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

REPLY BRIEF OF APPELLANT

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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.

The State's Answer Brief (AB) devotes much argument to addressing whether Mr. Franqui's Rule 3.851 motion filed after the Supreme Court's decision in *Hall v. Florida*, 134 S.Ct. 1986 (2014), was timely filed and whether some sort of procedural hurdle exists to thwart Mr. Franqui from the relief he requested below (AB at 36 *et seq.*). However, this Court's decision in *Oats v. State*, 2015 WL 9169766 (Fla. Dec. 17, 2015), answers the myriad of the procedural obstacles that the State has raised.

A. The *Oats* Decision.

On December 17, 2015, this Court issued its decision in *Oats*. At issue in *Oats* was the denial of his Rule 3.203 motion, following an evidentiary hearing in the circuit court, that had been filed in light of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Oats*, this Court determined that, in light of "developments in the law" since the issuance of the Supreme Court's decision in *Hall*, as well as the fact that the circuit court had "erred in its legal

analysis" with regard to one of the prongs for the test assessing intellectual disability (the "age of onset" prong), this Court "reverse[d] and remand[ed] ***for a full reevaluation of whether Oats is intellectually disabled."*** *Oats*, 2015 WL 9169766 at *1. Mr. Franqui is likewise asking this Court to reverse and remand his case to the lower court "for a full reevaluation of whether" he is intellectually disabled under the rubric set forth in *Hall*.

A full reevaluation is needed in Mr. Franqui's case particularly in light of the fact that this Court, when it last addressed Mr. Franqui's intellectual disability claim, denied his claim solely on the basis that his IQ score did not, as a matter of law (as this Court had interpreted the law) did not meet the prima facie cut-off score of 70 established in this Court's earlier decision in *Cherry v. State,* 959 So. 2d 702 (Fla. 2007). In *Cherry*, 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 intellectually disabled within the meaning of *Atkins v. Virginia*.

This Court unquestionably relied on its categorical rule in *Cherry* when it previously denied Mr. Franqui's claim of intellectual disability:

> 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 v. State, 59 So.3d 82, 92-94 (Fla. 2011) (hereinafter *Franqui II*).

Subsequently, the Supreme Court issued its decision in *Hall*. And in *Oats*, this Court's first post-*Hall* decision applying the decision to Florida, this Court "review[ed] the relevant law and the impact of the United States Supreme Court's recent decision in *Hall* on Florida's standard in determining whether a defendant has an intellectual disablility." *Oats* at *. This Court wrote:

> Prior to the United States Supreme Court's 2002 holding in *Atkins*, Florida had already implemented a prospective prohibition on imposing the death sentence upon an intellectually disabled defendant. *See* ch.2001-202, §1, Laws of Fla. (enacting §921.137, Fla. Stat. (2001)). Based on numerous considerations, including the trend within various legislative bodies to eliminate capital punishment for intellectually disabled defendants, the United States Supreme Court declared in *Atkins* that executing a person with an intellectual disability contravenes the Eighth Amendment. *Atkins*, 536 U.S. at 318. The Supreme Court further recognized that an intellectual disability consists of three prongs (1) subaverage intellectual functioning; (2) significant limitations in adaptive skills; and (3) manifestation of the condition before age 18. *Id*. However, the Supreme Court did not elaborate as to how this standard was to be implemented and left this determination to the states, including 'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' *Id*. at 317.
>
> Once the *Atkins* ruling extended this protection to all capital defendants, this Court immediately implemented procedures to ensure that defendants could present evidence to establish whether they were intellectually disabled. In determining what constituted an intellectual disability, this Court looked to the statutory definition set forth in section 921.137(1), Florida Statutes (2002), and held that in

considering whether a defendant had 'subaverage intelligence,' a defendant must establish an IQ score of 70 or less. *Cherry*, 959 So.2d at 712-14. This Court further held that courts were precluded from considering the application of the standard error of measurement as to the IQ score. *Id*. at 712-13.

This Court was asked to reconsider *Cherry*'s holding in *Hall* [*v State*], 109 So.3d [704] at 707-08 [(Fla. 2012)], a case that is substantially similar to the one before us now. In that case, Freddie Lee Hall had previously been found to have an intellectual disability, but since his crime occurred prior to Florida's statutory prohibition on imposing a sentence of death upon the intellectually disabled, such evidence was considered only as a mitigating circumstance. *Id*. at 706. Relying on the prior determination by the trial court that found Hall to be intellectually disabled, Hall sought relief after *Atkins*. *Id*. at 706-07. However, the postconviction court determined that Hall could not be considered intellectually disabled under Florida's statutory definition of the term because Hall's IQ scores varied between 71 and 73 and thus did not constitute 'subaverage intelligence.' *Id*. at 707. In a 4-2 decision, this Court affirmed the postconviction court's finding of no intellectual disability based on the strict cut-off score of 70, as set forth in *Cherry*. *Id*. at 709-10.

The United States Supreme Court granted certiorari in *Hall* and held that the manner in which Florida defined an intellectual disability for capital litigation violated the Eighth Amendment because it 'disregards established medical practice' and 'creates an unacceptable risk that persons with intellectual disability will be executed.' *Hall*, 134 S.Ct. at 1990, 1005. Specifically, the Supreme Court stated that Florida's bright line rule

> disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific instrument of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

> *Id*. at 1995. In determining whether an interpretation of intellectual disability violates the Eighth Amendment, the Supreme Court relied on psychiatric and professional studies that elaborated on the purpose and meaning of the prong at issue. *Id*. at 1993. In addition, the Supreme Court stressed that a single factor should not be considered dispositive because the three factors must be considered together in an interrelated assessment. *Id*. at 2001 (relying on the DSM-5, at 37 ('[A] person with an IQ score above 70 may have such severe adaptive behavioral problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.')).
>
> The United States Supreme Court emphasized these same principles in its most recent decision pertaining to the intellectual disability analysis, in which the Court held that the defendant was entitled to an evidentiary hearing on his intellectual disability claim. *See Brumfield [v. Cain],* 135 S.Ct. [2269], at 2279 [(2015)]. The Supreme Court first reiterated that an IQ test result of 75 is 'entirely consistent with intellectual disability,' relying on its prior decision in *Hall*. *Id*. at 2277. The Supreme Court then addressed the next two prongs, determining that the record contained 'substantial grounds to question [the defendant's] adaptive functioning,' based on numerous examples from the defendant's childhood, including his low birth weight, that he was placed in special classes in the fifth grade, and that he had difficulty processing information. *Id*. at 2280. Further, the Supreme Court noted that the evidence pertaining to his low birth weight and his intellectual shortcomings as a child provided 'ample evidence' that the defendant's disability manifested before adulthood and thus required an evidentiary hearing so that the trial court could hear all relevant evidence and determine whether the defendant is intellectually disabled. *Id*. at 2283.

Oats, at *9-*10.

Oats impacts Mr. Franqui's case in important—and dispositive—ways. It applies the Supreme Court's decision in *Hall* to Mr. Oats, whose case was, like Mr. Franqui's, in a successive posture in the circuit court. Simply because Mr. Oats's case was pending before this Court since 2012 while *Hall* issued does not mean

that it is meaningfully different in a procedural sense from Mr. Franqui's case. Mr. Franqui has sought, at every turn, to avail himself of the procedures and law available to him to seek to vindicate his right to establish that his intellectual disability prevents the State from executing him because the Eighth Amendment would prohibit his execution. When this Court previously addressed Mr. Franqui's intellectual disability claim, it denied the claim on the basis of *Cherry*. When *Hall* was decided by the Supreme Court and determined that this Court's interpretation in *Cherry* of a strict cut-off score of 70 was unconstitutional, Mr. Franqui returned to court with a new Rule 3.851 motion to again vindicate his rights and to seek a full evidentiary hearing. Although the underlying problem identified in *Oats* was not the first prong,[1] the lesson of *Oats* and its impact on Mr. Franqui's case is unmistakable: Mr. Franqui, like Mr. Oats, is entitled to a "full reevaluation" of his claim of intellectual disability now that this Court has, for the first time, spoken in a written opinion as to *Hall*'s impact on Florida intellectual disability cases.

Moreover, the *Oats* decision is significant in terms of the arguments made by Mr. Franqui in his Initial Brief to this Court. For example, he has argued to the Court that the second and third prongs of the intellectual disability test must also be viewed through *Hall*'s prism, that is, through the relevant medical and professional standards. The State argues that Mr. Franqui is "misrepresenting" the

[1] Mr. Franqui would note that the Court has yet to issue a ruling in Freddie Lee

holding in *Hall* in his argument that *Hall* required that the intellectual disability test (all three prongs) be considered through the prism of the relevant professional and medical community but this Court in *Oats* rejected the State's view of *Hall*:

> Based on further direction from the United States Supreme Court in *Hall*, reaffirmed in *Brumfeld*, ***courts must be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability.*** *See Hall*, 134 134 S.Ct. at 1993. ***In other words, in determining the definition of an intellectual disability, the informed assessments of medical experts cannot be disregarded.*** *Id*. at 2000. The experts review all three prongs together because determining intellectual disability is a 'conjuntive and interrelated assessment.' *Id*. at 2001.

Oats at *2 (emphasis added). *See also id.* at *13 ("In its decision in *Hall*, the Supreme Court *clarified* that the appropriate definition to use in determining whether an intellectual disability exists is the definition that is used by skilled professionals in making this determination in all contexts, including those 'far beyond the confines of the death penalty,' such as special education, medical treatment plans, and access to social programs") (emphasis added) (citing *Hall*, 134 S.Ct. at 1993).[2] Here, as in *Oats*, "neither the circuit court nor the parties and

[2] In a similar vein, the State argues that that Mr. Franqui's claim that *Brumfield* must be read to reaffirm the holding in *Hall* that the medical community's standards must inform on all three prongs of the intellectual disability test is "false" (AB at 52). The State's argument has now been rejected in *Oats*. *Oats* at *2 (Based on further direction from the United States Supreme Court in *Hall*, reaffirmed in *Brumfeld*, ***courts must be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability."***

their experts had the benefit of *Hall"* and thus here, as in *Oats*, the Court should "remand for further proceedings . . . including providing the parties with an opportunity to present additional evidence at an evidentiary hearing to enable a full *reevaluation* of whether Oats is intellectually disabled." *Oats* at *14.

B. *Oats* and the pleading requirements of Rule 3.851 in light of *Hall* and *Brumfeld.*

Among the litany of complaints raised by the State about the manner in which Mr. Franqui litigated his intellectual disability claim is the argument that "the lower court also properly denied the claim because it was insufficiently pled" (AB at 52). However, the lower court made no such finding; curiously the State's argument is not followed by any citation to the lower court's order because that is not what the lower court found. To the extent that the State is now, on appeal, is arguing that Mr. Franqui's motion suffered from some putative "pleading deficiencies," the State cannot sandbag Mr. Franqui by waiting to allege a pleading deficiency on appeal. At no time in its response filed below did the State allege any "pleading deficiency" (PCR-2 at 49-74). And if it had, the proper thing for the court to have done was put Mr. Franqui on notice of the alleged "pleading deficiency" and allow the motion to be amended. *See Spera v. State*, 971 So.3d 754, 761-62 (Fla. 2007). But the proper thing is not to sit silently by and then wait

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(emphasis added).

for an appeal to assert, for the first time, a perceived "pleading deficiency" as the State is now attempting to do and then, at the same time, argue that such "deficiency" should be a basis for affirmance of the lower court's order. *See Dillbeck v. State*, 643 So.2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.").

Mr. Franqui submits that, in light of *Hall* and this Court's decision in *Oats*, not to mention the State's arguments about the alleged "pleading deficiencies" in his motion, Mr. Franqui should be permitted to re-file his Rule 3.851 motion. *Oats* has changed the analysis—and thus the pleading requirements—for the evaluation of intellectual disability claims under *Hall* and *Brumfeld*. For example, now that the Court has had the opportunity to address the impact of *Hall* and *Brumfeld* on Florida, and specifically incorporated the medical community standards on all three prongs of the intellectual disability test, Mr. Franqui should be allowed to present his claim to the circuit court now that the legal effect of *Hall* has been decided by the Court in *Oats*. Indeed, the lower court in Mr. Franqui's case denied relief in part based on its view that *Hall* has "no effect" on defendants like Mr. Franqui whose claims were denied before *Hall* was decided (PCR-2 at 75). But we now know from *Oats* that such a miserly view of *Hall* is not proper; in *Oats*, this Court remanded for a "full *reevaluation*" of Sonny Boy Oats' claim of intellectual

disability specifically because "neither the circuit court nor the parties and their experts had the benefit of *Hall*". *Oats* at *1, *14. Given that the overall goal in this (and all like cases) is that Mr. Franqui is entitled to a "fair opportunity" to demonstrate his ineligibility for execution, due process and equal protection require no less than a remand in this case as was done in *Oats*.

The State's attempt to distinguish *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), is disingenuous at best. The State devotes a significant portion of its brief setting out a (misleading) version of events which, in the State's view, demonstrates that Mr. Franqui's counsel must have done a disservice to his client by candidly admitting to the lower court in the prior proceeding that his client could not meet the strict IQ score of 70 as set forth by the Court in *Cherry* and not wasting the court's time (not to mention financial resources) by forging ahead on a claim when he could not make out a prima facie claim on the very first prong. If the State is suggesting (and it does seem to be doing so) that counsel was negligent by not presenting evidence on the other two prongs during the prior proceeding, that is not Mr. Franqui's fault.[3] This is why Mr. Franqui is asserting that *Hooks* is

[3] Given the Supreme Court's command that capital defendants be given a "fair opportunity" to establish their intellectual disability as a bar to execution, Mr. Franqui should be given such an opportunity whether in this case or his other case, which is also pending before the Court. *See Franqui v. State*, No. SC15-1630. It is the same defendant in both proceedings and whether he is intellectually disabled and thus ineligible for execution in this state has yet to be determined under the standard set forth in *Hall* and *Oats*.

instructive. 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. In *Hooks,* 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 and in his Initial brief, Mr. Franqui submits that the lower court order summarily denying his Rule 3.851 motion should be reversed, and that an evidentiary hearing be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2016, 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*