment. Indeed, in rejecting Mr. Franqui's *Atkins* claim, this Court wrote:

> Recognizing that Franqui's scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution, Franqui's counsel argued below and now argues on appeal that by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. ct. 2242, 153 L.Ed. 2d 335 (2002). He asks the Court to revisit *Cherry* and *Nixon [v. State,* 2 So. 3d 137 (Fla. 2009)] to determine if we have misapplied the holding in *Atkins* by setting a bright-line, full scale IQ of

> 70 or below as the cut-off score in order to meet the first prong of the three-prong test for mental retardation. He contends that *Atkins* approved a wider range of IQ test results that can meet the test for mental retardation. Therefore, the issue presented is solely a question of law subject to de novo review. As explained below, a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process.
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> Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that ***under current Florida law*** Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

Franqui II at 92-94 (emphasis added).

B. Mr. Franqui's Rule 3.851 Motion and the Lower Court's Order

As noted earlier, Mr. Franqui filed a Rule 3.851 motion alleging his entitlement to an evidentiary hearing and to relief under *Atkins* in light of the Supreme Court's rejection of this Court's *Cherry* analysis in *Hall.* The lower court denied Mr. Franqui's motion (PCR-2 at 75-76). While noting that there was no genuine dispute as to Mr. Franqui's IQ score (75), the court nonetheless denied relief because, in the lower court's view, its prior order was denied "for failure to meet any of the prongs" and that:

> Defendant had a hearing and an opportunity to present evidence on all 3 prongs. His own expert did not find deficits in adaptive functioning, as he supported his family. Defendant also failed to meet the third prong. He is not entitled to **another** evidentiary hearing.

(PRC-2 at 76) (emphasis in original). For the reasons set forth below, Mr. Franqui submits that the lower court's order should be reversed and that this case be remanded for a full evidentiary hearing.[7]

1. Mr. Franqui has been denied a "fair opportunity" to demonstrate that he is intellectually disabled and thus ineligible for execution under the Eighth Amendment.

Despite the Eighth Amendment's command that Mr. Franqui be given a "fair opportunity" to demonstrate his ineligibility for execution, the lower court denied Mr. Franqui's 3.851 motion under faulty assumption that there had been some sort of previous "finding" that Mr. Franqui has not met the second and third prongs of the test for intellectual disability.[8] As explained below, this is not the case. And even if it were correct, *Hall* has changed not only how courts must assess the first prong of intellectual disability (intellectual functioning), but also the prism through

[7] "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013).

[8] The test for assessing intellectual disability comprises three prongs: (1) significantly subaverage intellectual functioning; (2) limitations in adaptive functioning; and (3) manifestation/onset prior to the age of 18.

which courts must assess the second and third prongs (adaptive functioning and age of onset). Therefore, Mr. Franqui should be given a fair opportunity under *Hall* to establish his ineligibility for execution. *See also Brumfield v. Cain*, 135 S. ct. 2269 (2015).

a. The Lower Court's 2009 Order and the Appeal Therefrom

In its October 9, 2009, order, when the lower court was tasked with addressing Mr. Franqui's *Atkins*-based claim, it most certainly did not make any "findings" that Mr. Franqui had not met the second and third prongs of the test for intellectual disability. In the 2009 order, the lower court, after recounting information contained in the experts' reports, found as follows:

> It would be prudent that the Defendant be required to make a prima facie showing of mental retardation before the Defendant is entitled to an evidentiary hearing. This case has been relinquished twice for a hearing when the Defendant's own expert determined in 2003 that the Defendant had an IQ above 70, no deficits in adaptive functioning and is not mentally retarded.

(Supp. PCR 442). This is hardly evidence of any "finding" on the second or third prongs of the test for intellectual disability. Rather, it is merely a reaffirmation that the lower court believed that Mr. Franqui could not make out a prima facie case of mental retardation sufficient for an evidentiary hearing.

On appeal from the denial of the 2009 order, this Court's opinion made crystal clear that it was rejecting Mr. Franqui's claim of intellectual disability

solely on the first prong, that is, on the IQ score of 75 and that its reading of the lower court's 2009 order also revealed it was a denial based on the first prong:

> Recognizing that Franqui's scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution, Franqui's counsel argued below and now argues on appeal that by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. ct. 2242, 153 L.Ed. 2d 335 (2002). He asks the Court to revisit *Cherry* and *Nixon [v. State,* 2 So. 3d 137 (Fla. 2009)] to determine if we have misapplied the holding in *Atkins* by setting a bright-line, full scale IQ of 70 or below as the cut-off score in order to meet the first prong of the three-prong test for mental retardation. He contends that *Atkins* approved a wider range of IQ test results that can meet the test for mental retardation. Therefore, the issue presented is solely a question of law subject to de novo review. As explained below, a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process.
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> Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that ***under current Florida law*** Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

Franqui II at 92-94 (emphasis added). That the court used the phrase "under current Florida law" is an unequivocal reference to its prior discussion of *Atkins*, *Cherry*, and *Nixon v. State*, 2 So. 3d 137 (Fla. 2009). The entire discussion by the Court in *Franqui II* is devoted to discussing the first prong and the Court concluded that the lower court had competent and substantial evidence *under current Florida law – i.e. Cherry* and *Nixon* – to deny Mr. Franqui's claim of intellectual disability as a matter of law. Thus, the lower court's 2015 order is not only inconsistent with its 2009 order but it overlooks this Court's opinion in *Franqui II.* It would have made little to no sense for this Court to write an elaborate opinion on the first prong if this Court believed that the lower court had "found" that Mr. Franqui had not met either of the other two prongs of the test for intellectual disability. When this Court affirmed the circuit court's prior order, it determined that Mr. Franqui could not, as a matter of law, make out a prima facie case for intellectual disability because his IQ score was above the strict cutoff of 70 that the Court has previously imposed in *Cherry*.

b. The Lower Court's 2015 Order

As noted above, the lower court's order presently under review misread its own prior order as well as this Court's opinion in *Franqui II.* It also incorrectly determined that "Defendant also failed to meet the third prong" (PCR-2 at 76). As Mr. Franqui's counsel argued at the case management hearing (and as the

pleadings before the lower court established), "Mr. Franqui dropped out of school, I believe, in the seventh or eighth grade, which is certainly before the age of 18. So again, under *Hall*, [] we ask the Court to reevaluate its prior assessment" (PCR-2 at 83-84).

With regard to the third prong (age of onset), the lower court purported to rely on Dr. Toomer's testimony at Mr. Franqui's penalty phase, but overlooked his testimony that school records establish Mr. Franqui's abysmal record with many failing grades (R847-922). Testimony adduced at the penalty phase from Mr. Franqui's family established that Mr. Franqui was "slow" or "retarded" (TR2864-73). Dr. Toomer testified that Mr. Franqui did poorly in school, dropped out in the 8th grade, and was raised by his uncle whom he thought was his father (TR3112-14, 3117, 3123). Mr. Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired (TR3115-16, 3131). In Dr. Toomer's opinion, Mr. Franqui was mentally retarded (TR3135). Even the report of Dr. Enrique Suarez, the expert on whose opinion the lower court purported to rely, provided information regarding the onset-before-age-of-18 prong of the test for intellectual disability. His report confirmed that Mr. Franqui's grades in school (5th through 7th grades) were generally low and contained many failing grades (PCR-417-18). For example, in the 7th grade Mr. Franqui received mostly Ds and Fs (*Id.*). Dr. Trudy Block-Garfield's report, also purportedly relied on by the lower

court, revealed that Mr. Franqui's "educational history is rather limited" and "[h]is grades were primarily Ds and Fs. He was not able to state if he was in any special classes but said that there were problems with his reading and he thought that it may have been dyslexia" (PCR at 406).

Based on the record and the above-referenced information, it is clear that the lower court's purported "finding" with regard to the third prong of the test for intellectual disability (age of onset) cannot withstand any scrutiny particularly without evidentiary development and a fair opportunity under *Hall* to establish his ineligibility for execution under the Eighth Amendment.

c. Mr. Franqui is Entitled to an Evidentiary Hearing and a Fair Opportunity to Establish his Entitlement to Relief under *Hall.*

On the basis of the rigid rule set forth in *Cherry* and found unconstitutional in *Hall*, this Court previously rejected Mr. Franqui's claim under *Atkins v. Virginia*. Until the decision in *Hall*, Mr. Franqui was not just unable to assert his *Atkins* claim with an IQ score above 70, he was also deprived of the opportunity to rely on expert testimony regarding the standard error of measurement and the Flynn effect and the ability to have the other prongs of the intellectual disability test evaluated in a proper manner as dictated by *Hall. Hall* made abundantly clear that Mr. Franqui is entitled to "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall,* 134 S. ct. at 2001. As explained below, such "a fair opportunity" must surely include notice of the correct standard as articulated in

Hall, the opportunity to present and rely on evidence concerning the Standard Error of Measurement as well as the well documented Flynn effect,[9] and to have counsel performing under the Sixth Amendment constitutional guarantee of effective representation.

At the core of *Hall* protection are those *Atkins* claimants whose claims for relief were categorically denied under *Cherry* without an opportunity to present evidence and receive consideration of other factors that might suggest their actual IQ lies lower in the SEM from their test scores. However, *Hall's* reasoning reaches immutably beyond that core holding, as clearly noted by the sharp dissent, which complained that the majority ruled that the statute must bow to the standards

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[9] The Eleventh Circuit explained the Flynn effect in *Conner v. GDCP Warden*, 784 F.3d 752 at n.11 (11th Cir. 2015). With respect to the Flynn effect in particular:

> An evaluator may also consider the "Flynn effect," a method that recognizes the fact that IQ test scores have been increasing over time. The Flynn effect acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field.

(citing *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010)).

adopted by a professional association. *See Hall v. Florida,* 134 S. Ct. 1986, 2005 (2014) (Alito, J., dissenting).

The Supreme Court reasoned in *Hall* that "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. at 1993. "To determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies . . . ." *Id*. at 1993. Observing that its reliance on medical consensus to determine the scope of Eighth Amendment protection under *Atkins* was significant, the Court assured that the fact

> [t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Id. at 1993. The Supreme Court conformed the Eighth Amendment standard to what ". . . the medical community accepts . . . ." *Id*. at 1994-95.

The *Hall* Court rejected this Court's bright-line cutoff because it failed to comport with medical community standards and the scientifically recognized standard error of measure. Under *Hall*, statutes defining the *Atkins* bar cannot operate in a way as to trump science and/or the medical community's standards. Mr. Franqui argues that *Hall* establishes that the medical community's standard

regarding intellectual disability governs not only the first prong but the other prongs as well; hence the need to provide Mr. Franqui with a fair opportunity to establish his ineligibility for execution under *Hall.* A contrary ruling would ignore the reasoning behind the *Hall* decision.

Hall stands for the proposition that this Court's *Atkins* jurisprudence cannot be more restrictive than the medical and clinical reality of diagnosing mental health conditions, because then "*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id*. at 1999. The Supreme Court warned that a contrary view, giving states "complete autonomy to define intellectual disability as they wished," would "conflict[] with the logic of *Atkins* and the Eighth Amendment." *Id*. *Hall* precludes statutory definitions of intellectual disability from being more restrictive than those used by the medical community. Indeed, *Hall* rejected *Cherry* because *Cherry* was more restrictive than the medical community in defining ID. Any legal standard that does the same is, of course, also unconstitutional under *Hall*. Moreover, it is not for experts, generally non-lawyers, to base their opinion on their non-expert understanding of statutory language. An expert's job is to employ the standards of his profession.

That *Hall*'s reasoning extends to the other prongs of the test for intellectual disability is established by the Supreme Court's grant of certiorari and vacation of

the judgment of the Court of Criminal Appeals of Alabama in *Lane v. Alabama*, 136 S. Ct. 91 (2015). In *Lane,* the Supreme Court remanded the case to the Court of Criminal Appeals of Alabama "for further consideration in light of *Hall v. Florida*." *Lane v. Alabama, (Id.).* The issue presented in the petition in *Lane* was that the state court rejected petitioner's evidence of intellectual disability in a legal opinion "untethered to any professional standard." Further in *Lane*, the State conceded that prong one was satisfied because the defendant's IQ score was 70. *See Lane v. State,* 169 So. 3d 1076 (Al. Ct. Crim. App. 2014). By granting certiorari and vacating the judgment of the Alabama Court of Criminal Appeals, the Supreme Court clearly extended *Hall* to the other prongs of the test for intellectual disability. Under *Lane* and *Hall,* Mr. Franqui must be given a fair opportunity to establish his ineligibility for execution under the Eighth Amendment and to have all the prongs viewed through the proper analysis as set forth in *Hall.*

Take as example the third prong—age of onset. Under *Hall,* there need only be some evidence of intellectual disability pre-18 so that the subaverage intellect and deficient functioning can be recognized as developmental in nature. The *Hall* Court struck down this Court's first-prong standard because it "disregard[ed] established medical practice . . . ." 134 S. Ct. at 1995. The third-prong standard must reflect the reality that evidence of early onset is usually thin, because it comes

from a time when there was no known reason to preserve and record the defendant's intellectual level.[10] It must also reflect the reality that some indicia of early onset—some causes and evidence before eighteen—is enough for the medical community.

While the *Hall* Court was clear that the views of the medical community "do not **dictate** the Court's decision," it made clear that courts could not "disregard these informed assessments." *Id*. at 2000 (emphasis added) . In other words, courts are not beholden to any consensus of the medical community, but in circumstances as in *Hall* where the courts create a legal fiction more restrictive than the medical community's standard and contrary to the reality of a situation, the Eighth Amendment will be offended. Use of a legal standard for the third prong that prevents intellectually disabled defendants from receiving *Atkins* protection violates the principle underscoring *Hall*.

When the medical community's standards regarding the third prong as reflected in DSM-IV[11] are properly understood and properly applied in Mr.

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[10] Because "[t]he death penalty is the gravest sentence our society may impose," *Hall* made clear that Florida law cannot "contravene[] our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id*. at 2001. It would offend that dignity and that commitment if capital defendants are held to an impossible standard of proof not imposed by the medical community.

[11] As this Court has recognized, "[t]he third prong . . . specifies that the present condition of 'significantly subaverage general intellectual functioning' and

Franqui's case, it is clear that the third prong could be established at an evidentiary hearing. Testimony adduced at the penalty phase from Mr. Franqui's family established that Mr. Franqui was "slow" or "retarded" (TR2864-73). Dr. Toomer testified that Mr. Franqui did poorly in school, dropped out in the 8th grade, and was raised by his uncle whom he thought was his father (TR3112-14, 3117, 3123). Mr. Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired (TR3115-16, 3131). In Dr. Toomer's opinion, Mr. Franqui was mentally retarded (TR3135). Even the report of Dr. Enrique Suarez, the expert on whose opinion the lower court purported to rely, provided information regarding the onset-before-age-of-18 prong of the test for intellectual disability. His report confirmed that Mr. Franqui's grades in school (5th through 7th grades) were generally low and contained many failing grades (PCR-417-18). For example, in the 7th grade Mr. Franqui received mostly Ds and Fs (*Id.*). Dr. Trudy Block-Garfield's report, also purportedly relied on by the lower court, revealed that Mr. Franqui's "educational history is rather limited" and "[h]is grades were primarily Ds and Fs. He was not able to state if he was in any special classes but said that there were problems with his reading and he thought that it may have been dyslexia" (PCR at 406).

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concurrent 'deficits in adaptive behavior' **must have first become evident during childhood**." *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007).

The second prong (deficits in adaptive functioning) must also, under *Hall*, be considered through the prism of the medical community's standards. In Mr. Franqui's case, for example, the report of Dr. Suarez indicated that he relied on telephone interviews with three corrections officers from Death Row who were "familiar with Mr. Franqui" (PCR-1 at 434). Dr. Suarez's telephonic interviews with these three death row guards generated interviews of almost 5 pages in his report and included the personal opinions of those guards as to whether Mr. Franqui was "mentally retarded" (*Id*. at 434-38). As explained below, such a methodology is, under *Hall*, improper and Mr. Franqui must be given a fair opportunity to have it evaluated by the lower court through *Hall*'s prism.

The AAIDD[12] is the world leader in the assessment of intellectual disability. In January 2015 (post-*Hall*) it published a manual for practitioners entitled *The Death Penalty And Intellectual Disability* (henceforth DPID).[13] This work encapsulates the science of evaluating intellectual disability in individuals facing the death penalty, including those who have been incarcerated in a high security prison for prolonged periods of time. The scientific approach outlined by the

[12] The American Association on Intellectual and Developmental Disabilities (AAIDD) is the leading professional association concerned with the diagnosis and treatment of intellectual disability.

[13] Edward A. Polloway Et Al., *The Death Penalty And Intellectual Disability*, 267 (Edward A. Polloway ed., American Association of Intellectual and Developmental Disabilities (2015)).

AAIDD in *The Death Penalty And Intellectual Disability* shows the need for a full hearing on the adaptive functioning prong in Mr. Franqui's case and the impropriety of Dr. Suarez's methodology. For example, AAIDD specifically addresses this issue in *The Death Penalty And Intellectual Disability*. It states in pertinent part that:

> **[**a]lthough, as noted earlier, current functioning cannot be validly assessed for a person who is incarcerated, judges may require that current functioning be assessed in *Atkins* cases. There are validity limitations when conducting such an evaluation. For instance, the administration of an AB scale to an individual who is familiar with the defendant's prison behavior (e.g., corrections officers, the defendant) would not yield a valid measure of adaptive behavior. Many items on AB scales cannot be answered for incarcerated individuals, and thus incarcerated persons were not included in the standardization sample of these scales.

(DPID at 189). In other words, *Hall* significantly undermines Dr. Suarez's conclusion about the second prong of the intellectual disability test. Hence, Mr. Franqui requested below, and requests here, a fair opportunity to establish his ineligibility for execution under the Eighth Amendment.

The "fair opportunity" to which Mr. Franqui is entitled under *Hall v. Florida* should include the right to effective representation under *Strickland v. Washington*, 466 U.S. 668 (1984), and the right under *Ake v. Oklahoma*, 470 U.S. 68 (1986), to the assistance of a qualified expert to assist in the preparation of his Eighth Amendment claim that his execution is barred due to his intellectual disability. As

the Tenth Circuit recently held, "defendants in *Atkins* proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments." *Hooks v. Workman*, 689 F.3d 1148, 1184 (6th Cir. 2012). "Having no right to [Sixth Amendment] counsel in a mental retardation proceeding—at least where that proceeding is the first opportunity to raise a claim of mental retardation—could render *Atkins* a nullity." The Tenth Circuit determined that the right to Sixth Amendment counsel was clearly established federal law:

> Therefore, we hold that defendants in *Atkins* proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments—a right that stems directly from, and is a necessary corollary to, *Atkins*.

Id. at 1185. To that end, the Court, in remanding the case for an evidentiary hearing in order to fulfill *Hall*'s mandate that Mr. Franqui be given a fair opportunity to establish his ineligibility for execution, should ensure that Mr. Franqui be afforded all the protections afforded and guaranteed by the Sixth and Fourteenth Amendments.

CONCLUSION

For the reasons set forth herein, Mr. Franqui submits that the lower court order summarily denying his Rule 3.851 motion be reversed, and that an evidentiary hearing be granted.

Respectfully submitted,

/s/ *Todd G. Scher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of November, 2015, I electronically filed the foregoing pleading with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record.

/s/ *Todd G. Scher*