IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1441

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@myfloridalegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

STATEMENT OF CASE AND FACTS

Defendant was indicted in the Circuit Court of the Eleventh Judicial Circuit, case no. F92-6089, for (1) the premeditated or felony murder of Raul Lopez; (2) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Sr.; (3) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Jr.; (4) the attempted robbery with a firearm of Lopez and the Cabanases; all of which occurred during an ambush-style robbery attempt on December 6, 1991; (5) the grand theft of a motor vehicle belonging to Young Kon Huh; (6) the grand theft of a motor vehicle belonging to Anthony Docal; and (7) the use of a firearm during the commission of the murder, attempted murders, and/or the attempted robbery. (R.[1] 1-5)

The matter proceeded to trial on September 20, 1993. (R. 22) The historical facts, as found by this Court are:

> Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash from his bank for the business. After Cabanas Sr. was robbed during a bank trip, Cabanas Jr. and a friend, Raul Lopez, regularly accompanied Cabanas Sr. to the bank.

[1] The symbol "R." refers to the record on direct appeal, Florida Supreme Court Case No. 83,116. The symbol "T." refers to the trial transcript. The symbols "PCR.," "PCT." and "PCR-SR." will refer to the record on appeal, transcript of post conviction proceedings and supplemental record on appeal in the appeal from the denial of Defendant's initial motion for post conviction relief, Florida Supreme Court case no. SC05-830, respectively. The symbol "PCR2." will refer to the record in the instant appeal.

The Cabanases were each armed with a 9mm handgun, and Lopez was armed with a .32 caliber gun.

On Friday, December 6, 1991, the Cabanases and Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew about $25,000 in cash and returned to the Chevrolet Blazer driven by his son. Lopez followed in his Ford pickup truck. Shortly thereafter, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicle and fled. Cabanas Jr. saw one person, also masked, exit the rear Suburban.

Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. One bullet hole was found in the passenger door of Lopez's pickup. The Suburbans, subsequently determined to have been stolen, were found abandoned. Both Suburbans suffered bullet damage--one was riddled with thirteen bullet holes. The Cabanases' Blazer had ten bullet holes.

[Defendant's] confession was admitted at trial. When police initially questioned [Defendant], he denied any knowledge of the Lopez shooting. However, when confronted with photographs of the bank and the Suburbans, he confessed. [Defendant] explained that he had learned from Fernando Fernandez about the Cabanases' check cashing business and that for three to five months he and his codefendants had planned to rob the Cabanases. He described the use of the stolen Suburbans, the firearms used, and other details of the plan. [Defendant] admitted that he had a .357 or .38 revolver. Codefendant San Martin had a 9mm semiautomatic, which at times jammed, and codefendant Abreu had a Tech-9 9mm semiautomatic, which resembles a small machine gun. [Defendant] stated that San Martin and Abreu drove in front of the Cabanases and [Defendant] pulled alongside them so they could not escape. Once the gunfight began, [Defendant] claimed that the pickup rammed the Cabanases' Blazer and Lopez opened fire. [Defendant] then returned fire in Lopez's direction.

> San Martin refused to sign a formal written statement to police. However, San Martin orally confessed and, in addition to relating his own role in the incident, detailed [Defendant's] role in the planning and execution of the crime. San Martin admitted initiating the robbery attempt and shooting at the Blazer but not shooting at Lopez's pickup. He placed [Defendant] in proximity to Lopez's pickup, although he could not tell if [Defendant] had fired his gun during the incident. San Martin initially claimed that the weapons used in the crime were thrown off a Miami Beach bridge, but subsequently stated that he had thrown the weapons into a river near his home, where they were later recovered by the police. San Martin did not testify at trial, but his oral confession was admitted into evidence over [Defendant's] objection.
>
> A firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by [Defendant] during the attempted robbery. He said the same about a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer. The rust on the .357, however, prevented him from ruling out the possibility that the bullets may have been fired from another .357 revolver.

Franqui v. State, 699 So. 2d 1312, 1315-16 (Fla. 1997). After considering this evidence and the argument of counsel, the jury found Defendant guilty as charged on all counts. (R. 668-74, T. 2464-66) The trial court adjudicated Defendant in accordance with the verdicts. (R. 675-76, T. 2471)

The penalty phase commenced on November 3, 1993. (R. 38) During the penalty phase, Alberto Gonzalez testified that he had met Defendant when Defendant started talking to his daughter Vivian while visiting friends of the Gonzalez family. (T. 2775-

76) Defendant seemed smitten with Vivian so Mr. Gonzalez checked Defendant's background, believed he was a good kid and allowed him to court Vivian. (T. 2776-78) Eventually, Defendant and Vivian moved in together in an apartment at Defendant's uncle's home and held themselves out as married even though they were not married. (T. 2778) Mr. Gonzalez stated that Defendant subsequently told him that he was looking for a bigger apartment that was closer to Mr. Gonzalez's home.

Mr. Gonzalez saw Defendant frequently and believed he was an excellent husband and father to the two girls he had with Vivian. (T. 2778-79) He had never known Defendant to drink or use drugs. (T. 2778) He stated that Defendant cleaned the house, fed the children and changed their diapers. (T. 2779)

Mr. Gonzalez worked in maintenance at a municipal golf course and assisted Defendant in getting a job there. (T. 2776, 2780-81) He believed that Defendant was an excellent worker but stated that Defendant would joke around and ride the golf carts during breaks, which made him seem immature. (T. 2781)

On cross, Mr. Gonzalez stated that he and Defendant had discussed plans Defendant was making for his future. (T. 2783) He never had any problems communicating with Defendant, who seemed to have his own mind and was normal. (T. 2781-82) Defendant had told Mr. Gonzalez that he had injured his leg when

he was young but never suggested he had received a head injury during that incident. (T. 2784)

Defendant seemed to have a good relationship with his family and never suggested he had been mistreated as a child. (T. 2784-86) He claimed to be in written communication with his mother, who had remained in Cuba. (T. 2785)

Mario Franqui Suarez testified that his brother Fernando had raised Petitioner since birth as his son even though Defendant was not his biological son. (T. 2854-56) Until the day before Mr. Franqui testified, Defendant did not know his father was not his father. (T. 2856)

Defendant was born with poor vision that was not treated. (T. 2864) Mr. Franqui believed that Defendant was slow to learn and retarded and stated that Defendant always kept his mouth open. (T. 2864, 2873)

When Defendant was in his late teens, Mr. Franqui took Defendant to live with his family. (T. 2870-71) While living with Mr. Franqui, Defendant was expected to behave and worked with Mr. Franqui selling tires. (T. 2871) Mr. Franqui was aware of Defendant's relationship with Vivian and the birth of their children. (T. 2873) He stated that Defendant was crazy about his daughters. (T. 2873)

On cross, Mr. Franqui insisted Defendant did poorly in school but admitted that he never saw Defendant's report cards. (T. 2881-82) He reluctantly admitted that the reasons he had given for believing Defendant to be retarded were that Petitioner kept his mouth open all the time and did not listen when he was scolded. (T. 2882-85) He also reluctantly acknowledged that Defendant had obtained his own apartment closer to Vivian's family and was making plans to buy a house. (T. 2886-88)

Dr. Jethro Toomer, a psychologist, testified that he evaluated Defendant by conducting an interview, administering tests and reviewing records. (T. 3106-09) The interview was conducted in three one hour sessions. (T. 3109) Dr. Toomer also interviewed Defendant's family. (T. 3110) Among the records Dr. Toomer reviewed were Defendant's school records from Florida. (T. 3110-11) Dr. Toomer stated that he learned that Defendant was born in 1970 in Cuba and dropped out of school in the eighth grade. (T. 3111-12)

Dr. Toomer stated that he had difficulty communicating with Defendant during their interviews. (T. 3115) He averred that Defendant seemed to have difficulty retrieving words. (T. 3115) He stated that Defendant would at times speak slowly and without

meaning or content and that at other times Defendant would be hyperverbal and had to be refocused. (T. 3115)

Dr. Toomer opined that Defendant's insight and judgment were impaired. (T. 3116) He stated that the opinion was based on the tests he administered and his impression that Defendant was unable to explain his reasons for his behavior and to describe his decision making process. (T. 3116)

Dr. Toomer believed that Defendant had subpar school performance in Cuba and was unable to keep up with other children. (T. 3117) He stated that Defendant came to this country when he was ten as part of the Mariel Boatlift. (T. 3117) Dr. Toomer believed that Defendant's school records in this country indicated a pattern of poor performance. (T. 3120) However, he also stated that they revealed incidents corresponding with the events in Defendant's life. (T. 3120) He averred that the records showed that Defendant attended school regularly during his first two years, but after his brother's death, Defendant started skipping school and doing badly. (T. 3120-22) He stated that the school had attempted to contact the family but had been unable to do so. (T. 3121)

Dr. Toomer knew that Defendant had been employed at times. (T. 3123) He knew that Defendant had held as many as three jobs simultaneously and that Defendant was always described as a hard

worker. (T. 3125) He believed that this was not inconsistent with retardation because retarded people can perform in jobs that are repetitive in nature and do not involve reasoning. (T. 3124) He also opined that retarded people were capable of hiding their deficits. (T. 3124)

Dr. Toomer believed that Defendant had been struck by a car while riding a bike when he was around 16. (T. 3125) Defendant claimed that he had been rendered unconscious during the accident. (T. 3125) Dr. Toomer averred that Defendant was hospitalized as a result of the accident and that he was confined to a wheelchair for six months after the accident. (T. 3125) Dr. Toomer has seen hospital records that corresponded with the accident. (T. 3126) He averred that cognitive difficulties and impaired judgment was frequently the result of head trauma. (T. 3126)

Dr. Toomer stated that Defendant became involved with Vivian when he was 17 or 18 and that they had two young daughters together. (T. 3126) Defendant and his family told Dr. Toomer that he was a caring father and devoted husband. (T. 3143)

Dr. Toomer stated that abandonment early in life and a lack of early nurturing caused a person to engage in dysfunctional behavior later in life. (T. 3128) He averred that these

circumstances caused a person not to be able to develop the ability for higher order thinking and to remain emotionally immature. (T. 3130)

Dr. Toomer stated that he administered five tests to Defendant: the Revised Beta test, the Bender Gestalt Design test, the Carlson Psychological Survey, the Minnesota Multiphasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS). (T. 3132-33, 3136, 3137) Dr. Toomer stated that the Revised Beta test was a test of nonverbal intelligence and that Defendant received an IQ score of less than 60 on this test. (T. 3133-35) He opined that this score was in the retarded range. (T. 3135) He described the Bender Gestalt test as a screening test for visual motor difficulties, organicity and overall personality functioning. (T. 3136)

Dr. Toomer opined that Defendant's intellectual functioning was impaired. (T. 3139) He believed that all of these impairments were life-long and caused Defendant to engage in criminal activity. (T. 3140-41) He also believed that dropping out of school and committing crimes shows that Defendant had a history of maladaptive behavior. (T. 3144)

On cross, Dr. Toomer admitted that he had believed that Defendant's interpersonal relationships had been spotty until he learned that Defendant was a devoted husband and father. (T.

3172-73) He acknowledged that the hospital records did not show that Defendant had lost consciousness during his bike accident. (T. 3173-74) He also admitted that Defendant's uncle has told him that Defendant did not lose consciousness during the accident. (T. 3175-76)

Dr. Toomer admitted that the full scale IQ Defendant obtained on the WAIS was 83, which he described as both low average and below average. (T. 3198-99) He admitted that Defendant received a performance IQ of 92, which was average, and that performance was a measure of nonverbal intelligence. (T. 3199)

Dr. Toomer acknowledged that while Defendant received bad grades in academic subjects, he received good grades in classes such as art and mechanical shop. (T. 3210) When asked about the relationship between the WAIS score and retardation, Dr. Toomer responded that he relied on the Revised Beta score and noted that there was a difference in the verbal and performance scores on the WAIS that was indicative of organicity. (T. 3211-12) When asked if he was testifying Defendant was retarded, Dr. Toomer responded, "he is retarded according to his functioning on the Revised Beta." (T. 3211) He asserted that WAIS score difference suggested the need for a neuropsychological evaluation. (T. 3212) When asked if he was opining that

Defendant had organic brain damage, Dr. Toomer skirted the issue by stating that the WAIS score indicated organicity but admitted that he had not done neuropsychological testing. (T. 3213-14)

On redirect, Dr. Toomer stated that his opinion that Defendant did not act as a leader in these crimes was based on his test results and evaluation, which led him to believed that Defendant acted out of the need to be accepted. (T. 3214-15) He insisted that the Revised Beta and WAIS results could not be compared. (T. 3215) He stated that the numerous inconsistencies he observed in Defendant's responses meant that Defendant was easily confused. (T. 3216)

In rebuttal, Dr. Charles Mutter, a psychiatrist, testified that he evaluated Defendant. (T. 3220-23) In doing so, he had reviewed police reports, Defendant's confession, depositions, Defendant's school records and raw data from Dr. Toomer's evaluation. (T. 3224, 3235, 3240) He also interviewed Defendant in the presence of Defendant's attorney. (T. 3234)

Dr. Mutter had no difficulty communicating with Defendant and found that his thinking was not concrete. (T. 3236) Defendant told Dr. Mutter that he had left school because he did not like school. (T. 3238, 3239) He informed Dr. Mutter that he had worked for his uncle, then a factory, then his uncle again and finally for the City of Miami. (T. 3238-39)

Defendant lost the job with the city because he left work without signing out when Vivian accidentally locked one of his children in a car. (T. 3238-39) Defendant claimed that he was trying to become a police officer. (T. 3239)

Dr. Mutter opined that Defendant was not retarded. (T. 3240) He noted that Defendant's score on the WAIS was above the level of retardation while the Revised Beta showed impairment. (T. 3240) Dr. Mutter averred that the IQ score on the performance section of the WAIS should be consistent with the score on the Revised Beta. (T. 3240-41) He stated that one reason for a significant difference between such scores would be that the person intentionally did poorly on one of the tests. (T. 3241) He noted that it was not possible to obtain an IQ score that exceeded one's intellectual capacity. (T. 3241)

Dr. Mutter was not surprised that there was difference in Defendant's scores on the verbal and performance scale of the WAIS because Defendant had no interest in academic learning. (T. 3241-42) He stated that the difference was not consistent with organic brain damage. (T. 3242) Instead, it was based on the fact that since Defendant did not want to learn academic skills, he had not done so. (T. 3242)

On cross, Dr. Mutter admitted that he had received information suggesting that Defendant was a good husband and

father. (T. 3285) He stated that Defendant did tend to elaborate beyond the point of a question in answering it. (T. 3285-86) He admitted that Defendant's IQ score was in the dull normal range. (T. 3286) Dr. Mutter stated that the abilities Defendant demonstrated during their interaction was inconsistent with his score on the Revised Beta. (T. 3290-91, 3298-3300)

Michael Barrechio testified that he was the head greenskeeper at the City of Miami Golf Course. (T. 3348) Defendant worked for him from June 1991 to October 1991. (T. 3349) The type of work Defendant did was not repetitive, and Defendant's job assignments changed on a daily basis. (T. 3349-50) Moreover, Defendant showed initiative by finding areas that needed work and doing the work if Mr. Barrechio was not available. (Doc 7-App. Q-Vol. 26 at 3350) Mr. Barrechio stated that Defendant was a good worker who was mentally sharp and displayed no indication that he was retarded. (T. 3351)

Mr. Barrechio testified that Defendant approached him in November 1991, seeking re-employment. (T. 3352) Mr. Barrechio agreed to hire Defendant back, but he never saw Defendant again. (T. 3352)

After the State made its penalty phase closing argument, Defendant moved the trial court to sentence him to life. (T. 3411) In support of this motion, Defendant argued, *inter alia*,

that he was retarded and a death sentence would be unconstitutional. (T. 3411-12) The trial court denied the motion. (T. 3412-13) After considering the evidence presented and the argument of counsel, the jury recommended that Defendant be sentenced to death for the murder of Mr. Lopez by a vote of nine to three. (R. 1125, T. 3500-01)

The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 1183-1204, 1206, T. 3561-84, 3610) In its sentencing order, the trial court rejected Defendant's claim that he was retarded:

> [Defendant] is mentally retarded as evidenced by Dr. Toomer's conclusion that his IQ level is below 60.
>
> The court consolidates paragraphs "e" and "f" of [Defendant's] sentencing memorandum at page twelve for the purposes of this discussion.
>
> The court has considered the results of Dr. Toomer's test as concerns [Defendant's] IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in the light of the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.
>
> The defense suggests that this court should accept, as a non-statutory mitigating factor that, according to Dr. Toomer, [Defendant] is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively established that [Defendant] is not retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation, calculation and shrewd planning that are totally inconsistent with mental retardation. [Defendant's] "good employment

> background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on occasion he displayed initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have and raise children with her and to support a family further suggest that he is not mentally retarded.
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts in this case. The court is unwilling to so this and therefore rejects the existence of this non-statutory mitigating circumstance.

(R. 1195-96)

Defendant appealed his convictions and sentences to this Court, raising six issues, including an issue in which he contended that the trial court had erred in failing to find that he was retarded. In support of the issue regarding retardation, Defendant asserted that such a finding was supported by the record. This Court affirmed all of his convictions, except the two counts of attempted murder, and his death sentence. *Franqui*, 699 So. 2d at 1329. In doing so, it rejected the retardation argument because the trial court's findings on this issue were supported by competent, substantial evidence. *Id.* at 1325-26. Both the State and Defendant sought certiorari review. The State's petition was denied on March 23, 1998. *Florida v. Franqui*, 523 U.S. 1040 (1998). Defendant's petition was denied on April 27, 1998. *Franqui v. Florida*, 523 U.S. 1097 (1998).

On January 15, 1999, Defendant filed a shell motion for post conviction relief. (PCR. 37-129) On April 18, 2000, Defendant filed his amended motion for post conviction relief, raising ten claims. (PCR-SR. 37-83, 314) On August 18, 2000, Defendant filed a pleading entitled, "Amended Exhibits to Motion for Post Conviction Relief Pursuant F.R.CR.P. §3.850." (PCR. 357-59) The pleading attached an affidavit from Fernando Fernandez and sought to adopt a claim from San Martin's motion for post conviction relief concerning Pablo Abreu. *Id.* On January 7, 2002, the state post conviction court entered an order summarily denying all of the claims in Defendant's motion for post conviction relief but allowing him to participate in the evidentiary hearing it had ordered regarding claims raised by San Martin about Abreu. (PCR. 478-657)

On October 18, 2002, Defendant filed a supplement to his post conviction motion, in which he claimed, *inter alia*, that his death sentence was unconstitutional because he had "substantial limitations in present functioning and/or significant subaverage intellectual functioning." (PCR-SR. 339-41) In support of this claim, he asserted that he had been diagnosed as demonstrating "borderline intellectual abilities and neuropsychological deficits, particularly in memory and executive functioning." (PCR-SR. 339) He averred that the

"precise level of intelligence was in dispute" at trial but that he was either "'retarded' or close to it." *Id.* He contended that the trial court had erred in rejecting claims of mental mitigation. *Id.* He then noted the existence of *Atkins v. Virginia*, 536 U.S. 304 (2002), and §921.137, Fla. Stat. and asked that his sentence be vacated. (PCR-SR. 339-41)

On November 25, 2002, Defendant obtained a court order for Dr. Trudy Block-Garfield to evaluate him for retardation through *ex parte* contact with the state post conviction court. (PCR-SR. 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.*

On March 19, 2003, Defendant filed what he entitled as an "additional supplement." (PCR. 721-31) In this pleading, Defendant asserted that the state post conviction court should consider his claim based on *Atkins* because counsel may have been ineffective, new tests might become available and he might suffer from a degenerative condition. (PCR. 723-25)

When the state post conviction court entered its final orders regarding the denial of post conviction relief, it did not enter an order on this claim. (PCR. 752-60) Defendant did not attempt to obtain an order on this claim and, instead, appealed the orders the state post conviction court had entered. (PCR. 764)

On July 20, 2007, Defendant moved this Court to hold his post conviction appeal in abeyance and relinquish jurisdiction back to the state post conviction court for the purpose of allowing him to file and litigate a motion pursuant to Fla. R. Crim. P. 3.203. In the motion, Defendant complained that the state post conviction court had not entered an order on the supplemental claim based on *Atkins* and asserted that he should now be able to file a motion under Fla. R. Crim. P. 3.203 as a result. *Id.* The only factual assertion in support of the claim that Defendant is retarded was a statement that there had been

testimony at sentencing that he had an IQ score less than 60. *Id.*

The State responded that while Defendant had mentioned *Atkins* in his supplemental claim, a review of the pleadings and argument on the supplemental claim showed that Defendant had really asserted that his counsel was ineffective for failing to investigate and present mental health mitigation and not that Defendant actually met the definition of retardation. It asserted that there had been a ruling on that claim. The State further argued that even if Defendant had actually claimed to be retarded, he had waived the claim by appealing without obtaining a ruling and that Defendant's failure to comply with the deadline set in Fla. R. Crim. P. 3.203 barred any claim under that rule. Finally, the State pointed out that Defendant had not alleged that there was even a basis to raise a claim under Fla. R. Crim. P. 3.203.

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 state post conviction court entered its order denying the claim, finding the assertion that he was retarded had been decided adversely to Defendant at trial and on direct appeal, that he had not sufficiently plead a claim of

retardation and that the record refuted the claim he was retarded. (PCR-SR. 364-66)

In his initial brief on post conviction appeal, Defendant asserted that he was entitled to an evidentiary hearing on his claim that he was retarded because he had mentioned Dr. Toomer's penalty phase testimony in his supplemental post conviction motions and because the fact that Dr. Toomer's testimony had already been determined to be incredible should be ignored. On July 16, 2009, this Court reversed the summary denial of the retardation claim and remanded that claim for an evidentiary hearing. *Franqui v. State*, 14 So. 3d 238 (Fla. 2009).

During the relinquishment, the State moved to compel Defendant to provide it with the reports, test data and notes from any mental health evaluations of him 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) Defendant responded to this motion, asserting he had not been evaluated in connection with the motion but would provide the information when he was evaluated. (PCR-SR. 386-91) He further averred that his present counsel was not in possession of information

regarding any evaluations since 1998, 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.* He asserted 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.*

At the hearing on the motion, the State explained that it had asked for information regarding evaluations after 1998 because that was the year that the last of the trial proceedings regarding Petitioner's four criminal cases had concluded such that it had information regarding evaluations before that year. It requested that the state post conviction 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 state post conviction 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. It also entered an order appointing Dr. Enrique Suarez, whom the State had suggested, and Dr. Heather Holmes, whom Defendant had suggested, to evaluate Defendant for retardation and requiring Dr. Suarez to use the WAIS and Dr. Holmes to use the Stanford-Binet. (PCR-SR. 394) Pursuant to that order, Defendant disclosed Dr. Block-Garfield's report.

At the next status hearing held on August 25, 2009, Defendant informed the state post conviction 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. (PCR-SR. 390-90) 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).

(Doc 8-App. R-Vol. 18 at 388-92) 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 test Defendant's IQ. (PCR-SR. 391-94) However, it planned to continue to have Dr. Suarez look at Defendant's adaptive functioning. (PCR-SR. 393-94) Defendant averred that his decision making included having the State proceed with its testing of his intelligence. (PCR-SR. 393) After considering argument on this point, the state post conviction 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, 394-95)

At the next status hearing, the State reported that Dr. Suarez had not completed his evaluation but had administered the WAIS-IV and obtained an IQ score of 75. (PCR-SR. 446-47) It indicated that it had yet to receive a witness list from Defendant and stated that it needed to know what witnesses Defendant would be presenting on the second and third elements of retardation since it was sure that Defendant wanted to make a complete record even if he could not satisfy the first element. (PCR-SR. 447-50) Defendant acknowledged that he did wish to create a complete record but averred that he could not provide a

witness list until he had a final report from Dr. Suarez. (PCR-SR. 448, 450)

On September 9, 2009, Defendant filed a motion to declare this Court's interpretation of the definition of retardation in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), unconstitutional. (Doc 8-App. R-Vol. 17 at 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* and asked the state post conviction court to declare *Cherry* unconstitutional. *Id.*

At a hearing that afternoon, the State pointed out that this Court had already rejected the argument, and the state post conviction court denied the motion. (PCR-SR. 460-63, 467) When the state post conviction court inquired how Defendant wanted to proceed given that he could not meet the first element of retardation, Defendant responded that he believed his motion should be summarily denied based on the reports. (PCR-SR. 461-63) The State replied that the parties would have to stipulate the reports into evidence for them to be considered and noted that doing so would result in a failure of proof on all three elements of retardation since they did not show concurrent deficits in adaptive functioning or onset before the age of 18.

(PCR-SR. 463-64) The court acknowledged that it had seen nothing to prove the other two elements and inquired if Defendant had evidence on these elements. (PCR-SR. 464) Defendant admitted he had no evidence on the other prongs and averred that presentation of such evidence would be futile because he would not be able to prove the first element. (PCR-SR. 464) Because Dr. Suarez had not completed his report, Dr. Block-Garfield's report was accepted into evidence by stipulation and another hearing was set to stipulate Dr. Suarez's report into evidence. (PCR-SR. 465-69)

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 Petitioner'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 state post conviction 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 state post conviction court accepted the stipulation and denied the claim. (PCR-SR. 482-83) In its written order, the state post conviction court found:

> At the evidentiary hearing, both the State and counsel for [Defendant], with [Defendant's] consent, stipulated into evidence the reports of their respective experts, Dr. Suarez and Dr. Block-Garfield. It was stipulated that if the experts had been called to testify, that they would testify consistently with the contents of their reports. Based upon that, this court orally denied [Defendant's] motion. This order follows.

Fla. R. Crim. P. 3.203 states as follows:

> **(b) Definition of Mental Retardation.** As used in this rule, the term "mental retardation" 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-4.011 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.

According to the report of Dr. Block-Garfield, [Defendant's] full scale IQ is 75, which places him in the borderline range of intellectual functioning in all areas measured. Dr. Block-Garfield states in her report: "The scores do reflect considerable difficulties, but it does not appear that [Defendant] functions in the retarded range." She also notes that his score on the Stanford Binet was 76, which does not indicate mental retardation but rather reflects functioning in the borderline range of intelligence. Dr. Block-Garfield's report also states that while his functioning at the time of arrest was impaired, it was likely due to [Defendant's] immaturity and impulsive behavior. She further states that: "Certainly, he was in some fashion supporting a family which could not be accomplished by an individual who is mentally retarded."

While Dr. Suarez's report is the most comprehensive this court has ever seen and is very impressive, this court will not go into details as it is clear that since [Defendant's] own expert determined that he is not mentally retarded, that it is not necessary. This court will only note that the IQ score obtained by Dr. Suarez is consistent with the IQ score obtained by Dr. Block-Garfield. It is clear that [Defendant's] IQ is 75 or 76.

Fla.R.Crim.P. 3.203 also states:

> **(c) Motion for Determination of Mental Retardation as a Bar to Execution: Contents; Procedures.**
>
> (1) A defendant who intends to raise mental retardation as a bar to execution shall file a written motion to establish mental retardation as a bar to execution with the court.
>
> (2) The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

Dr. Block-Garfield's report is dated March 4, 2003. It was not turned over to the State until September 9, 2009, 6½ years later. Current counsel has been on this case at least since 2005, over 4 years. It is unknown how long he has been in possession of the report or if he pursued this claim with knowledge he could not prove it. This claim was originally summarily denied on Feb. 21, 2008, after the Florida Supreme Court relinquished jurisdiction to the trial court on November 30, 2007, for an evidentiary hearing. It again relinquished jurisdiction to this court for an evidentiary hearing. Dr. Suarez spent a lot of time and effort evaluating [Defendant] and preparing an impressive report. Counsel for [Defendant] is commended for stipulating the reports into evidence instead of causing a larger expense for the live testimony of the expert witnesses.

It would be prudent that [Defendant] be required to make a prima facie showing of mental retardation before [Defendant] is entitled to an evidentiary

> hearing. This case has been relinquished twice for a hearing when [Defendant's] own expert determine in 2003 that [Defendant] had an IQ above 70, no deficits in adaptive functioning and is not mentally retarded.

(PCR-SR. 440-42)

In his supplemental brief after the remand, Defendant argued that the requirement that he demonstrate an IQ score of 70 or below was contrary to *Atkins* because the Court had mentioned the clinical definitions in *Atkins* and the clinical sources allowed a diagnosis of retardation to be made if a person had an IQ above 70. However, Defendant made no attempt to argue that the state post conviction court had erred in rejecting this claim or to explain how he had presented any evidence to satisfy the other two elements of retardation. On January 6, 2011, this Court affirmed the rejection of the claim, finding that Florida's definition of retardation was constitutional and that the denial of the claim was supported by competent, substantial evidence. *Franqui v. State*, 59 So. 3d 82, 90-95 (Fla. 2011).

Defendant moved for rehearing, reiterating his argument that it was unconstitutional not to accept the clinical definitions of retardation, and adding an argument that this Court had created an unconstitutional, mandatory presumption by defining retardation as it had. On April 11, 2011, this Court summarily denied the motion for rehearing.

Defendant then filed a federal habeas petition in the Southern District of Florida, in which he claimed, *inter alia*, that he was entitled to relief because he was retarded. On August 20, 2014, the district court denied the petition and specifically found that the retardation claim did not merit relief. Order, Case No. 11-CV-22858-CIV-GRAHAM at 65-78 (S.D. Fla. Aug 20, 2014). Defendant appealed the denial of federal habeas relief to the Eleventh Circuit and that appeal remains pending.

On May 27, 2015, Defendant filed a second motion for post conviction relief, raising one claim:

> [DEFENDANT'S] DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED THAT TO WHICH HE IS ENTITLED: "A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS [HIS] EXECUTION" DUE TO HIS INTELLECTUAL DISABILITY.

(PCR2. 11-31) In support of his claim, Defendant noted that the United States Supreme Court had decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), and found that this Court's refusal to consider the standard error of measure in ruling on retardation claims was improper. (PCR2. 20-26) He then contended that he was similarly situated to Jerry Haliburton, whose case was remanded to this Court by the United States Supreme Court after *Hall* and whose case this Court then remanded to the trial court for an evidentiary hearing on retardation, and that he was entitled to

a new hearing on retardation. (PCR2. 27-28) He further asserted that he was entitled to a jury trial on retardation and that he should not be required to prove that he was retarded by clear and convincing evidence. (PCR2. 29-30) However, Defendant offered no explanation of how his motion could be considered timely nor how he could prove that he met all three elements of retardation if granted another hearing. (PCR2. 11-31)

On June 8, 2015, the State filed its response to this motion. (PCR2. 49-74) It pointed out that Defendant had failed to allege how his motion was timely and argued that it was not. In support of the timeliness argument, the State asserted that Defendant should be estopped from claiming that *Hall* was a retroactive change in law as he had claimed that *Hall* was not a change in law at all in his federal habeas appeal and that *Hall* would not qualify as a retroactive change even if Defendant was allowed to take inconsistent positions. It also asserted that the claim was successive as Defendant had been granted an evidentiary hearing on his claim and permitted to present evidence on all elements of retardation but had failed to do so. It averred that Defendant and Haliburton were not similarly situated as Haliburton's retardation claim had been summarily denied exclusive based on an IQ score and was still pending

certiorari when *Hall* was decided and Defendant's claim had been denied after an evidentiary hearing and was final when *Hall* was decided.

At the *Huff* hearing, Defendant argued that he had brought the motion in light of *Hall* because he had been unable to prove he met the first element of retardation when he previously claimed to be retarded. (PCR2. 81) He averred that he believed that he could now prove all the elements of retardation based on information from the reports of Dr. Toomer and Dr. Block-Garfield. (PCR2. 81) When the trial court inquired now this was true as Dr. Block-Garfield had expressly found that the second element was not present, Defendant averred that *Hall* had altered the requirements for all elements of retardation and that information contained in Dr. Block-Garfield's report would show deficits in adaptive functioning even though she had concluded they were not present. (PCR2. 82-83)

Defendant noted that the State had argued that the claim was untimely and successive because *Hall* was not a retroactive change in law. (PCR2. 84) He then argued that *Hall* was not a retroactive change in law because it was not a change in law at all. (PCR2. 84-86)

The State responded that as Defendant was claiming that *Hall* had not changed the law, his motion was untimely. (PCR2.

86) It averred that Defendant was not similarly situated to Haliburton because the rejection of Haliburton's retardation claim had not become final when *Hall* was decided as Defendant's claim had and Haliburton's claim was summarily denied and Defendant's was denied after an evidentiary hearing. (PCR2. 86) It noted that Defendant had been repeatedly urged by both the post conviction court and the State to present evidence on the other elements of retardation when he first claimed to be retarded. (PCR2. 86) Instead of doing so, Defendant chose to stipulate two reports into evidence that found no element of retardation satisfied. (PCR2. 86)

The post conviction court then announced that it was denying the motion because Defendant had been given an evidentiary hearing and permitted to present evidence on all of the elements of retardation. (PCR2. 87) On June 26, 2015, it entered its written order denying the claim. (PCR2. 75-76) It stated that *Hall* merely required that the standard error of measure be considered in determining whether an IQ score was 70 or below and did not affect the denial of retardation claims based on the other elements of retardation. *Id.* It noted that Defendant's claim had been denied previously after an evidentiary hearing because he had not proven any of the elements of retardation and that neither Dr. Toomer nor Dr.

Block-Garfield had even suggested that Defendant could satisfy the third element of retardation. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's successive motion motion for post conviction relief, which sought to relitigate a retardation claim, because the motion was untimely, successive and insufficiently plead.

ARGUMENT

THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S UNTIMELY, SUCCESSIVE AND INSUFFICIENTLY PLEAD CLAIMS OF RETARDATION.

Defendant asserts that the lower court erred in denying his successive motion for post conviction relief in which he again claimed to be retarded. He insists that he was not previously given an evidentiary hearing on all the elements of retardation, that there was no previous determination that he did not meet any of the elements of retardation and that he is now entitled to a new evidentiary hearing on retardation under *Hall v. Florida*, 134 S. Ct. 1986 (2014). However, the lower court was correct to deny the successive motion because it was untimely, successive and insufficiently plead.[2]

Pursuant to Fla. R. Crim. P. 3.851(d), a motion for post conviction relief must be filed within one year of when the defendant's convictions and sentences became final. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Here, Defendant's convictions and sentences became final on April 27, 1998, when the United States Supreme Court denied certiorari after direct review. *Franqui v. Florida*, 523 U.S. 1097 (1998). As that was well more than one year before the filing of this motion, it was

[2] This Court reviews a trial court's summary denial of a motion for post conviction relief *de novo*. *Kormondy v. State*, 154 So. 3d 341, 351 (Fla. 2015)

untimely. While Fla. R. Crim. P. 3.851(d) does contain exceptions for claims that are based on newly discovered evidence or fundamental changes of constitutional law that have been held to be retroactive, Defendant did not claim below and does not assert on appeal that any evidence supporting his claim could not have been discovered earlier through an exercise of due diligence. *See Geralds v. State*, 111 So. 3d 778, 801 (Fla. 2010). Moreover, he relied on the issuance of *Hall* as a basis for bringing this motion. (PCR2. 11-31) As this Court has recognized, claims based on the issuance of new cases are not considered to be claims based on newly discovered evidence. *Coppola v. State*, 938 So. 2d 507, 510-11 (Fla. 2006). As such, Defendant did not show that his claim was timely because it was based on newly discovered evidence.

Moreover, Defendant not only made no attempt to assert that *Hall* had been held to be a retroactive change in constitutional law such that he qualified for the exception contained in Fla. R. Crim. P. 3.851(d)(2)(B) in his motion (PCR2. 11-31), he affirmatively argued that *Hall* was not a retroactive change in law because it was not a change in law at all at the *Huff* hearing. (PCR2. 84-86) As such, Defendant did not show that he qualified for this exception either. Given these circumstances, Defendant's motion for post conviction relief was untimely, and

the lower court properly summarily denied it as a result. The denial should be affirmed.

To extent that Defendant may attempt to claim that his motion is timely because *Hall* qualifies under Fla. R. Crim. P. 3.851(d)(2)(B), the argument should be rejected. As this Court has stated, it "does not sanction such jockeying of positions within the course of continuing litigation." *Mendoza v. State*, 87 So. 3d 644, 663 (Fla. 2011). Here, as noted above, Defendant affirmative argued that *Hall* was not a retroactive change in law below. Additionally, he took this same position in his federal habeas appeal. (PCR2. 66) Since Defendant has taken the position that *Hall* is not a retroactive change in law, he is estopped from arguing that his motion is timely because it is now. Since the motion was untimely, the lower court properly summarily denied the motion and should be affirmed.

Even if Defendant could argue that his motion was timely because *Hall* is a retroactive change in constitutional law, the lower court would still have properly denied the motion as untimely. While Fla. R. Crim. P. 3.851(d)(2)(B) does recognize an exception to the one year limitations period, that section provides "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Defendant does not

suggest that *Hall* has been held to be retroactive, and no court has held that it is. In fact, the Eleventh Circuit held that *Hall* is not a retroactive change in constitutional law. *Kilgore v. Sec'y, Florida Dep't of Corrections*, 2015 WL 7175659, *10-*14 (11th Cir. Nov. 16, 2015); *see also In re Hill*, 777 F.3d 1214, 1223-24 (11th Cir. 2015); *In re Henry*, 757 F.3d 1151, 1158-61 (11th Cir. 2014). Instead, he would have had to ask the lower court to make that determination in the first instance. However, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Defendant could not use the assertion that the alleged change in law in *Hall* should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he had to show that it has been held retroactive for the exception to apply. *See Tyler v. Cain*, 533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). Since he could not make that showing, this motion was untimely and properly denied as such.

Even if making a request for retroactive application was proper under Fla. R. Crim. P. 3.851(d)(2)(B), the motion would still have been untimely because the alleged change in *Hall*

would not be retroactive. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or this Court had made a significant change in constitutional law, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52, 53 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30. It further stated that new cases that merely concerned evidentiary standards and procedural fairness were evolutionary refinements that did not apply retroactive. *Id.* at 929.

In *Hall*, the Court merely held that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. Thus, the new rule announced in *Hall* was merely a procedural requirement that Florida permit defendants with IQs above 70 but within the range of 70 considering the standard error of measure the opportunity to present evidence regarding the other elements of retardation.

Kilgore, 2015 WL 7175659 at *10; *In re Henry*, 757 F.3d at 1158, 1161 (11th Cir. 2014); *see also Mays v. Stephens*, 757 F.3d 211, 217-19 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015)(rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). As a result, it did not place anyone beyond the State's power to punish anyone. In fact, the Court recognized its holding did not even render Hall's own death sentence unconstitutional. *Hall*, 134 S. Ct. at 2001. Moreover, even before *Hall*, this Court had held that a defendant could present evidence regarding the other elements of retardation even if he could not prove the first element. *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009). As such, *Hall* actually did little more than refine and apply this law to require that the additional evidence be given consideration when a defendant's IQ score might be 70 or below after consideration of the standard error of measure. Thus, *Hall* merely refined and applied the law to the facts of Hall's case. Such refinements and applications of the law do not apply retroactively. *Witt*, 387 So. 2d at 929-30. Since *Hall* does not satisfy *Witt*, it does not apply retroactively and does not make this motion timely. Since the motion was not timely, it was properly summarily denied.

Additionally, this motion was barred as successive. As this Court has held, claims raised in prior post-conviction proceedings cannot be relitigated in a successive post-conviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Moreover, claims raised in a successive motion that were available but not raised at the time of the prior post conviction proceedings are also barred. *Jimenez v. State*, 997 So. 2d 1056, 1064-65 (Fla. 2008).

Here, Defendant previously claimed that he was retarded and was granted an evidentiary hearing on that claim despite the fact that he never alleged that he could show that he had concurrent deficits in adaptive functioning or that his alleged condition onset before the age of 18 and that he chose to appeal without obtaining a ruling on the claim. *Franqui*, 14 So. 3d at 238-40. Not only did neither the State nor the lower court prevent him from presenting any evidence he wanted on the elements of retardation but also both the State and the lower court actively encouraged Defendant to present his evidence even if he could not prove the first element of retardation. (PCR-SR. 447-50, 463-64) However, Defendant chose not to do so, admitting that he had no evidence other than the expert reports

that found none of the elements of retardation satisfied. (PCR-SR. 482) Moreover, the assertions regarding a jury trial and the burden of proof were clearly available when Defendant previously litigated this issue, as Defendant's counsel himself raised these claims on behalf of other defendants. *See Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005). Thus, Defendant was doing nothing more than attempt to relegate claims that were previously rejected or that were available but unraised earlier. As such, the claims were barred as successive. The summary denial was proper and should be affirmed.

In attempting to avoid this result, Defendant acts as if his original post conviction retardation claim was summarily denied based merely on his inability to show that his IQ was 70 or below. However, the lower court properly rejected this assertion. This Court expressly ordered the lower court to hold an evidentiary hearing on the claim. *Franqui*, 14 So. 3d at 238-40. Since this Court ordered the lower court to hold an evidentiary hearing, the lower court had no choice but to do so. *See Hoffman v. Jones*, 280 So. 2d 431, 433-34 (Fla. 1973); *see also Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980)(noting that while a "trial judge may well be free to express his personal disagreement with the decisions of higher courts in some forums, but he is not free to disregard them in

the exercise of his judicial duties."). This is all the more true as Florida law prohibits trial courts from summarily denying motions for post conviction relief based on documents that were not in the court file before the motion for post conviction relief was filed. *Havis v. State*, 555 So. 2d 417, 418 (Fla. 1st DCA 1989); *Sampson v. State*, 158 So. 2d 771, 773 (Fla. 2d DCA 1963); *see also McLin v. State*, 827 So. 2d 948, 951-56 (Fla. 2002)(error to summarily deny motion after making factual determination based on documents attached to State's response to post conviction motion); *Cintron v. State*, 504 So. 2d 795, 796 (Fla. 2d DCA 1987)(trial court could not rely on document without evidence showing it was part of the court file before the motion was filed). As such, Defendant's suggestion that the lower court summarily denied his retardation claim during his initial post conviction proceeding is incorrect and should be rejected.

In fact, the record from the initial post conviction proceedings reflects that while Defendant urged the lower court to summarily deny his motion based on the reports, the lower court did not do so after the State pointed out it could not do so. (PCR-SR. 461-69) In fact, the lower court even ensured that Defendant personally understood that it was having an evidentiary hearing, that he was entitled to present evidence on

all the elements of retardation and that the hearing was being truncated to stipulating the experts' reports into evidence because he had no evidence to support any element of retardation. (PCR-SR. 477-82) Moreover, the lower court's own statements about the other elements of retardation from that record support its finding in this order that it had denied the retardation claim on the lack of proof on all three elements. In fact, the lower court directly stated that it found no evidence to support either the second or third element at the time it accept the stipulation to Dr. Block-Garfield's report. (PCR-SR. 463-64, 475-80) Moreover, the lower court expressly discussed the evidence in Dr. Block-Garfield's report regarding the lack of evidence of adaptive functioning deficits and relied on that report in denying the claim. (PCR-SR. 440-42) As such, the record shows that it is not the lower court that misunderstood its prior ruling but Defendant. Since the lower court had already denied the claim after an evidentiary hearing based on a failure to prove any element of retardation, the lower court was correct to find that Defendant's claim was successive and summarily deny it as such. The lower court should be affirmed.

Moreover, Defendant's insistence that the lower court must have been wrong to find that it had previously given Defendant

the opportunity to present evidence on all elements of retardation and found that he did not prove any element because this Court's opinion affirming that decision was largely devoted to discussing whether requiring a defendant to show his IQ was actually two standard deviations below the mean was constitutional provides no basis for relief. First, the fact that this Court concentrated on the issue of whether requiring an IQ score of 70 or below is hardly surprising as this was the only issue that Defendant presented. In the supplement brief that Defendant filed after the retardation hearing, the only issue Defendant raised was:

> THIS COURT'S INTERPRETATION OF MENTAL RETARDATION PURSUANT TO *ATKINS V. VIRGINIA* IS CONTRARY TO *ATKINS* ITSELF AND THE EIGHTH AMENDMENT.

Supplemental Brief of Appellant, SC05-830. In support of this issue, Defendant argued only that this Court was wrong to require him to prove that his IQ was 70 or below without even attempting to explain how such a ruling would benefit him since he had presented no evidence to carry his burden on the other two elements of retardation. *Id.* at 10-13. In fact, he did not even explain how the ruling would have affected the experts' opinions that he did not satisfy the first element as Dr. Block-Garfield had issued her report years before *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), was decided such that it could not have

influenced her opinion and Dr. Suarez believed that the IQ score he obtained was artificially low because Defendant was malingering. (PCR-SR. 404-09, 415-39) Moreover, both of the experts had calculated the actual standard error of measure ranges for their IQ scores and determined that they were 71 to 80, such that the score would not be two or more standard deviations below the mean even considering the standard error of measure. *Id.* Given that Defendant's only argument concerned the constitutionality of the cut off, it is understandable that this Court chose to write about this issue more extensively that it did about the evidentiary support for the lower court's order.

Second, this Court did recognized that Defendant bore the burden of proving all three elements of retardation and found that the lower court's order finding a lack of evidence on all three elements was supported by competent, substantial evidence. *Franqui*, 59 So. 3d at 91, 92. Since the only evidence Defendant presented was the reports of two experts who agreed that Defendant did not satisfy either of the first two elements of retardation, that finding was the only one the record would support. As such, Defendant's suggestion that the manner in which this Court wrote its last opinion on retardation shows that the lower court erred in finding Defendant was not entitled

to relief under *Hall* should be rejected, and the lower court affirmed.

Defendant also insists that *Hall* requires the State to adopt the medical community's thoughts on retardation and that he had no notice that the State would be required to do so. In *Hall*, the Court merely held that states had to permit defendants to present evidence regarding the other elements of retardation if their IQ's might be 70 or below if the standard error of measure was considered. *Hall*, 134 S. Ct. at 2001. Defendant had notice that Florida law permitted him to do so based on this Court's decision in *Nixon,* 2 So. 3d at 142-43. Thus, his suggestion that his claim should not have been found to be barred based on an alleged lack of notice should be rejected, and the lower court affirmed.

Instead of basing his argument on the holding of *Hall* and the provisions of Florida law, Defendant is basing his argument on a misrepresentation of dicta from *Hall.* The Court did not hold that the states must adopt the medical community's views retardation. In fact, it directly stated that work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. It merely stated that it was appropriate for legal authorities to

"consult" and be "informed" by the views of the medical community. *Id.* at 1993. These statements are entirely consistent with the Court's prior recognition that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Thus, Defendant's assertion that *Hall* required Florida to adopt the medical community's views is simply false. The claim was barred and properly denied as such.

This is all the more true as when one considers the dicta in context. While the Court did state in *Hall* that it was appropriate to consult the views of the medical community regarding the definition of retardation, it stated the reason why doing so was appropriate was that "the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans." *Hall*, 134 S. Ct. at 1993. Thus, the Court's rationale for consulting the medical community was based on definitions they provide for general use.

As the definitions quoted in *Atkins* show, the medical community requires a finding of deficits in adaptive functioning

concurrent with the adult IQ score used to meet the first element of retardation to satisfy the second element. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002)(noting that the AAIDD definition refers to "substantial limitations in **present** functioning" and requires a showing that the adaptive functioning deficits exist "**concurrently with**" the low IQ score)(emphasis added); American Psychiatric Association, Diagostic and Statistical Manuel of Mental Disorders 49 (4th ed. text rev. 2000)("DSM-IV")(stated that second diagnostic criteria concerns "**[c]oncurrent** deficits or impairments in **present** adaptive functioning")(emphasis added). In fact, Gregory Olley, one of the contributors to the book on which Defendant relies, admits in those articles that a "customary assessment of adaptive behavior examines **current** functioning." J. Gregory Olley, The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 1, Psychology in Mental Retardation and Developmental Disabilities (American Psychological Association/ Division 33, Washington, D.C.), Summer 2006, at 2, 2 (emphasis added). Thus, the definitions of retardation the medical community provides for general use are fully consistent with Florida law. Since the reason the Court gave for consulting the medical community was that their definitions had uses beyond exempting people for execution, *Hall* does not support

Defendant's assertion that requiring concurrent deficits in adaptive functioning is unconstitutional. The motion was properly summarily denied.

Moreover, Defendant's assertion that the order in *Lane v. Alabama*, 136 S. Ct. 91 (2015), shows that *Hall* applies to definitions of the other elements of retardation is incorrect. The entire text of the order in *Lane* is:

> On petition for writ of certiorari to the Court of Criminal Appeals of Alabama. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Criminal Appeals of Alabama for further consideration in light of *Hall v. Florida*, 572 U.S. ----, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014).

Id. at 91. As the Court itself has recognized, such language does not even establish that a constitutional violation has occurred. *Parker v. Randolph*, 442 U.S. 62, 76 n.8 (1979), *abrogated on other grounds by Cruz v. New York*, 481 U.S. 186 (1987). Instead of relying on the language of the order, Defendant seeks to infer a holding from the pleadings and record in *Lane*. However, the Court has held that doing so is improper. *United States v. Mitchell*, 271 U.S. 9, 14 (1926). As such, Defendant's contention that *Lane* establishes that *Hall* requires the adoption of any particular definition of second and third elements of retardation should be rejected, and the lower court affirmed.

Moreover, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), which Defendant cites, shows that Defendant's claim that the Court adopted a nationwide standard for retardation based on the views of the medical community is false. In *Brumfield*, the defendant had timely raised an *Atkins* claim and pointed to evidence regarding his low IQ and placement in special education that had been presented at trial because Louisiana defendants had to be granted funds to investigate post conviction claims. *Id.* at 2274-75. Without granting funds for any addition investigation, the trial court found that the defendant had failed to allege retardation adequately. *Id.* at 2275. In finding that the state court had acted unreasonably, the Court did not apply a nationwide standard for retardation. Instead, it looked at Louisiana law, stated that a defendant only had to present sufficient information to show a bona fide doubt about whether he was retarded to be granted an evidentiary hearing under that law and determined that the facts the defendant had alleged were sufficient to raise a bona fide doubt on each of the elements of retardation under Louisiana law. *Id.* at 2274, 2277-81. Thus, *Brumfield* refutes Defendant's claim that this Court must adopt the standard he wants. The lower court should be affirmed.

Additionally, the lower court also properly denied the claim because it was insufficiently plead. In his motion,

Defendant made no attempt to allege any facts showing that he could satisfy either the second or third element of retardation. (PCR2. 11-31) In fact, while he complained about the inability to rely on the standard error of measure during the first retardation proceeding, he did not even allege that he could prove the first element of retardation if the standard error of measure was considered. *Id.* At the *Huff* hearing, Defendant only made vague assertions that he believed he could meet the first element under *Hall* and could use information from the reports of Dr. Toomer and Dr. Block-Garfield to show the second and third element were met without identifying any facts other than the fact that Defendant had dropped out of school that would allegedly do so. (PCR2. 81-83) However, he acknowledged that Dr. Block-Garfield had considered those unidentified facts and found that they did not satisfy the second element of retardation. (PCR2. 83) As this Court had held, such vague assertions are insufficient to state a claim for post conviction relief. *Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008). Instead, Defendant was required to allege sufficient facts that were not refuted by the record showing that he would be entitled to relief if the facts were proven. *See Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004); *Hamilton v. State*, 875 So. 2d 586, 591 (Fla. 2004); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla.

1999); *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990). Since Defendant did not do so, the motion was insufficiently plead and properly summarily denied as such. The lower court should be affirmed.

While Defendant attempts to remedy the deficiencies in his pleadings below by arguing that the record contains evidence that suggests that he was retarded before the age of 18 in his brief, he cannot do so. As this Court has held, a defendant cannot present arguments on appeal that he did not properly present in the lower court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). In fact, this Court has even refused to allow a defendant to rely on facts that he did present below to show that a claim was sufficiently plead when the defendant waited until after the claim had been denied to allege those facts. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). As such, Defendant's attempt to rely on facts that he did not plead below to show that his claim was sufficiently plead should be rejected, and the lower court affirmed.

Even if these assertions could be considered, they would still not show the lower court erred in finding that the reports of Dr. Toomer and Dr. Block-Garfield did not mention retardation having an onset before age 18. As a review of Dr. Block-Garfield's report shows, she did not suggest that Defendant had

a condition that onset before the age of 18, probably because she found that Defendant did not exhibit either of the first two elements of retardation such that he had no condition at all. (PCR-SR. 404-09) While she did note Defendant's poor performance in school, she also noted that this performance level was due to Defendant's repeated absences from school because he was having problems with his family and chose not to attend school. (PCR-SR. 406) Similarly a review of Dr. Toomer's testimony shows that he did not opine that Defendant had significantly subaverage general intellectual functioning or deficits in adaptive functioning that onset before the age of 18. (T. 3106-3220) In fact, while Defendant claims that Dr. Toomer opined that Defendant was retarded, this is simply false. In fact, when Dr. Toomer was directly asked if he was testifying that Defendant was retarded, he responded that Defendant "is retarded according to his functioning on the Revised Beta." (T. 3211) Moreover, Dr. Toomer also noted that Defendant's poor school performance was accompanied by excessive absenteeism that was related to problems with his family life. (T. 3120-22) As such, the record does support the lower court's determination that Defendant's own expert did not provide testimony to support the third element of retardation. It should be affirmed.

Further, while Defendant attempts to justify the lack of

evidence of onset before the age of 18 by claiming "there was no known reason to preserve or record his intellectual level" at that time, he cites nothing to support this assertion. The lack of support is understandable as the statement is false. The record reflects that Defendant immigrated to this Country in 1980 when he was approximately 10 years old and was then enrolled in schools in Florida. (T. 3110-12, 3117, PCR-SR. 404, 406) Federal law requires that state school systems have programs in place to identify children with handicaps, including retardation, and provide them with appropriate special education and has done so since the 1970's. 20 U.S.C. §1412(a)(3); 20 U.S.C. §1401(3); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 194 n.16 (1982). Since federal law required the Florida schools to identify retarded children and provide them with special education when Defendant was in school, there was a known reason why his intellectual level would have been preserved and recorded if there had been a reason to believe that Defendant was retarded before the age of 18. However, as Dr. Suarez (the only expert to offer an opinion on the third element of retardation) stated in his report, Defendant's school records were devoid of any evidence that such an issue had been raised. (PCR-SR. 417-18, 439)

Additionally, while Defendant attempts to rely on Dr. Toomer's opinion regarding Defendant's ability to communication and lack of insight and judgment, that opinion was rebutted by Dr. Mutter's testimony at trial. As a result, the trial court rejected Dr. Toomer's opinions as incredible in its sentencing order. (T. 1183-1204) Since these opinions have already been determined to be incredible, Defendant attempt to rely on them as credible evidence should be rejected, and the lower court affirmed.

Moreover, it should be remembered that Defendant would not be able to prove the first element even considering the standard error of measure on this record. Defendant has been administered four IQ tests that would be admissible at a retardation hearing and obtained IQs score of 83 on the WAIS administered by Dr. Toomer, a 75 on the WAIS administered by Dr. Block-Garfield, a 75 on the WAIS-IV administered by Dr. Suarez and a 76 on the Stanford-Binet administered by Dr. Block-Garfield. (T. 3198-99, PCR-SR. 404-09, 412-39) Both Dr. Suarez and Dr. Block-Garfield actually calculated the true standard error of measure ranges for their 75 IQ scores, and both stated that the resulting range was 71 to 80. (PCR-SR. 407, 428) As such, even considering the standard error of measure, Defendant's IQ score would still not be two or more standard

deviations below the mean on the WAIS. Thus, the evidence does not support a finding that the first element was met even after considering the standard error of measure. As such, the lower court was correct to deny this motion. It should be affirmed.

Finally, Defendant cites to *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), and asserts that he should have a right to counsel and to expert assistance at any hearing on retardation. However, Defendant offers no explanation of how this decision shows that the lower court erred in summarily denying his motion. As such, this assertion is insufficiently plead to raise an issue about a right to counsel in this appeal. *Doorbal*, 983 So. 2d at 482-83. The assertion should be rejected.

This is all the more true as Defendant had counsel to present his claim and was appointed not one, but two experts, of his own choosing. Moreover, this Court has rejected the assertion that a defendant has a right to a jury trial on retardation and the assertion that a defendant should be entitled to rights applicable to trials in raising retardation claims in post conviction proceedings. *Nixon*, 2 So. 3d at 146-47; *Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005); *Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005). As the lower court was bound by this Court's precedent and not that of the

Tenth Circuit, the fact that the Tenth Circuit has reached a different conclusion does not show that the lower court erred in denying this claim. The denial of the claim should be affirmed.

CONCLUSION

For the foregoing reasons, the denial of the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@
myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Todd Scher, TScher@msn.com, 398 E. Dania Beach Blvd, #300, Dania Beach, Florida 33004, this 4th day of December 2015.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General