IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1630

LEONARDO FRANQUI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal of the circuit court's summary denial of a Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." -- trial transcript;

"R2." -- record from resentencing on the direct appeal to this Court;

"PC-R." -- record on appeal from denial of first Rule 3.851 motion;

"PC-SR." -- supplemental record on appeal from denial of first Rule 3.851 motion;

"2PC-R." -- record on appeal of denial of the second Rule 3.851 motion;

"3PC-R." -- record on appeal of denial of the second Rule 3.851 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Franqui has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Franqui, through counsel, accordingly urges that the Court permit oral argument. Mr. Franqui is entitled to "a fair opportunity to show that the Constitution prohibits [his] execution. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

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INTRODUCTION

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S.578, 584 (1988). As the United States Supreme Court has explained, this means that "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). This includes the constitutional right to effective assistance of counsel in the litigation his intellectual disability and the applicability of the Eighth Amendment prohibition against executing the intellectually disable. *Hooks v. Workman*, 689 F.3d 1148, 1184 (10th Cir. 2012) ("We have concluded that defendants in *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments). To date as explained herein, Mr. Franqui has not been afforded the "fair opportunity" mandated by the Eighth Amendment to show that his execution is prohibited due to his intellectual disability. This means that he has been deprived of "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Hall v. Florida*, 134 S. Ct. at 2001.

STATEMENT OF THE CASE AS TO THE PRESENT APPEAL

A. Mr. Franqui's 3.851 motion premised on *Hall v. Florida*

On May 27, 2015, Mr. Franqui filed the Rule 3.851 motion at issue in this appeal. In that motion to vacate he challenged his sentence of death as unconstitutional on the basis of *Hall v. Florida*. He captioned his claim as follows:

> MR. FRANQUI'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.

(3PC-R. 133). Mr. Franqui's claim was predicated upon the fact that:

> he had been found to be mentally retarded by Dr. Jethro Toomer on the basis of his IQ score, "substantial limitations of present functioning," and evidence of his mental deficits before the age of 18 (" Mr. Franqui did poorly in school and dropped out in the 8th grade"). Specifically, Mr. Franqui relied upon Dr. Toomer's diagnosis of Mr. Franqui as mentally retarded and his conclusion that each of the three prongs of the test for mental retardation were present.

(3PC-R. 136).[1] Mr. Franqui noted that this Court in 2013 had rejected his intellectual disability claim relying on its earlier decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), writing:

> Finally, we affirm the circuit court's summary denial of Franqui's *Atkins* claim because it is meritless. To establish mental retardation as a bar to the imposition of the death penalty, Franqui must prove each of the following three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an

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[1]Mr. Franqui pled that all three prongs of the test for intellectual disability were present in his case.

> adult IQ score of 70 or below; (2) concurrent deficits in adaptive functioning; and (3) manifestation before the age of 18. ***See Cherry v. State*, 959 So.2d 702, 711 (Fla.2007)**. Further, the only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford-Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); Fla. Admin. Code 65G-4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford-Binet Intelligence Scale. His scores on the acceptable IQ tests were above 70. *See Franqui*, 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence-two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations-to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

(3PC-R. 136) (emphasis added). *See Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (Table); Appendix A.[2]

In his May 27, 2015, motion, Mr. Franqui relied upon the holding in *Hall v. Florida* that declared: "Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Hall*, 134 S. Ct. at 2001. (3PC-R. 137). Mr. Franqui's motion included the following quotation from *Hall v. Florida*, 134 S. Ct. at 2001:

> **Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized**

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[2]For the sake of convenience, Mr. Franqui is attaching the 2013 opinion in *Franqui v. State* to this brief as Appendix A. It also appears in the record on appeal, as it was attached to the motion to vacate filed in circuit court. *See* 3PC-R. 146-47.

> **by an IQ of "approximately 70."** 536 U.S., at 308, n. 3, 122 S.Ct. 2242. **Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design** but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but **the law requires that he have the opportunity to present evidence of his intellectual disability**, including deficits in adaptive functioning over his lifetime.

(3PC-R. at 137) (emphasis added). On the basis of *Hall v. Florida*, Mr. Franqui argued that this Court's previous summary denial of his intellectual disability claim rested on unconstitutional grounds.

In his May 27, 2015, motion, Mr. Franqui also relied upon the United States Supreme Court's ruling in *Haliburton v. Florida*, 135 S. Ct. 178 (2014): "On the basis of *Hall v. Florida*, the United States Supreme Court vacated this Court's unpublished decision denying Mr. Haliburton's claim under *Atkins v. Virginia*." (3PC-R. 139). Mr. Franqui then explained that the *Haliburton* decision issued by this Court and vacated by the United States Supreme Court in *Haliburton v. Florida* was virtually identical to this Court's 2013 order denying Mr. Franqui's intellectual disability claim. In this regard, Mr. Franqui wrote:

> The Florida Supreme Court's denial of Mr. Haliburton's *Atkins* claim was on the same basis it had used to deny Mr.Franqui's *Atkins* claim, *i.e.* on the basis of the rigid rule set forth in *Cherry v. State*. In an

unpublished order referenced at *Haliburton v. State*, 123 So.3d 1146 (2013), this Court wrote:

> To prove mental retardation, a defendant must demonstrate "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." *Cherry v. State*, 959 So.2d 702, 711 (Fla.2007) (quoting § 921.137(1), Fla. Stat. (2002)). To satisfy the requirement of "significantly subaverage general intellectual functioning," the defendant must establish that he has an IQ of 70 or below. *State v. Herring*, 76 So.3d 891, 895 (Fla.2011), cert. denied --- U.S. ----, 133 S.Ct. 28, 183 L.Ed.2d 676 (2012); *Cherry v. State*, 959 So.2d 702, 713 (Fla.2007). In *Turner v. State*, 46 So.3d 568, 2010 WL 3802538 (Fla.2010) (table), this Court stated that "[b]ecause the expert reports conclusively rebutted the first-prong of Turner's *Atkins* claim, the trial court did not err in summarily denying Turner's claim that he was mentally retarded." **Haliburton scored 74 on the IQ test administered by his expert and submitted to the trial court as part of this claim. Haliburton has never scored 70 or below on any standardized intelligence test** recognized under section 921.137(1), Florida Statutes (2006). Therefore, the trial court did not err in summarily denying Haliburton's claim.
>
> Haliburton also contends that this Court should overrule its decision in *Cherry v. State*, 959 So.2d 702 (Fla.2007), because it is unconstitutional. This Court has repeatedly rejected Haliburton's argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be mentally retarded and ineligible to be executed is unconstitutional. *See, e.g., Herring*, 76 So.3d at 895; *Franqui v. State*, 59 So.3d 82, 94 (Fla. 2011); *Nixon v. State*, 2 So.3d 137, 142-43 (Fla. 2009). Therefore, Haliburton is not entitled to relief.

(Emphasis added).

(3PC-R 139-40). Following the issuance of *Haliburton v. Florida*

vacating this Court's decision in *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013), this Court issued an order that "vacate[d] our previous order of affirmance dated July 18, 2013, and remand [Haliburton's] case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203."[3]

B. The State's response to the 3.851 motion

On June 8, 2015, the State filed a response to Mr. Franqui's motion to vacate (3PC-R. 149-68). The State acknowledged that this Court in its 2013 order in Mr. Franqui's prior appeal had summarily denied Mr. Franqui's:

> retardation claim because the IQ score Defendant relied upon was not from an admissible IQ test, his scores on the admissible IQ tests were too high and he did not even plead he could satisfy the third element of retardation.

(3PC-R. 158). *See Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (Table); Appendix A.

Later in a section of its response titled: "ARGUMENT", the state made false representations that an evidentiary hearing had been conducted on his previous Rule 3.851 motion raising his intellectual disability:

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[3]This Court's February 5, 2015, order in *Haliburton v. State* was attached to Mr. Franqui's motion to vacate as Attachment B. However for some unknown reason, the page with the February 5, 2015, order in *Haliburton v. State* does not appear in the record on appeal that the clerk of the circuit court submitted to this Court. *See* 3PC-R. 148 (it is a sheet of paper that simply says "Attachment B"), 3PC-R. 149 (it is the first page of the State's response). Mr. Franqui is attaching this missing page of the record on appeal to this brief as Appendix B.

> 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 Defendant 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 that claim. **Not only did neither the State nor this Court prevent him from presenting any evidence he wanted on the elements of retardation but also both the State and this Court actively encouraged Defendant to present his evidence** even if he could not prove the first element of retardation.

(3PC-R. 164). The State's argument in this regard was just not true. An evidentiary hearing has not been held at any time on Mr. Franqui's intellectual disability in the Case No. F92-2141B, the case from which this appeal arises.[4]

Having falsely argued to the circuit court that Mr. Franqui had previously been afforded an evidentiary hearing on his intellectual disability claim set forth in his motion to vacate

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[4]Undersigned counsel is Mr. Franqui's registry counsel in Case No. F92-2141B; he is not registry counsel in Case No. F92-6089B, and is not in a position to address what did or did not happen in that case. Throughout the history of the two separate prosecutions, Mr. Franqui has been represented by different counsel in the separate cases. And in this Court on October 7, 2015, the State successfully opposed consolidating the two separate appeals arising from the two separate prosecutions of Mr. Franqui that are pending before this Court. The State's position that the cases must be heard separately won the day. Accordingly, the State should be held to honor the separation that it asked for and recognize that Mr. Franqui, contrary to the State's argument below, has never been accorded the opportunity in Case No. F92-2141B to present evidence in support of his intellectual disability claim. The State should also be required to recognize that Mr. Franqui has been afforded separate counsel in the separate prosecutions and that separate records on appeal are before this Court. Undersigned counsel does not have and has not been provided the record in Case No. F92-6089B.

filed in Case No. F92-2141B, the State then asserted that Mr. Franqui "is doing nothing more than attempt to relegate [sic] claims that were previously rejected or that were available but unraised earlier. Thus, the claims are barred." (3PC-R. 164-65).

C. The circuit court's summary denial of the 3.851 motion

On June 10, 2015, at 8:42 AM, a mere 41 hours after the State's response was filed, the circuit court entered an order denying Mr. Franqui's motion to vacate without holding a case management hearing or affording Mr. Franqui any opportunity to address the State's response. Within the June 10th order, the circuit court wrote: "As this claim was previously found to be time barred and higher courts agreed, no case management conference will be held and no motion for rehearing will be entertained." (3PC-R. 173) (emphasis added).[5] Without giving Mr. Franqui an opportunity to reply to the State's response, to appear at a case management hearing, or to file a motion for rehearing from the order summarily denying the motion to vacate, the order denying Mr. Franqui's motion was entered. Mr. Franqui was denied any an opportunity to be heard as to the State's erroneous assertions in its response and the factual and legal

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[5]This Court did not time bar Mr. Franqui's intellectual disability claim. It denied the claim on the merits, relying on *Cherry v. State*. *Franqui v. State*, 118 So. 3d 807 (Table) (Appendix A).

errors contained in the circuit court's order.

In its order, the circuit court maintained that it had previously denied Mr. Franqui's intellectual disability as time barred, which "[t]he Florida Supreme Court affirmed in *Franqui v. State*, 118 So. 3d 807 (Fla. 2013)." (3PC-R. 172). The circuit court made no reference to the fact that this Court in its 2013 opinion denied Mr. Franqui's intellectual disability claim on the merits relying upon *Cherry v. State*, a fact that was at least acknowledged at one point in the State's response. The circuit court also attached a five-page report dated March 4, 2003, from Dr. Trudy Block-Garfield (3PC-R. 174-79). The circuit court's order asserted that the attachment was "the report of his own expert." (3PC-R. 172). However, the report indicated that it was in reference to "Case Number F92-6089b", which is a separate criminal prosecution from the one at issue.

In Case No. F92-6089B, Mr. Franqui has been provided separate court-appointed counsel. Not only does the undersigned registry counsel appointed to represent Mr. Franqui Case No. F92-2141B not represent Mr. Franqui in Case No. F92-6089B, he does not have the record from that case and is not served with documents filed in that criminal prosecution. The trial record in the two separate criminal prosecutions were separate, as was each and every collateral record.

However due to the circuit court's ruling that "no motion

for rehearing will be entertained," Mr. Franqui was deprived of a vehicle to address the factual and legal errors in both the State's response and the circuit court's order denying the motion to vacate. Accordingly, Mr. Franqui filed a Notice of Proffer setting forth a proffer of the matters that he would have presented at a case management hearing and/or a motion for rehearing had the circuit court complied with Rule 3.851 and followed the procedures set forth therein for considering a motion to vacate.

Within the proffer, Mr. Franqui noted that he had become aware of Dr. Block-Garfield's report in the wake of receiving the State's response and its reference "to expert reports that found none of the elements of retardation satisfied." (3PC-R. 164). Though the State did not actually identify Dr. Block-Garfield by name and produce her report from Case No. F92-6089B in response to the May 27, 2015, motion to vacate, undersigned counsel did obtain the service of an expert in anticipation of the anticipated case management hearing.[6] Undersigned counsel on behalf of Mr. Franqui provided Dr. Block-Garfield's report to his expert in this case, Dr. Gordon Taub. As pled in the notice of proffer, undersigned counsel had intended to proffer Dr. Taub's conclusions regarding Mr Franqui at the case management

[6]And within 41 hours of receiving the State's response, Mr. Franqui's undersigned counsel received the circuit court's order summarily denying with Dr. Block-Garfield's report attached.

conference that is required by Rule 3.851. Within the notice of proffer, Mr. Franqui set forth Dr. Taub's analysis, primarily of Dr. Block-Garfield's report:

> I have reviewed the March 4, 2003, report by Dr. Trudy Block-Garfield regarding her evaluation of Leonardo Franqui. Per your request, I have analyzed the intelligence scores that Mr. Franqui obtained during her assessment.
>
> First, Dr. Block-Garfield indicates that following her appointment on November 25, 2002, and before her March 4, 2003, report, she "administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R)". While she repeatedly indicates that she administered the WAIS-R through the first four pages of her report, on page 5 she refers to the test as a "Wechsler-III". Thus, there is ambiguity in her report as to what test she administered. The WAIS-R was published in 1981 and its subsequent revision into the WAIS-III was published in 1997. Best practice requires psychological professionals to adopt the revised instrument within one year of its publication. Thus, it is unlikely that in 2003 Dr. Block-Garfield administered a WAIS-R given that it was rendered obsolete with the release of the WAIS-III in 1997, six years earlier. So, I will assume that the FSIQ score of 75 that Mr. Franqui earned on Wechsler Adult Intelligence Scale was on the WAIS-III, not the WAIS-R.
>
> Next, Dr. Block-Garfield indicates that she administered a second intelligence test, the "Stanford-Binet Intelligence Scale, Fourth Edition" (SB-IV). She stated that she administered the SB-IV because it "produces information more consistent with actual IQ." This statement is consistent with research comparing the SB-IV and the WAIS-III, which indicates the SB-IV is more sensitive at the floor (i.e., scores at or below the Borderline range) of the instrument. Interestingly, one of the revision goals of the Wechsler Adult Intelligence Scale- Fourth Edition (WAIS-IV), the revision of the WISC-III, was to improve the revised instrument's sensitivity at the floor and ceiling. Mr. Franqui's Composite score (analogous to the term FSIQ on the WAIS) was 76, which is within the Borderline range of the instrument.

There are two important psychometric implications resulting from Dr. Block-Garfield's assessment. The first is what is commonly referred to as *practice effects*. The second is the *Flynn Effect*. When two intelligence tests are administered, one after the other or within weeks of each other scores on the second intelligence test are higher or inflated because of the examinee's experience completing the first intelligence test. (This is similar to taking practice LSAT tests, one becomes familiar with the process and tends to score higher.) The increase in the obtained global intelligence score (i.e., Composite score or FSIQ) due to practice effects on an intelligence test is about 3-5 points.

The second implication from Dr. Block-Garfield's assessment is the Flynn Effect (FE) which is a well-accepted phenomenon in psychometric assessment. The FE results in an inflation of ones' obtained global intelligence score (i.e., Composite score or FSIQ). The FE accounts for an increase of about .03 points per year or about 3 points per decade. Within the WAIS-IV's Technical Manual, the publisher indicates the FE was one of the reasons why the WAIS-III was revised into the WAIS-IV.

When the FE is taken into account, Mr. Franqui's FSIQ score on the WAIS-III is reduced by 2 points (.03 points per year for 6 years), resulting in a FSIQ of 73. The SB-IV was published in 1986, so Mr. Franqui's score, when adjusted for the FE is 5.1 points lower (.03 points per year for 17 years) resulting in a Composite score of 70.90. It is important to note that although the test is published in year X, the data collected for the calculation of the instrument's norms (i.e., the data used to score the instrument) was collected at least one year prior, which is why 6 years and 17 years were applied to each instrument respectively; although the assessment took place in March of 2003.

Mr. Franqui's scores should also be corrected for practice effects. If the WAIS-III was administered first, his Composite score on the SB-IV is inflated by 3-5 points, which results in a corrected Composite score ranging between 71-73. If the SB-IV was administered first, then the FISQ score on the WAIS-III

> should be adjusted for practice effects, which results in a FSIQ of 70-72. In addition to discussing the WAIS-III prior to the SB-IV, Dr. Block-Garfield presents the results from the WAIS-III prior to the results from the SB-IV; this may indicate the WAIS-III was administered first, followed by the SB-IV.
>
> When both the FE and practice effects are taken into account and the WAIS-III was administered first, Mr. Franqui's Composite score on the SB-IV should be adjusted to 65.9-67.9. If the SB-IV was administered first, his FSIQ on the WAIS-III should be adjusted to 68-70. Both of these adjusted scores are within the mentally deficient range (e.g., mentally retarded range) of each instrument. This means, when correcting for the FE and practice effects, his *obtained global intelligence* score on *one* of the instruments administered is within the intellectually deficient (i.e., mentally retarded) range.
>
> When correcting for either the FE *or* practice effects and applying the standard error of measurement, Mr. Franqui global intelligence score is within the intellectually deficient range on *both* instruments. These data indicate that Mr. Franqui may be intellectually deficient.

(3PC-R. 186-88). However, because the circuit court did not follow the procedure mandated in Rule 3.851, it did not learn of the adjustments to the IQ scores obtained by Dr. Block-Garfield and required by the scientific community.

Mr. Franqui also pled in his proffer:

> In her report attached to the June 10th Order, Dr. Block-Garfield actually referenced deficits and impairments that were apparent in Mr. Franqui, but inexplicably and contrary to the standard that the Florida Supreme Court adopted in *Jones v. State* attributed the deficits and impairments to "immaturity and general impulsive behavior."

(3PC-R. 188). Because Mr. Franqui was not afforded an evidentiary hearing, Dr. Block-Garfield was not cross-examined on

the seemingly erroneous conclusions that she reached.

On July 8, 2015, Mr. Franqui filed a notice of appeal in order the summary denial of his motion to this Court (3PC-R. 192-94).

STATEMENT OF THE FACTS

On January 3, 1992, a bank was robbed by four gunmen in North Miami.[7] During the robbery a police officer was shot and killed (T. 956-60). A couple of weeks later the police investigation led to Mr. Franqui and four other individuals.[8] Mr. Franqui, along with his four co-defendants, was charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, third degree grand theft and burglary (R. 1-5).

In 1993, counsel had obtained a report from a mental health expert, Dr. Toomer, regarding his psychological evaluation of Mr. Franqui. Dr. Toomer noted in his 1993 report that during his

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[7]Because Mr. Franqui was also charged with a homicide that occurred on December 6, 1991, in Hialeah and had multiple co-defendants in that case, a common way to reference to the two different cases is by the city in which they occurred. The homicide at issue in the current appeal is frequently referenced as the North Miami case, while the December 6th homicide is often referenced as the Hialeah case.

[8]The other co-defendants in the North Miami case were Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez and Pablo Abreu. The co-defendants in the Hialeah case were Pablo San Martin and Pablo Abreu. *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997).

evaluation of Mr. Franqui psychological testing was done on which Mr. Franqui scored an IQ of less than 60 (which is squarely within the range of mental retardation and lower than 97.8% of the population). Dr. Toomer found that Mr. Franqui had a limited ability to reason abstractly and discriminatively, and further demonstrated behaviors symptomatic of schizophrenia, paranoid type. Dr. Toomer noted that Mr. Franqui is easily influenced and has an impaired level of overall functioning (2PC-R. 62). Dr. Toomer's report also reflected that Mr. Franqui had been rendered unconscious in an automobile accident and was wheelchair bound from that accident for seven months (2PC-R. 62). Dr. Toomer found Franqui had a history of learning disabilities, academic failure, and "very serious deficits in overall psychological functioning and cognitive processing." (2PC-R. 149). Dr. Toomer concluded that Mr. Franqui had deficient intellectual abilities and neuropsychological deficits, particularly in memory and executive functioning.

Dr. Toomer obtained test a score on a Revised Beta showing an IQ of less than 60 (2PC-R. 148). Dr. Toomer concluded that this was "reflective of very serious deficits in overall psychological functioning and cognitive processing skills." (2PC-R. 149). This placed Mr. Franqui in the mentally retarded range. Mr. Franqui did poorly in school and dropped out in the 8th grade. According to Dr. Toomer's 1993 evaluation, Mr. Franqui

had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired.

In May of 1994, Mr. Franqui was tried jointly with two of his co-defendants, Gonzalez and San Martin (R. 24).[9] Over Mr. Franqui's objection during the presentation of its case, the State was permitted to introduce statements by co-defendants Gonzalez and San Martin.[10] Mr. Franqui was convicted of all charges (T. 2324-25). Thereafter, the jury returned a death recommendation and the sentencing judge imposed a sentence of death on the first degree murder conviction (R. 480, 588-601).

On direct appeal, this Court found that the introduction of co-defendant Gonzalez's statement was error. *Franqui v. State,*

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[9]Co-defendant Fernandez in the North Miami case was tried by a separate jury at the same time. Co-defendant Abreu negotiated a guilty plea prior to trial and avoided a death sentence in the North Miami case.

Co-defendant Abreu also negotiated a plea prior to trial and avoided a death sentence in the Hialeah case. Pursuant to his plea agreement, he testified against Mr. Franqui in the Hialeah case. *Franqui v. State*, 699 So. 2d at 1324.

[10]Prior to trial, co-defendant Fernandez filed a motion for severance of defendants due to the fact that San Martin and Gonzalez had made post-arrest statements which directly incriminated him (R. 115). Mr. Franqui, who had joined the motion, renewed it throughout the trial and prior to the penalty phase (T. 17-33, 57-58, 80-88, 1347, 1375-76, 1398-1400, 1408, 1419-20, 1544, 1564, 1773, 1776, 2348, 2908, 2917, 3101). Over Mr. Franqui's objections, San Martin's and Gonzalez's statements were introduced without deletion of their references to Mr. Franqui upon the trial court's finding that they were "interlocking." (R. 122-28).

699 So. 2d 1332, 1335-36 (Fla. 1997).[11] However, a majority of the Court concluded that the introduction of the statement was harmless as to the guilt phase of the trial, reversing only as to the imposition of a death sentence. *Id.* at 1336.[12] Accordingly, Mr. Franqui's case was remanded for a new sentencing proceeding before a newly impaneled jury. *Id.*

A new penalty phase was held before a second jury in August, 1998 (R2. 1). At the 1998 resentencing, the State presented Mr. Franqui's conviction of first degree murder in the Hialeah case as establishing that Mr. Franqui was previously convicted of a crime of violence.[13] After the presentation of the evidence, the

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[11]The majority opinion of this Court stated:

> In this case, there is no question that Gonzalez's confession interlocked with Franqui's confession in many respects and was substantially incriminating to Franqui. Moreover, we cannot say that the totality of the circumstances under which Gonzalez made his confession demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.
>
> —Thus, the admission of Gonzalez's confession was error.

Franqui, 699 So. 2d at 1335-36.

[12]Two justices dissented as to the failure to order a new trial as to the erroneous introduction of Gonzalez's statement. *Id.* at 1337-38.

[13]This Court had affirmed Mr. Franqui's conviction and sentence of death in the Hialeah case in 1997. *Franqui v. State*, 699 So. 2d at 1315.

jury returned a 10-2 death recommendation (R2. 155). The sentencing judge followed the recommendation and imposed a sentence of death (R2. 158-75). In his findings, the judge found three aggravating circumstances:

> (1) Franqui had a prior conviction for a capital or violent felony (great weight); (2) the murder was committed during the course of a robbery and for pecuniary gain, merged (great weight); and (3) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer, merged (great weight).

Franqui v. State, 804 So. 2d 1185, 1191 n. 2 (Fla. 2002). The judge found no statutory mitigating circumstances, while he identified four nonstatutory mitigating circumstances as present:

> (1) Franqui's relationship with his children (little weight); (2) cooperation with authorities (little weight); (3) life sentences imposed on codefendants San Martin and Abreu (little weight); and (4) self-improvement and faith while in custody (some weight). The trial court rejected Franqui's family history and the fact that he did not fire the fatal bullet as nonstatutory mitigating circumstances.

Id. at 1191 n. 4.[14]

In Mr. Franqui's second direct appeal in the North Miami case, this Court affirmed the imposition of a death sentence. This Court did find that the trial judge erred when he "comment[ed] that the law required jurors to recommend a death

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[14]For sake of clarity, it should be noted that Pablo San Martin received a life sentence for his role in the North Miami case. In the Hialeah case, San Martin received a death sentence which this Court affirmed on direct appeal. *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997).

sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law." *Franqui v. State*, 804 So. 2d at 1193. However over the objection of three dissenters, a majority of this Court concluded that "Franqui was not prejudiced by this error." *Id.*[15]

Following the direct appeal, Mary Catherine Bonner was appointed to serve as Mr. Franqui's registry counsel in the North Miami case.[16]

On January 8, 2003, Mr. Franqui filed a Rule 3.851 motion in the circuit court (PC-SR. 759-74). The motion was subsequently withdrawn and refiled on April 7, 2003 (PC-R. 100-161). An evidentiary hearing was conducted on August 24, 2004 (PC-SR. 465-

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[15]Justice Shaw writing for the three dissenters explained their reasoning as to why they believed that Mr. Franqui's sentence of death should be vacated and remanded:

> I dissent from the majority's application of a harmless error analysis to the trial court's opening remarks to the initial venire wherein the trial judge stated:
>
> > If you believe that the aggravating factors outweigh the mitigating factors, then the law *requires* that you recommend a death sentence.
>
> This was a serious misstatement of the law and guaranteed a death sentence if in the jury's opinion the aggravators outweighed the mitigators and the jurors, in obedience to their oath, followed the judge's advice.

Franqui v. State, 804 So. 2d at 1199.

[16]Ms. Bonner was not appointed to serve as registry counsel for Mr. Franqui in the Hialeah case.

635). Included in the Rule 3.851 motion was Mr. Franqui's claim that he received ineffective assistance of counsel at the resentencing. *Franqui v. State*, 965 So. 2d 22, 32-33 (Fla. 2007).[17] Following the evidentiary hearing, the circuit court denied Mr. Franqui's motion for postconviction relief (PC-R. 290-329). Mr. Franqui appealed to this Court. After briefing, this Court affirmed the denial of postconviction relief. *Franqui v. State*, 965 So. 2d 22 (Fla. 2007).

Mr. Franqui filed a petition for writ of habeas corpus with this Court simultaneously with the submission of his initial brief on appeal. However, this Court denied the habeas petition in the same opinion in which it affirmed the denial of the motion for postconviction relief.

On September 12, 2007, Mr. Franqui filed a petition for writ

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[17]In the subsequent appeal of the denial of relief, this Court found that Mr. Franqui's registry counsel had failed to fully plead his ineffective assistance of counsel claim:

> Franqui also alleges that trial counsel was ineffective for failing to present Dr. Toomer's letter to the resentencing court. However, this claim was not raised in the trial court, nor was there any type of similar claim in which Franqui alleged error for failing to present the Toomer letter to the resentencing jury or judge as a means of establishing mental health mitigation. Accordingly, this claim is procedurally barred as an argument raised for the first time on appeal to this Court.

Franqui v. State, 965 So. 2d at 32. Dr. Toomer's 1993 letter which this Court referenced was attached to the State's response to the 2010 Rule 3.851 motion and is accordingly in the record before this Court (2PC-R. 148-51).

of habeas corpus in the District Court for the Southern District of Florida. Mary Catherine Bonner, who had been appointed by the state circuit court to represent Mr. Franqui in postconviction proceedings under §27.711 signed the petition and sought appointment as Mr. Franqui's counsel by the federal court in a separate motion. An order appointing Ms. Bonner as Mr. Franqui's counsel under the federal Criminal Justice Act was entered on October 2, 2007. Subsequently, on July 10, 2008, the district court entered its order denying the habeas petition. Mr. Franqui appealed to the Eleventh Circuit.

On April 7, 2009, Mr. Franqui filed a *pro se* motion for relief from judgment pursuant to Rule 60(b) as well as a motion to discharge counsel and to appoint alternative counsel. The motion was denied by the district court on April 20, 2009. Mr. Franqui filed a *pro se* notice of appeal and application for a COA on May 11, 2010. The application for a COA was granted by the district court on May 14, 2009 (Doc. 30).

Subsequently, Mr. Franqui filed a *pro se* motion with the Eleventh Circuit requesting that Bonner be discharged as his federal counsel and that the Eleventh Circuit appoint alternative counsel to represent him. On August 12, 2009, the motion to discharge Bonner was granted. In its order, the Eleventh Circuit indicated that new counsel would be appointed and that the new counsel would be permitted to supplement or amend Mr. Franqui's

pending application for a COA.

On August 26, 2009, undersigned counsel was appointed as Mr. Franqui's counsel in the federal proceedings under the Criminal Justice Act.

Subsequently, Mr. Franqui lost his effort to appeal the denial of the habeas petition. However, the appeal of the denial of the Rule 60(b) motion on which the district court had issued a COA proceeded. Following briefing and oral argument, the Eleventh Circuit issued an opinion on April 22, 2011, vacated the district court's order on the Rule 60(b) motion, found a lack of subject matter jurisdiction, and remanded with instructions to dismiss the motion for want of jurisdiction.

Meanwhile, undersigned counsel discovered in November of 2010 that Mr. Franqui was without registry counsel in the Florida state courts. Undersigned counsel, concerned about the failure of prior registry counsel to present a claim on behalf of Mr. Franqui that his intellectual disability precluded the imposition of a sentence of death, consulted with Mr. Franqui, who expressed his desire that counsel seek to be appointed as registry counsel and present the circuit court with all claims that could be made on his behalf. Mr. Franqui made it clear that he wished to have his claims presented to the circuit court and, if the circuit court denied those claims, he wished to appeal any and all adverse rulings to this Court. As a result, undersigned counsel

served a motion seeking to be appointed as registry counsel on November 26, 2010 (2PC-R 81). Over the State's objection, the circuit court issued an order appointing undersigned counsel as Mr. Franqui's registry counsel on January 13, 2011 (2PC-R. 119).

Undersigned counsel then filed a motion to vacate with Mr. Franqui's *Atkins* claim. The circuit court issued an order denying Mr. Franqui's motion to vacate on January 21, 2011. At a proceeding conducted on January 28, 2011, without notice to either Mr. Franqui or undersigned counsel, the signed order was provided to the clerk of court and filed in open court (2PC-R. 36).

A notice of appeal was filed on April 15, 2011 (2PC-R. 217). On July 12, 2011, this Court granted the State's motion to dismiss on the grounds that the notice of appeal had been filed untimely. Mr. Franqui filed a motion for rehearing/clarification which this Court subsequently denied on September 13, 2011.

On October 18, 2011, undersigned counsel on behalf Mr. Franqui filed a petition for belated appeal. On January 31, 2012, this court granted the petition and provided a new case styled as *Franqui v. State*, Case No. SC12-182, as the vehicle to hear Mr. Franqui's appeal of the denial of his Rule 3.851 motion. Subsequently, this Court addressed Mr. Franqui's intellectual disability claim on the merits and denied it, relying on *Cherry v. State*:

> Finally, we affirm the circuit court's summary denial of Franqui's *Atkins* claim because it is meritless. To establish mental retardation as a bar to the imposition of the death penalty, Franqui must prove each of the following three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an adult IQ score of 70 or below; (2) concurrent deficits in adaptive functioning; and (3) manifestation before the age of 18. ***See Cherry v. State*, 959 So.2d 702, 711 (Fla.2007)**. Further, the only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford-Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); Fla. Admin. Code 65G-4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford-Binet Intelligence Scale. His scores on the acceptable IQ tests were above 70. *See Franqui*, 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence-two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations-to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

(3PC-R. 136) (emphasis added). *See Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (Table); Appendix A.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court refused to conduct an evidentiary hearing, and therefore,

the facts alleged by Mr. Franqui must be accepted as true for purposes of this appeal in order to determine whether Mr. Franqui was and is entitled to an opportunity to present evidence in support of his factual allegations. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENTS

1. The circuit court erred in denying Mr. Franqui's Rule 3.851 motion to vacate without conducting a case management hearing and providing Mr. Franqui with an opportunity, as guaranteed by the Rule 3.851(f)(5)(B) and by due process, to address the State's response to the motion to vacate and respond to the assertions and arguments made therein. Mr. Franqui was also entitled to know that the circuit court was considering Dr. Block-Garfield's report issued in a different criminal prosecution and to be afforded an opportunity to put that report through the crucible of an adversarial testing. Due process requires notice and a meaningful opportunity to be heard. In *Huff v. State*, 622 So. 2d 982 (Fla. 1993), this Court held that a Rule 3.851 movant must be afforded an opportunity to orally argue his motion to vacate before the circuit court in accordance with due process.

The circuit court further erred in ruling in contravention of Rule 3.851(f)(7) that it would not entertain a motion for

rehearing. Rule 3.851(f)(7) specifically authorizes a capital movant to seek a rehearing if "the court has overlooked a previously argued issue of fact or law". The circuit court's action in this regard compounded the harm to Mr. Franqui from its refusal to afford Mr. Franqui his right to be heard at a case management hearing.

The circuit court's decision to deny Mr. Franqui the process that Rule 3.851 promised Mr. Franqui when filing a motion to vacate prejudiced Mr. Franqui as the notice of proffer that he filed in circuit court clearly demonstrates.

2. The circuit court erred in asserting that this Court had previously found Mr. Franqui's intellectual disability claim time barred. The circuit court's error was compounded when it then concluded that Mr. Franqui's re-presentation of his *Atkins* claim within one year of the decision of *Hall v. Florida* was time barred by virtue of the early time bar.

This Court had in fact rejected Mr. Franqui's *Atkins* claim in 2013 on the merits in reliance on *Cherry v. State* and therefore did not apply a time bar to the claim. In *Hall v. Florida,* the United States Supreme Court declared the strict 70 cutoff (that this Court in *Cherry v. State* found to be statutorily required) was contrary to *Atkins v. Virginia* and unconstitutional. The decision in *Hall v. Florida* means that this Court's application of the strict 70 cutoff *to* Mr Franqui's

Atkins was equally unconstitutional. Because Mr. Franqui re-presented his *Atkins* claim in a motion to vacate within one year of the issuance of *Hall v Florida*, he is entitled to have the merits of the claim reheard.

Now in light of *Hall v. Florida*, Mr. Franqui must be accorded a full and fair opportunity to fully plead his *Atkins* claim and be afforded an evidentiary hearing at which the Sixth Amendment applies.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT PREJUDICIALLY ERRED IN DENYING MR. FRANQUI'S RULE 3.851 MOTION WITHOUT CONDUCTING A CASE MANAGEMENT HEARING AS REQUIRED BY RULE 3.851(f)(5)(B) AND AS REQUIRED BY THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AS THIS COURT HELD IN *HUFF V. STATE*, AND WITHOUT ALLOWING MR. FRANQUI TO FILE A MOTION FOR REHEARING FOLLOWING ITS SUMMARY DENIAL.

A. Denial case management hearing and the opportunity to file a motion for rehearing violated due process

Rule 3.851(f)(5)(B) states that "[w]ithin 30 days after the state files its answer to a successive motion for postconviction relief, the trial court ***shall*** hold a case management conference" (emphasis added). That language mandates a case management conference and does not leave it to the discretion of the courts. The rule continues, "[a]t the case management conference, the trial court shall determine whether an evidentiary hearing should be held and hear arguments on any purely legal claims not based

on disputed facts." The language in the rule requiring a case management hearing resulted from this Court's decision in *Huff v. State*, 622 So. 2d 982 (1993). In *Huff*, this Court determined that due process required a circuit judge to give a capital post-conviction litigant notice and an opportunity to be heard and present argument on a pending motion for post-conviction relief. Specifically, this Court explained:

> "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990). We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard. We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard.

Huff, 622 So. 2d at 983.

Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). "Although the trial judge in this case did not rely on secret information, his silence following the State's response to the

presentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing. Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126 (1991).

Rule 3.851 provides that when a successive motion for Rule 3.851 relief is filed, "[w]ithin 30 days after the state files its answer to a successive motion for postconviction relief, **the trial court shall hold a case management conference.**" Rule 3.851(f)(5)(B) (emphasis added). The use of the word "**shall**" means that the trial court is required to conduct a case management hearing within 30 days of when the State files an answer to the 3.851 motion.[18] There are absolutely no qualifiers set forth in the rule limiting the right to a case management hearing. In the June 10th Order, the circuit court justified ignoring the mandatory language of the rule because "this claim was previously found to be barred and higher courts agreed."[19]

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[18]Here, the State filed and served its answer on June 8, 2015, meaning this Court was required to conduct a case management hearing on or before July 8, 2015. Instead, this Court entered its Order on June 10, 2015, denied the 3.851 motion, and held that a case management hearing would not be conducted.

[19]As is explained *infra*, this factual assertion regarding higher courts' agreement with the ruling is demonstrably false. Certainly, a case management conference would have provided Mr. Franqui's counsel with the opportunity to educate the circuit court to the fact that this Court addressed the merits of Mr. Franqui's intellectual disability claim when it affirmed; this Court did not find Mr. Franqui's claim time barred.

However, the rule simply does not provide for such an exception to the requirement that **"the trial court shall hold a case management conference."**

Not only is Rule 3.851(f)(5)(B) a mandatory directive binding on this Court, it also constitutes notice to Mr. Franqui of how his right to be meaningfully heard operates once he has filed a 3.851 motion. The language in the rule assures him he will be given an opportunity to respond to the State's answer to the 3.851 motion at the case management hearing, *i.e.* at the case management hearing he will be given a chance to address the State's position and present argument as to why the State's answer is in error. The requirement that a trial court conduct a case management hearing dates back to the decision in *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993)("the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion. If this procedure had been followed in the instant case, this Court might not be faced with the issue of whether Huff's due process rights were violated."). In *Huff v. State*, this Court found a due process violation in the trial court's order denial of relief and adoption of the State's unsolicited proposed order as its own:

> without an opportunity for Huff's counsel to object to its contents, leaves the impression that Huff's arguments were not considered. Moreover, the State's cover letter anticipated that Huff would be given an

> opportunity to participate in the decision-making by the judge. The effect on the appearance of the impartiality of the tribunal is precisely the "insidious result" that this Court condemned in *Rose v. State*. 601 So.2d at 1183.

Huff v. State, 622 So.2d at 984.

Rule 3.851(f)(7) also gave Mr. Franqui notice that he would be afforded an opportunity to be meaningfully heard in a motion for rehearing if the circuit court denied the 3.851 motion itself. Rule 3.851(f)(7) specifically provides:

> Motions for rehearing shall be filed within 15 days of the rendition of the trial court's order and a response thereto filed within 10 days thereafter. A motion for rehearing shall be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on legal precedent or statute not available prior to the court's ruling.

However in violation of Rule 3.851(f)(7), and in violation of Mr. Franqui's due process rights, the circuit court in its June 10th order wrote "no motion for rehearing will be entertained."

At no point did the State did not advise the circuit court of Rule 3.851(f)(5)(B), nor did the State advise the circuit court of *Huff v. State*, both of which were controlling authority, nor did the State advise the circuit court that it was required to entertain a properly filed motion for rehearing because Rule 3.851(f)(7), provided for the filing of motions for rehearing.

After the State filed its response in Mr. Franqui's case on June 8, 2015, Mr. Franqui was denied an opportunity to address the response, to point out the factually erroneous

representations contained therein, to reply to the dubious legal arguments, and/or to proffer facts in reply to the State's assertions. Mr. Franqui was never given an opportunity to respond and be heard on the matter as required by Rule 3.851(f)(5)(B) ("**[w]ithin 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference**") (emphasis added).[20] There have been instances in which, following the summary denial of a postconviction motion without a case management conference, this Court has relinquished jurisdiction so that such a conference could be held. *See Thompson v. State*, 759 So. 2d 650, 655 (Fla. 2000) ("we granted the motion filed by the State to relinquish jurisdiction for the purpose of holding a *Huff* hearing"). Certainly, it would be appropriate here for this Court to relinquish jurisdiction so that a case management

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[20] Rule 3.851(f)(5)(A) sets forth the purpose of the case management hearing:

> At the case management conference, the trial court **shall**:
>
> (i) schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination;
>
> (ii) hear argument on any purely legal claims not based on disputed facts; and
>
> (iii) resolve disputes arising from the exchange of information under this subdivision.

(Emphasis added).

conference could be held and Mr. Franqui be afforded the opportunity to be heard on a motion for rehearing should the occasion to file one arise on remand.

However, erroneous denial of Mr. Franqui's right to a case management hearing was compounded by the circuit court's ruling that it would not entertain a motion for rehearing. Deprivation of the right to file a rehearing and be heard violated Mr. Franqui's right to due process. Mr. Franqui was not given an opportunity to address the circuit court's position that this Court had previously time barred the claim. Mr. Franqui was not given an opportunity to address Dr. Block-Garfield's report. The circumstances here are indistinguishable from the due process violation found in *Lankford v. Idaho*.

B. Mr. Franqui was prejudiced by the due process violation

As shown by the Notice of Proffer that he filed in the circuit court, Mr. Franqui was prejudiced by the due process violation. When he filed his 3.851 motion on May 27, 2015, Mr. Franqui could not have anticipated that the circuit court would toss out the rule book and ignore the procedures that the rule book mandates trial courts follow once a 3.851 motion is filed. And of course at a case management hearing and/or in a motion for rehearing, Mr. Franqui's court-appointed counsel could have and would have picked up the rule book that the circuit court was casting aside and pointed that the circuit court's actions were

contrary to the rule book.

As bad as tossing out the rule book is, the circuit court's June 10th Order made matters worse by not reading Mr. Franqui's 3.851 motion with enough care to notice that the motion was premised upon this Court's April 9, 2013 opinion in *Franqui v. State*, Case No. SC12-182, which is referenced in *Franqui v. State*, 118 So.3d 807 (Fla. 2013) (table).[21] In his 3.851 motion, Mr. Franqui repeatedly quoted the portion of this Court's opinion that addressed the merits of Mr. Franqui's claim that his death sentence is unconstitutional under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002). In addition, Mr. Franqui attached the full WestLawNext printout of the Florida Supreme Court's April 9, 2013, opinion (3PC-R. 146-47).

Apparently because the circuit court failed to read the three full block quotes from this Court's rejection of Mr. Franqui's *Atkins* claim on the merits that were inserted in the motion and also failed to read the full opinion that this Court issued on April 9, 2013, and that was attached to the motion, the circuit court wrote in its June 10th Order:

> Defendant raised an untimely *Atkins* claim in this court in 2010. In an order dated Janaury 21, 2011, the claim

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[21]For whatever reason, West Publishing only references the April 9, 2013 opinion in a table in the hardcopy of the Southern Third Reporter with the abbreviation "Aff." Yet, WestLawNext shows the decision for *Franqui v. State*, 118 So.3d 807 (Fla. 2013) with the full text of the Florida Supreme Court's opinion, labeled with the word "Opinion."

> was time barred. The Florida Supreme Court affirmed in *Franqui v. State*, 118 So.3d 807 (Fla. 2013).

(3PC-R. 172). The circuit court then erroneously concluded that Mr. Franqui's "claim was previously found time barred and higher courts agreed" (3PC-R. 173). If the circuit court had read this Court's opinion dated April 9, 2013, it would have seen that **this Court did NOT agree that Mr. Franqui's *Atkins* claim was time barred.**

Of course, the whole purpose of the requirement that a case management hearing be conducted is to provide the 3.851 movant with the opportunity to be heard and to insure that his arguments are actually understood and considered. *Huff v. State*, 622 So.2d at 984 (the failure to conduct a hearing "leaves the impression that Huff's arguments were not considered"). Certainly in Mr. Franqui's case, the circuit court's June 10th Order leaves more than an impression; it conclusively shows that the circuit court did not read the 3.851 motion and this Court's April 3, 2013, opinion that was attached to the motion. By violating Rule 3.851 and denying Mr. Franqui both a case management hearing and the opportunity to be heard on a motion for rehearing, the circuit court effectively denied Mr. Franqui the opportunity to show that the circuit court had overlooked the fact that the Florida Supreme Court in 2013 did not find Mr. Franqui's *Atkins* claim time barred, but denied the claim on the merits on the basis of

Cherry v. State, 959 So.2d 702 (Fla. 2007).

Besides ignoring the mandatory provisions of Rule 3.851, depriving Mr. Franqui of his due process rights and ignoring this Court's 2013 opinion, the circuit court attached the report of Dr. Judy Block-Garfield to its June 10th order and described Dr. Block-Garfield as Mr. Franqui's "own expert" (3PC-R 172). However, Mr. Franqui's 3.851 motion clearly indicated that the expert on whom he had relied previously and was still relying was Dr. Jethro Toomer as to his *Atkins* claim and the three prongs for intellectual disability:

> In his Rule 3.851 motion filed in November of 2010, Mr. Franqui challenged his death sentence under *Atkins v. Virginia*. Mr. Franqui pled that he had been found to be mentally retarded by Dr. Jethro Toomer on the basis of his IQ score, "substantial limitations of present functioning," and evidence of his mental deficits before the age of 18 (" Mr. Franqui did poorly in school and dropped out in the 8th grade"). Specifically, Mr. Franqui relied upon Dr. Toomer's diagnosis of Mr. Franqui as mentally retarded and his conclusion that each of the three prongs of the test for mental retardation were present.

(3PC-R. 135-36). No where in the 3.851 motion did Mr. Franqui plead Dr. Block-Garfield as "his expert". Clearly, the circuit court went outside the record in Case No. F92-2141B in asserting that Dr. Block-Garfield was Mr. Franqui's expert, without affording Mr. Franqui notice and opportunity to object or respond. This was a violation of *Lankford v. Idaho*, 500 U.S. 110 (1991).

Had Mr. Franqui been advised of what the circuit court intended to do or been given an opportunity to attend a case management hearing or file a motion for rehearing, he would have proffered Dr. Taub's analysis of Dr. Block-Garfield's report. Dr. Taub's analysis which is set forth in the Statement of the Case, *supra*, further supports Dr. Toomer's conclusions that Mr. Franqui is intellectually disabled.

Mr. Franqui would have also pointed out, as he did in his Notice of Proffer, that in Dr. Block-Garfield's report, she referenced deficits and impairments that were apparent in Mr. Franqui, but then inexplicably and contrary to the standard that this Court adopted in *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007), attributed the deficits and impairments to "immaturity and general impulsive behavior." Had Mr. Franqui had notice that this Court was considering and using Dr. Block-Garfield's report when neither her name nor her report appeared in the 3.851 motion, he would have had an opportunity at a case management hearing or in a motion for rehearing to meaningfully address Dr. Block-Garifield's failure to employ the standard set forth in *Jones v. State*. *See Lankford v. Idaho*, 500 U.S. 110.

It is also important to recognize that had Mr. Franqui been afforded a case management hearing and an opportunity to address the State's response and/or the circuit court's concerns, any pleading deficiencies identified in the motion to vacate itself

could have been corrected. This Court held in *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005), that an opportunity to correct pleading deficiencies in a Rule 3.851 motion should be extended to capital defendants.

In the circumstances presented here, this Court cannot find the error harmless where the State urged the circuit court to deprive Mr. Franqui the opportunity to orally argue his motion to vacate, and the circuit court did so without affording Mr. Franqui the opportunity to be heard and to advise the circuit court of the controlling contrary authority that the State had failed to note.

In the proceedings in circuit court on his May 27, 2015, motion to vacate, Mr. Franqui was deprived of his due process rights to notice and opportunity to be meaningful heard. *See Lankford v. Idaho*, 500 U.S. 110. As a result, Mr. Franqui was prejudiced. Accordingly, this Court should vacate the order summarily denying his motion to vacate and remand for proceedings the comport with Rule 3.851 and due process.

ARGUMENT II

MR. FRANQUI'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENTS UNDER *HALL V. FLORIDA* AND *ATKINS V. VIRGINIA* BECAUSE MR. FRANQUI HAS NOT BEEN GIVEN THE FAIR OPPORTUNITY IN THE CRIMINAL PROSECUTION AT ISSUE IN THIS APPEAL THAT THE EIGHTH AMENDMENT REQUIRES BE AFFORDED TO THOSE WHO SEEK TO PROVE THAT THEY ARE INTELLECTUALLY DISABLED.

A. Introduction

In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), the United States Supreme Court concluded that there was a national consensus against executing mentally retarded[22] offenders:

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

In light of this national consensus, the Supreme Court concluded that the execution of mentally retarded defendants violated the Eighth Amendment of the United States Constitution:

> Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Atkins, 536 U.S. at 321.

In reaching this conclusion, the Supreme Court employed the clinical definition of "mental retardation" and discussed whether the execution of a mentally retarded offender served any valid penological purpose. The Supreme Court then concluded:

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[22]In *Atkins*, the Supreme Court used the phrase "mentally retarded" because at the time that was the term by clinicians, i.e. experts in the field. Subsequently when the clinicians decided that the condition previously known as "mental retardation" should instead be referred to as "intellectual disability," the Supreme Court deferred to the clinicians, i.e. the experts in the field, and employed that terminology in its decision in *Hall v. Florida*, 134 S. Ct. at 2003 n.1.

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21 (footnotes omitted).[23]

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[23]In *Atkins* the Supreme Court set forth the clinical definition of mental retardation in a footnote:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different

In conducting this analysis, the Supreme Court used the clinical definition of mental retardation. Based upon what it means clinically to be mental retarded, the Supreme Court determined that the execution of offenders who were mentally retarded violated the Eighth Amendment. The Supreme Court explained:

> As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.23 There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.24 Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318. Footnotes 23 and 24 cited articles written about mental retardation by experts in the field who had

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> etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id., at 42-43.

Atkins, 536 U.S. at 308 n.3.

studied it. Clearly, the Supreme Court determined that offenders who fit within the clinical definition of mental retardation could not be executed under the Eighth Amendment, just as it later determined in *Roper v. Simmons,* 543 U.S. 551 (2005), that juveniles under the age of 18 years of age at the time of the commission of the capital offense could not be executed under the Eighth Amendment.

Having determined that those offenders who were mentally retarded could not be executed, the Supreme Court concluded that it would permit the States to develop a procedure for separating those who were mentally retarded from those who merely claimed to be:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416-417, 106 S.Ct. 2595.

Atkins, 536 U.S. at 317.

The reference to Supreme Court's approach in *Ford v. Wainwright,* 477 U.S. 399 (1986), is illuminating. There, the Supreme Court determined that the Eighth Amendment precluded the execution of offenders who were not competent to be executed. The Supreme Court defined what constituted incompetency to be executed in *Ford*. What was left to the States was the

development of procedures for determining whether a particular offender was incompetent to be executed:

> We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.

Ford v. Wainwright, 477 U.S. at 416-17.

Justice Powell, the fifth vote in the *Ford* majority wrote in his separate opinion:

> In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of § 2254(d) on federal habeas corpus.

Ford v. Wainwright, 477 U.S. at 427 (Powell, J., concurring).

Subsequently in *Pannetti v. Quarterman*, 551 U.S. 930, 948 (2007), the Supreme Court explained that *Ford* did not give the States the ability to change the criteria established in *Ford* that identified who was incompetent to be executed, nor adopted procedures that were inadequate to provide an offender alleged to be incompetent to be executed with minimum process required by *Ford*:

> Petitioner claims that the Eighth and Fourteenth Amendments of the Constitution, as elaborated by Ford,

> entitled him to certain procedures not provided in the state court; that the failure to provide these procedures constituted an unreasonable application of clearly established Supreme Court law; and that under § 2254(d) this misapplication of Ford allows federal-court review of his incompetency claim without deference to the state court's decision.
>
> We agree with petitioner that no deference is due. The state court's failure to provide the procedures mandated by Ford constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders.

The Supreme Court decision in *Atkins* to leave it to the States to develop procedures for determining who was mentally retarded and who wasn't, did not permit the States to change the criteria defining mental retardation any more than *Ford* permitted the States to change the criteria that defined incompetency to be executed or adopt unreasonable procedures for hearing *Ford* claims. Yet, the Florida Legislature in implementing *Atkins* sought to narrow the definition of mental retardation so as to exclude a number of offender's who meet the clinical definition of mental retardation.

This Court addressed the statutory definition of mental retardation in *Cherry* v. *State*, 959 So. 2d 702, 712-13 (Fla. 2007):

The fundamental **question considered by the circuit court and raised in this appeal is whether the rule and statute provide a strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning.** Cherry argues that the standard error of plus or minus five points should be taken into account so that the actual cutoff score is 75, in accordance with provisions and rules from the Diagnostic and Statistical Manual of Mental Disorders and the American Association on Mental Retardation. Cherry also argues that because of the SEM, the IQ measurement is more appropriately expressed as a range of scores rather than just one number. Thus, his IQ score should actually be described as within the range of 67 to 77.

However, the circuit court denied this argument, holding:

> Neither Rule nor statute reference the standard error measurement or use the word "approximately". The Florida Department of Children and Families, in determining mental retardation for eligibility for developmental services, makes the 70 IQ score a bright-line cutoff. This Court notes, however, that the DSM-IV-TR recognizes IQ is more accurately reported as a range of scores, a position reflected in the staff analysis for (what was ultimately) Fla. Stat. § 921.137. The Legislature had mental retardation definitions from various states before it, some of which unequivocally provided that certain IQ scores created a mere presumption either for or against mental retardation; language the Legislature did not include in the Florida law. Neither did they set the cutoff at 75. This Court declines to perform a blanket change of the clearly stated IQ criteria, however, the +/-5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.

Supplemental Order at 7 (citations and footnotes omitted).

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. Thus, the language of the statute and the corresponding rule are clear.** We defer to the plain meaning of statutes:
>
> > When [a] statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So.2d 297, 303 (Fla.2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris*, 875 So.2d 408, 410 (Fla.2004). When the statutory language is clear, "courts have no occasion to resort to rules of construction—they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker*, 668 So.2d 989, 990-91 (Fla.1996).
>
> *Daniels v. Fla. Dep't of Health*, 898 So.2d 61, 64-5 (Fla.2005). Because the circuit court applied the plain meaning of the statute, it did not err in its conclusion that Cherry failed to meet this first prong.

(Emphasis added).[24]

The United States Supreme Court in *Hall v. Florida* addressed the strict 70 IQ cutoff that was found to have been legislatively adopted in this Court's opinion in *Cherry*, and stated:

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[24]This Court's ruling in *Cherry* was premised upon "the plaining meaning of the statute." This means that the strict 70 cutoff was in effect that the legislative became effective - it did not just suddenly spring up when this Court issued *Cherry*.

> **Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of "approximately 70."** 536 U.S., at 308, n. 3, 122 S.Ct. 2242. **Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test.** By failing to take into account the standard error of measurement, **Florida's law** not only **contradicts the test's own design** but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but **the law requires that he have the opportunity to present evidence of his intellectual disability**, including deficits in adaptive functioning over his lifetime.

Hall v. Florida, 134 S. Ct. at 2001. Indeed, Florida's statute had taken the phrase that had been used in *Atkins* ("approximately 70") and stripped off the word "approximately" to mandate that the IQ score must be no higher than 70. It was this altered definition of mental retardation that the Supreme Court in *Hall* found violated *Atkins*.[25] Indeed, Florida's law imposing the 70 cutoff was inconsistent with the national consensus that the United States Supreme Court had found in *Atkins* that precluded the execution of those offenders who were mentally retarded within the nationally recognized clinical standards.

Thus, *Hall v. Florida* was a determination by the United States Supreme Court that the statutorily adopted strict 70

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[25]That the Supreme Court found the strict 70 cutoff in violation of *Atkins* is clear from its statement that the statute could have been construed by this Court to conform with the holding in *Atkins*: "On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Hall v. Florida*, 134 S. Ct. at 1994.

cutoff that was set forth in *Cherry v. State* violated *Atkins v. Virginia*. The decision in *Hall* on its face dates back to the 2002 decision in *Atkins*.

B. This Court's denial of Mr. Franqui's *Atkins* claim in 2013

In November of 2010, Mr. Franqui filed a motion to vacate in the circuit court that included an *Atkins* claim.[26] In January of 2011, the circuit court entered an order summarily denying Mr. Franqui's *Atkins* claim. As to the *Atkins* claim, the order

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[26]When undersigned counsel filed the 2010 motion to vacate, he had not yet been appointed to serve as Mr. Franqui's registry counsel. Counsel had been appointed as Mr. Franqui's CJA counsel in the federal courts. In that capacity, counsel had learned that Mr. Franqui was without state court registry counsel. Counsel prepared the motion to vacate when he did not have a contract in place with the Department of Financial Services and did not have the ability to obtain the assistance of a mental health expert or an investigator. Contemporaneous with filing the motion to vacate, counsel prepared and filed a motion for him to be appointed as Mr. Franqui's registry counsel (2PC-R. 81). It was not until January 13, 2011, that counsel was appointed as registry counsel for Mr. Franqui (2PC-R. 119). This was nearly six weeks after the motion to vacate had been filed. When appointing the undersigned to serve as Mr. Franqui's registry counsel, the presiding judge noted that the mental retardation claim had been raised in the motion to vacate and indicated that counsel would be able to hire a mental health expert - "you can knock yourself out" (2PC-R. 295). Counsel for the State seemed to disagree with the judge. She referenced "the evidentiary hearing" that had occurred in Case No. F92-6089B and indicated that "[i]t consisted of the stipulation of two reports that found that he wasn't retarded, assuming Mr. McClain could surpass that, he doesn't get to have a - - that would exert the rule and would require that the Court appoint experts." (2PC-R. 296). The order denying the motion to vacate was signed eight days after counsel's appointment and before he had the ability to "knock [him]self out" and obtain the assistance of a mental health expert.

stated:

> Any *Atkins* claim is time barred. Also, the issue of whether Franqui is mentally retarded has been litigated and is res judicata. *Franqui v. State*, 2011 WL 31379 (Fla. 2011). Defendant cannot be mentally retarded in one case and not in the other, as that would defy the definition of mental retardation.

(2PC-R. 191). Subsequently, this Court heard Mr. Franqui's appeal from that order.

This Court's opinion denying Mr. Franqui's appeal issued on April 9, 2013. As to the *Atkins* claim, this Court affirmed the summary denial of the claim, but not for the reasons given by the circuit court. This Court did not find Mr. Franqui's *Atkins* claim either time barred or procedurally barred. Instead, this Court addressed the merits of the *Atkins* claim and found that on the basis of *Cherry v. State* the claim was meritless because "[h]is scores on the acceptable IQ tests were above 70":

> Finally, **we affirm** the circuit court's summary denial of Franqui's *Atkins* claim **because it is meritless**. To establish mental retardation as a bar to the imposition of the death penalty, Franqui must prove each of the following three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an adult IQ score of 70 or below; (2) concurrent deficits in adaptive functioning; and (3) manifestation before the age of 18. ***See Cherry v. State*, 959 So.2d 702, 711 (Fla.2007)**. Further, the only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford-Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); Fla. Admin. Code 65G-4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford-Binet Intelligence

> Scale. **His scores on the acceptable IQ tests were above 70.** *See Franqui*, 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence-two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations-to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

(3PC-R. 136) (emphasis added). *See Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (Table); Appendix A.

Of course as this quoted passage reflects, this Court included one sentence in its justification for its finding the claim meritless that did not concern the strict 70 cutoff that was articulated in *Cherry v. State*. This sentence which indicated that Mr. Franqui "did not plead whether the mental retardation manifested before he was 18 years of age." However, this assertion was not quite correct. While Mr. Franqui's motion did not use the specific words that were included in that sentence, the 2010 motion to vacate relied upon Dr. Toomer's 1993 evaluation of Mr. Franqui and set forth that "Mr. Franqui has been evaluated by Dr. Jethro Toomer who found that Franqui's history of learning disabilities, academic failure, and retardation." (2PC-R. 68). While this language was not the model of clarity it did recite that Dr. Toomer had found a history of learning disabilities and academic failure. Dr. Toomer's report set forth that:

> At age fifteen, he dropped out of eighth grade at Booker T. Washington High School and worked for Building and Grounds Department of the City of Miami and for a tire shop. The subject describes his overall health as good, with no periods of hospitalization indicated. At age sixteen, the subject indicates he was struck by an automobile and rendered unconscious. As a result of this injury, he was confined for approximately six to seven months in a wheelchair

(2PC-R. 149).[27] At the time of Dr. Toomer's 1993 evaluation, Mr. Franqui was 23 years old. Later in his report, Dr. Toomer wrote:

> A picture emerging of Leonardo Franqui is one of an individual whose behavior is characterized by a pervasive pattern of instability **that is life long** and present in a variety of contexts. There is instability in terms of identity, self image, mood, interpersonal relationships and affect. **The origins can be found in early abandonment, resulting in pervasive developmental disabilities which precluded appropriate ego development ad higher order thought processes.** Resultingly, there are deficits that combine to adversely affect reality testing, appropriate decision making and long range planning.

(2PC-R. 151) (emphasis added). A bit later in the report, Dr. Toomer wrote:

> Leonardo Franqui suffers from extreme mental and emotional disturbance and severe impairment of cognitive functioning. History and the results of this evaluation reflect behavior symptomatic of serious mental deficits. **His history is characterized by poor school achievement, poor socialization, poor environment incapable of providing sufficient nurturing and early-on abandonment.** He is unable to reason abstractly and discriminatively or to project consequences and his level of mental functioning is characteristic of being easily influenced.

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[27]Dr. Toomer's report noted that Mr. Franqui was born in Cuba and remained there until he was approximately ten years old (2PC-R. 149). Records from Cuba were apparently not available at the time of Dr. Toomer's evaluation.

(2PC-R. 151) (emphasis added).

Mr. Franqui argues that the 2011 motion to vacate and Dr. Toomer's report were sufficient to have plead that the retardation was manifest before Mr. Franqui reached the age of 18 years of age. Certainly, the circuit court did not find that the claim had been inadequately pled when it ruled that the issue "has been litigated and is res judicata" (2PC-R. 191). Indeed had the circuit court concluded that the pleading was deficient, Mr. Franqui would have been entitled to have the opportunity correct the pleading deficiency. This Court held in *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005), that an opportunity to correct pleading deficiencies in a Rule 3.851 motion should be extended to capital defendants.

At the time that motion to vacate was filed in 2010, Mr. Franqui did not have a registry attorney representing him in the Florida state courts. Mr. Franqui's federally appointed CJA counsel filed the motion in November of 2010 in order to submit his claim under *Porter v. McCollum*, 558 U.S. 30 (2009), within one year of the issuance of that decision. The *Atkins* claim was included because CJA counsel had learned that the *Atkins* claim had not been presented in the Florida state courts. The claim was written up while counsel had no resources such as the assistance of a mental health expert or of an investigator. It was not until, January 13, 2011, six weeks after CJA counsel

filed the motion to vacate and asked to be appointed as Mr. Franqui's registry counsel that an order was signed granting the appointment. The appointment was granted eight days before the circuit court denied the motion to vacate and procedurally barred the *Atkins* claim. Once the appointment was finally granted, counsel was not given any time to further develop and plead the *Atkins* claim.

When the 2010 motion was filed, *Cherry v. State* was the law in Florida and created an insurmountable obstacle for Mr. Franqui's *Atkins* - other than Dr. Toomer's IQ score on a Beta, Mr. Franqui and his counsel did not have an IQ score of 70 or below. *See Lankford v. Idaho*, 500 U.S. 110. Mr. Franqui's federally appointed CJA counsel pled the *Atkins* claim in the 2010 motion to vacate in order to exhaust the claim in the Florida state courts so that he could litigate the claim in federal court and challenge the constitutional vitality of *Cherry v. State* in a petition seeking certiorari review by the United States Supreme Court or Rule 60(b) relief in federal district court. Accordingly, the focus in preparing the *Atkins* claim in 2010 was prong one of the criteria for intellectual disability which implicated *Cherry v. State*.

Finally, there are three points to be made as to this Court's 2013 opinion finding Mr. Franqui's *Atkins* claim meritless. First, this Court did not find the claim time barred

and/or barred on the basis of res judicata. It addressed the claim on the merits. The State did not seek a rehearing and argue that this Court erred in entertaining the merits of the *Atkins* claim.[28] Presumably, this Court's merits ruling is thus the law of the case.

Second, this Court relied upon *Cherry v. State* in finding Mr. Franqui's *Atkins* claim meritless. It found the 75 IQ score referenced in *Franqui v. State*, 59 So. 3d 82, 91 (Fla. 2011), was above the strict cutoff set forth in *Cherry*, and thus meant that Mr. Franqui's *Atkins* claim was meritless. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) ("Accounting for this margin of error [the standard error of measurement], Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability.").

Third, this Court's statement that Mr. Franqui had not adequately pled the third prong of the intellectual disability standard, i.e. onset before the age of 18 years of age, deprived Mr. Franqui of the opportunity to correct the pleading

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[28]This Court has entertained *Atkins* claims filed beyond the time limitations contained in Rule 3.203 in the form originally adopted in *Amendments to Fla. Rules of Crim. Pro.*, 875 So. 2d 563 (Fla. 2004). *See Coleman v. State*, Case No. SC04-1520 (On April 18, 2005, Coleman filed a motion for relinquishment of jurisdiction so that an *Atkins* claim could be presented, and this Court granted the motion for relinquishment on September 23, 2005). Presumably, this Court recognizes that a meritorious *Atkins* claim renders a capital defendant ineligible for a death sentence and thus innocent of the death penalty.

deficiency. It also ignored the fact the Sixth Amendment right to effective representation attaches to all state of a criminal prosecution, and that includes the death eligibility determination under *Atkins* when the issue arises for the first time in collateral proceedings because the sentence of death was final when *Atkins v. Virginia* issued in 2002. *Hooks v. Workman*, 689 F. 3d 1148, 1183-84 (10th Cir. 2012). When the 2010 motion to vacate was filed, Mr. Franqui was without the benefit of court-appointed registry counsel. The *Atkins* claim was pled by Mr. Franqui's federal CJA counsel who was provided with no funding of any kind to investigate and prepare the *Atkins* claim. When registry counsel was finally appointed to represent Mr. Franqui on the *Atkins* claim, it was eight days before the summary denial of the claim issued. Registry counsel's contract with the Department of Financial Services, which must be signed to authorize funding, was not executed until February 8, 2011, well after the January 21st summary denial. Certainly, the representation that Mr. Franqui received in these circumstances could not have met the Sixth Amendment standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Quite simply, Mr. Franqui was not provide a full and fair opportunity to adequately plead the third prong.[29]

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[29]It should be recognized that Mr. Franqui's *Atkins* claim was premised upon Dr. Toomer's 1993 evaluation. On the basis of Dr. Toomer's 1993 report, this Court determined that in Case No. F92-

C. The circuit court's 2015 order summarily denying Mr. Franqui's *Atkins* claim.

On May 27, 2015, Mr. Franqui filed the motion to vacate at issue in this appeal. The motion asserted that the United States Supreme Court's decision in *Hall v. Florida* held that this Court's decision in *Cherry v. State* was contrary to *Atkins v. Virginia*, and necessarily invalidated this Court's 2013 rejection of Mr. Franqui's *Atkins* claim because it was premised upon *Cherry v. State* (3PC-R. 138-39). And to demonstrate this, Mr. Franqui block quoted the portion of this Court's 2013 opinion rejecting his *Atkins* claim on the basis the strict 70 cutoff that this Court in *Cherry v. State* had found statutorily required (3PC-R. 139). This block quote of this Court's 2013 opinion that appeared in the motion included this Court's statement that Mr. Franqui's *Atkins* claim was being denied because it was meritless.

Yet despite its appearing in the motion that this Court had denied Mr. Franqui's *Atkins* claim on the merits, the circuit court summarily denied the motion without the benefit of a case management hearing saying:

6089B an evidentiary hearing was warranted on the *Atkins* claim that was presented by Mr. Franqui's attorney in that case. *Franqui v. State*, 14 So. 3d 238 (Fla. 2009). Given that this Court determined that Dr. Toomer's report was sufficient, even as to third prong, to warrant an evidentiary hearing, the pleading deficiency that this Court identified in its 2013 opinion can only be as to a failure to include certain magic words in the motion to vacate, i.e. a technical deficiency that could have been easily rectified.

> Defendant raised an untimely *Atkins* claim in this court in 2010. In an order dated January 21, 2011, the claim was denied as time barred. The Florida Supreme Court affirmed in *Franqui v. State*, 118 So. 3d 807 (Fla. 2013).

(3PC-R. 172).

The circuit court order then referenced the report that Dr. Block-Garfield prepared in Case No. F92-6089B:

> Attached is the report of his own expert, who found he did not suffer from deficits in adaptive functioning. "Certainly, he was in some fashion supporting a family which could not be accomplished by an individual who is mentally retarded." Report of Trudy Block-Garfield, page 5.

(3PC-R. 173).

The circuit court's order then concluded:

> As **this claim was previously found to be time barred and higher courts agreed**, no case management conference will be held and no motion for rehearing will be entertained.

(3PC-R. 173) (emphasis added).

The circuit's order completely ignored the fact that the only higher court's opinion that mattered was this Court's opinion in 2013 that did not find the *Atkins* claim time barred, but instead considered the claim on the merits. Seemingly unaware of this Court's actual ruling in 2013, the circuit court attempted to bolster its time bar assertion by noting:

> When the Governor signed a death warrant for Clarence Hill, he filed a motion alleging he was exempt from execution pursuant to *Atkins, supra*. The Florida Supreme Court held that the trial court properly concluded that the claim was time barred as it was not filed within 60 days after October 1, 2004. *Hill v.*

State, 921 So. 2d 579, 584 (Fla. 2006).

(3PC-R. 172). But here too, the circuit court ignored the fact this Court only enforced the time bar because Hill's *Atkins* claim was meritless:

> While Hill does allege a December 15, 2005, psychological evaluation to support his claim, this evaluation provides no truly new evidence to support Hill's claim. This newest evaluation declares that Hill has "mild mental retardation"; however, it finds **Hill's IQ to be sixteen points above the level required to establish mental retardation in Florida. Such a finding does not exempt a defendant from execution.** *See Zack v. State*, 911 So.2d 1190, 1201 (Fla.2005) (finding that in order to be exempt from execution under Atkins, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below). This claim is procedurally barred.

Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) (emphasis added). This Court specifically noted that the report on which Hill relied found Hill's IQ score to be 16 points above the 70 cutoff, i.e. Hill's IQ score was 86. This Court found that a mental health expert's diagnosis of mental retardation on the basis of an 86 IQ score "does not exempt a defendant from execution." This was a determination that Hill's *Atkins* claim lacked merit, and implicitly that Hill was not innocent of the death penalty and thus could not circumvent the procedural bar this Court then found to apply.

The circuit court's reliance upon *Hill v. State* was entirely misplaced. Hill's IQ score of 86 readily distinguishes his case from Mr. Franqui who has a qualifying IQ score of 75, before the

Flynn effect is factored in. Moreover, this Court's application of a procedural bar occurred after holding that Hill's 86 IQ score did not exempt him from execution.

By failing to recognize that this Court's opinion in 2013 did not apply a time bar, but instead denied Mr. Franqui's *Atkins* on the merits relying on *Cherry v. State*, the circuit court did not address whether the re-presentation of the *Atkins* claim within one year of the decision in *Hall v. Florida* could result in a time bar. This Court's well established jurisprudence is that when a claim is re-presented within one year of a decision by the United States Supreme Court, the claim can only be procedurally barred if the new decision relied upon did not invalidate the basis for this Court's previous denial of the claim.

After the United States Supreme Court in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), ruled that this Court had misread *Lockett v. Ohio*, 438 U.S. 586 (1978), and in doing so violated the Eighth Amendment, this Court held that capital defendants had two years under the then two-year clock in Rule 3.850 to re-present their *Lockett* claims in light of *Hitchcock*. *See Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). The

situation in Florida following the issuance of *Hall v. Florida* is indistinguishable from the circumstances that arose in the wake of *Hitchcock*. Quite clearly, the United States Supreme Court found the strict 70 cutoff contained in Florida law violated *Atkins v. Virgina*. That the Supreme Court found the strict 70 cutoff in violation of *Atkins* is clear from its statement that the statute could have been construed by this Court to conform with the holding in *Atkins*: "On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Hall v. Florida*, 134 S. Ct. at 1994. This is a clear statement that the strict 70 cutoff and *Cherry v. State* violated *Atkins*. Just as *Hitchcock* was dictated by *Lockett* and dated back to *Lockett*, *Hall v. Florida* is dictated by *Atkins v. Virginia* and dates back to that decision.

Of course, this means that Mr. Franqui's re-presentation of his *Atkins* claim within one year of the issuance of *Hall v. Florida* was timely, i.e. not time barred. The circuit court's ruling to the contrary is erroneous.

While the circuit court's reference to the report by Dr. Block-Garfield did not serve as a basis for the circuit court's conclusion that the *Atkins* was time barred, the citation to it by the circuit court was error. Mr. Franqui did not rely upon Dr. Block-Garfield's report in his motion to vacate. The State did not mention Dr. Block-Garfield by name in its response, although

there was a passing reference at one point to "the expert reports" (3PC-R. 164). The circuit court attached the report to its June 11, 2015, order and described it as "the report of his own expert" (3PC-R. 172). However, this characterization was and is not true; but worse, the circuit court did not afford Mr. Franqui an opportunity to address Dr. Block-Garfield's report and advise the circuit court that she was not his expert. This was a clear violation of due process under *Lankford v. Idaho*.

In fact had Mr. Franqui been advised that the circuit court was going to be considering Dr. Block-Garfield's report, he would have made sure that the circuit court knew it was obligated to consider Dr. Toomer's report and that credibility findings regarding the reports could not be made without an evidentiary hearing in Case No. F92-2141B at which Mr. Franqui was represented by counsel in that case with knowledge of the record in that case. And even more importantly, he would have addressed the fact that Dr. Block-Garfield in her report did not comply with the governing clinical standards as to adaptive functioning, the very same standards that this Court outlined as governing Florida law as to prong two of an *Atkins* claim. He discussed this in his Notice of Proffer:

> The Florida Supreme Court has explained what is required to be shown to establish deficits in adaptive functioning:
>
> > Further, as Jones admits, Florida's definition of mental retardation is consistent with the

definition of the American Psychiatric Association, which provides the following diagnostic criteria for mental retardation:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent **deficits or impairments** in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) **in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.**

C. The onset is before age 18 years.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000) (DSM-*IV).

Jones v. State, 966 So. 2d 319, 326-27 (Fla. 2007) (emphasis added). In her report attached to the June 10th Order, Dr. Block-Garfield actually references deficits and impairments that were apparent in Mr. Franqui, but inexplicably and contrary to the standard that the Florida Supreme Court adopted in *Jones v. State* attributed the deficits and impairments to "immaturity and general impulsive behavior."

Once again, had Mr. Franqui had notice that this Court was considering and using Dr. Block-Garfield's report when neither her name nor her report appeared in the 3.851 motion, he would have had an opportunity at a case management hearing or in a motion for rehearing to meaningful address Dr. Block-Garifield's failure to employ the standard set forth in *Jones v. State*.

(3PC-R. 188-89).[30]

[30]It is true that Dr. Block-Garfield's report was written in 2003 before this Court issued its opinion in *Jones v. State* that

The circuit court's citation to Dr. Block-Garfield's report and seeming deference to it as somehow definitive as to the adaptive functioning prong quite simply violated due process. *Lankford v. Idaho*, 500 U.S. 110.

D. A de novo review of the merits of Mr. Franqui's *Atkins* claim in this appeal

Given that the basis of the circuit court's application of a time bar was clearly erroneous and the circuit court did not address the merits of Mr. Franqui's claim under *Hall v. Florida*, the merits of the claim are before this Court for de novo consideration.

This Court denied Mr. Franqui's claim in 2013 and relied upon its decision in *Cherry v. State* and the strict 70 cutoff as to prong one of *Atkins* claims. And as previously noted, this Court held in *Cherry v. State* that the strict 70 cutoff arose from the plain meaning of the statutory definition of mental retardation, and thus dated back to the legislative enactment. So at all times prior to the issuance of *Hall v. Florida* in 2014, the strict 70 cutoff arising from the plain meaning of the

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adopted the standards to govern the second prong of an *Atkins* claim. It is certainly possible that Dr. Block-Garfield's analysis of the second prong may change in light of the 2007 decision in *Jones v. State*. However at this point because an evidentiary hearing was not conducted on Mr. Franqui's *Atkins* claim in Case No. F92-2141B, the effect of the decision in *Jones* upon Dr. Block-Garfield's review of the second prong of an *Atkins* claim is unknown.

statutory language governed all *Atkins* claims in Florida.

In *Hall v. Florida*, the United States Supreme Court held that this Court in *Cherry v. State* failed to construe the statutory language in a fashion that would have been consistent with *Atkins*. *Hall v. Florida*, 134 S. Ct. at 1994 ("On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case."). This is a clear statement that the strict 70 cutoff and this Court's decision in *Cherry v. State* violated *Atkins*.[31]

Because the United States Supreme Court determined that this

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[31]The State made an argument in its response in the circuit court which was not adopted by the circuit court that *Hall v. Florida* "merely refined and applied the law to the facts of Hall's case" (3PC-R. 163). This contention that *Hall* refined *Atkins* can only be made someone who did not read the opinion or who is in denial as to what the United States Supreme Court clearly stated:

> **Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70."** 536 U.S., at 308, n. 3, 122 S.Ct. 2242. **Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test.** By failing to take into account the standard error of measurement, **Florida's law** not only **contradicts the test's own design** but also bars an essential part of a sentencing court's inquiry into adaptive functioning.

Hall v. Florida, 134 S. Ct. at 2001 (emphasis added). The Supreme Court is not discussing the application of *Atkins* to Mr. Hall's case. The Supreme Court could not be more clear in stating that Florida law "misconstrued" *Atkins*. The Supreme Court did not refine *Atkins*; instead, it said that Florida law did not get or understand what *Atkins* held.

Court's decision in *Cherry v. State* and the strict 70 cutoff were unconstitutional under *Atkins v. Virginia*, this Court's 2013 opinion relying upon the unconstitutional strict 70 cutoff must also be rendered unconstitutional. This Court's use of an unconstitutional provision of Florida law to deprive Mr. Franqui of "a fair opportunity to show that the Constitution prohibits [his] execution" is itself unconstitutional. *Hall v. Florida*, 134 S. Ct. at 2001.

Mr. Franqui filed his 2015 motion to vacate within one year of the issuance of *Hall v. Florida*. Accordingly, this Court must recognize that its 2013 opinion, which was premised upon an unconstitutional provision of Florida law, cannot stand. It must then entertain Mr. Franqui's *Atkins* claim on the merits.

As to the merits, Mr. Franqui relies upon the 1993 report of Dr. Toomer as making out a prima facie case of mental retardation. The fact that in 2003 Mr. Franqui received a 75 IQ score on an intelligence test is not determinative and cannot be determinative in the wake of *Hall v. Florida*. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary

hearing.").[32]

Mr. Franqui also relies upon his proffer of Dr. Taub's analysis:

> Next, Dr. Block-Garfield indicates that she administered a second intelligence test, the "Stanford-Binet Intelligence Scale, Fourth Edition" (SB-IV). She stated that she administered the SB-IV because it "produces information more consistent with actual IQ." This statement is consistent with research comparing the SB-IV and the WAIS-III, which indicates the SB-IV is more sensitive at the floor (i.e., scores at or below the Borderline range) of the instrument. Interestingly, one of the revision goals of the Wechsler Adult Intelligence Scale- Fourth Edition (WAIS-IV), the revision of the WISC-III, was to improve the revised instrument's sensitivity at the floor and ceiling. Mr. Franqui's Composite score (analogous to the term FSIQ on the WAIS) was 76, which is within the Borderline range of the instrument.
>
> There are two important psychometric implications resulting from Dr. Block-Garfield's assessment. The first is what is commonly referred to as *practice effects*. The second is the *Flynn Effect*. When two intelligence tests are administered, one after the other or within weeks of each other scores on the second intelligence test are higher or inflated because of the examinee's experience completing the first intelligence test. (This is similar to taking practice LSAT tests, one becomes familiar with the process and tends to score higher.) The increase in the obtained global intelligence score (i.e., Composite score or FSIQ) due to practice effects on an intelligence test is about 3-5 points.
>
> The second implication from Dr. Block-Garfield's assessment is the Flynn Effect (FE) which is a well-accepted phenomenon in psychometric assessment. The FE results in an inflation of ones' obtained global

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[32]In *Brumfield*, The Supreme Court held that it was unreasonable and contrary to well-established federal law to refuse to conduct an evidentiary hearing on an *Atkins* claim where the capital defendant had attained an adjusted IQ score of 75.

intelligence score (i.e., Composite score or FSIQ). The FE accounts for an increase of about .03 points per year or about 3 points per decade. Within the WAIS-IV's Technical Manual, the publisher indicates the FE was one of the reasons why the WAIS-III was revised into the WAIS-IV.

When the FE is taken into account, Mr. Franqui's FSIQ score on the WAIS-III is reduced by 2 points (.03 points per year for 6 years), resulting in a FSIQ of 73. The SB-IV was published in 1986, so Mr. Franqui's score, when adjusted for the FE is 5.1 points lower (.03 points per year for 17 years) resulting in a Composite score of 70.90. It is important to note that although the test is published in year X, the data collected for the calculation of the instrument's norms (i.e., the data used to score the instrument) was collected at least one year prior, which is why 6 years and 17 years were applied to each instrument respectively; although the assessment took place in March of 2003.

Mr. Franqui's scores should also be corrected for practice effects. If the WAIS-III was administered first, his Composite score on the SB-IV is inflated by 3-5 points, which results in a corrected Composite score ranging between 71-73. If the SB-IV was administered first, then the FISQ score on the WAIS-III should be adjusted for practice effects, which results in a FSIQ of 70-72. In addition to discussing the WAIS-III prior to the SB-IV, Dr. Block-Garfield presents the results from the WAIS-III prior to the results from the SB-IV; this may indicate the WAIS-III was administered first, followed by the SB-IV.

When both the FE and practice effects are taken into account and the WAIS-III was administered first, Mr. Franqui's Composite score on the SB-IV should be adjusted to 65.9-67.9. If the SB-IV was administered first, his FSIQ on the WAIS-III should be adjusted to 68-70. Both of these adjusted scores are within the mentally deficient range (e.g., mentally retarded range) of each instrument. This means, when correcting for the FE and practice effects, his *obtained global intelligence* score on *one* of the instruments administered is within the intellectually deficient (i.e., mentally retarded) range.

> When correcting for either the FE *or* practice effects and applying the standard error of measurement, Mr. Franqui global intelligence score is within the intellectually deficient range on *both* instruments. These data indicate that Mr. Franqui may be intellectually deficient.

(3PC-R. 187-88).

Mr. Franqui also relies upon this Court's opinion in *Jones v. State*, 966 So. 2d at 326-27, which adopted standards for the adaptive functioning prong of the intellectual disability criteria. An examination of the governing standards set forth in *Jones v. State* reveals that Dr. Block-Garfield did not employ the proper standards which now govern an analysis of the adaptive functioning prong.

Finally as to the third prong, Dr. Toomer's 1993 report clearly makes out a prima facie case that the intellectual disability was manifest in Mr. Franqui before the age of 18 - indeed, this Court acknowledged as much in an order regarding an evidentiary hearing on the basis of Dr. Toomer's 1993 report in *Franqui v. State*, 14 So. 3d 238 (Fla. 2009).

Accordingly on the merits, this Court must reverse and remand in to give Mr. Franqui that which the Eighth Amendment requires - "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall v. Florida*, 134 S.Ct. at 2001.

CONCLUSION

In light of the foregoing arguments, Mr. Franqui requests on the basis of the Arguments set forth herein that this Court

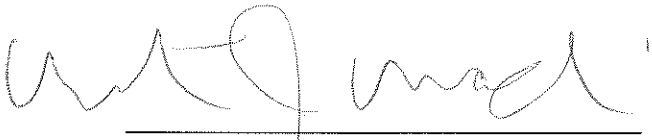
vacate the summary denial of his claim under *Hall v. Florida* and *Atkins v. Virginia* and remand for proceedings that comport with Rule 3.851 and due process, and for an evidentiary hearing at which Mr. Franqui is provided a fair opportunity to establish that the Eighth Amendment precludes his execution due to his intellectual disability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was furnished by email to Sandra Jaggard, Assistant Attorney General, as her primary email address: capapp@myfloridalegal.com, on November 23, 2015.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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APPENDIX A

118 So.3d 807 (Table)
Unpublished Disposition
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Leonardo FRANQUI, Appellant(s)
v.
STATE of Florida, Appellee(s).

No. SC12–182. | April 9, 2013.
| Rehearing Denied July 3, 2013.

Opinion

***1** Leonardo Franqui, a prisoner under sentence of death, appeals the circuit court's order summarily denying a successive motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), of the Florida Constitution.

On appeal, Franqui contends that: (1) his sentence of death violates the Sixth and Eighth Amendments under *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), and the failure to apply *Porter* retroactively is arbitrary and violates *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and the Fourteenth Amendment; (2) the State withheld *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), material or, alternatively, Franqui discovered new evidence under *Jones v. State,* 591 So.2d 911 (Fla.1991), which would have reduced the weight of the prior crime of violence aggravating circumstance; and (3) the circuit court erred in summarily denying his mental retardation claim under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

We affirm the summary denial of Franqui's claim that *Porter* is retroactive because this Court decided this precise issue in *Walton v. State,* 77 So.3d 639 (Fla.2011), holding that *Porter* was not retroactive. Although Franqui argues that this Court incorrectly decided *Walton,* this Court is not persuaded. Franqui also argues that this Court's refusal to apply the benefit of the "evolutionary refinement" of *Porter* to his case, though Porter received that same benefit, is arbitrary and a violation of due process pursuant to *Furman.* This Court, however, stated in Walton that "Porter involved a mere application and evolutionary refinement and development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland.*" *Walton,* 77 So.3d at 644. Thus, it is not a violation of due process and unconstitutionally arbitrary not to apply *Porter* to Franqui's claim of ineffective assistance of counsel.

As to his second claim, Franqui argues that he is entitled to an evidentiary hearing based on newly discovered evidence. Specifically, Franqui argues that Pablo Abreu, a codefendant in a Hialeah murder involving Franqui and Pablo San Martin, *see Franqui v. State,* 59 So.3d 82, 86 (Fla.2011), signed an affidavit and provided collateral testimony in collateral proceedings in San Martin's case which established that the State did not disclose favorable information in violation of *Brady,* or that the State allowed Abreu to provide false or misleading testimony to go uncorrected in violation of *Giglio.* This claim was untimely and thus procedurally barred. *See* Fla. R.Crim. P. 3.851(d)(2)(A) (requiring postconviction motions to be filed within one year after the judgment and sentence become final unless the facts on which the claim are predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence). To be considered timely filed as newly discovered evidence, Franqui's successive motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence. *See Lukehart v. State,* 103 So.3d 134, 136 (Fla.2012). Abreu's affidavit was executed on March 29, 2000, and he testified in the postconviction evidentiary hearing in the Hialeah case on December 18, 2002. Franqui filed his claim on November 29, 2010, at least eight years after the claim became discoverable.

***2** Even assuming otherwise, we find no merit in Franqui's claim because he cannot demonstrate that "the newly discovered evidence would probably yield a less severe sentence." *Schwab v. State,* 969 So.2d 318, 325 (Fla.2007) (citing *Jones,* 591 So.2d at 915). Franqui argues that the Abreu affidavit and testimony somehow minimize the prior violent felony aggravator in this case because the jury would have heard it was not a premeditated murder. Franqui, however, was still convicted of first-degree murder in the Hialeah case. Thus, that conviction could still support the prior violent felony aggravator. In addition, the prior violent felony aggravator was also supported by Franqui's convictions for multiple counts of armed robbery, aggravated

assault, and attempted armed robbery, and one count of armed kidnapping. In *Franqui v. State,* 699 So.2d 1312, 1328 (Fla.1997), this Court noted that the trial court's reliance on two attempted murder convictions, which this Court reversed, in finding the statutory aggravator of prior conviction of a felony involving the use or threat of violence was error. The Court, however, held that "the error was harmless beyond a reasonable doubt because the trial court also found that Franqui had been previously convicted of the crimes of aggravated assault and attempted armed robbery in one case and armed robbery and armed kidnapping in another." *See also Sims v. State,* 602 So.2d 1253, 1258 (Fla.1992) (rejecting Sims' claims that fundamental error occurred when the trial court aggravated the penalty based on the common law robbery conviction because Sims had committed a separate, documented violent crime sufficient to support the trial court's finding of aggravation). Accordingly, Franqui's successive postconviction claim regarding newly discovered evidence is without merit.

Finally, we affirm the circuit court's summary denial of Franqui's *Atkins* claim because it is meritless. To establish mental retardation as a bar to the imposition of the death penalty, Franqui must prove each of the following three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an adult IQ score of 70 or below; (2) concurrent deficits in adaptive functioning; and (3) manifestation before the age of 18. *See Cherry v. State,* 959 So.2d 702, 711 (Fla.2007). Further, the only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford–Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R.Crim. P. 3.203(b); Fla. Admin. Code 65G–4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford–Binet Intelligence Scale. His scores on the acceptable IQ tests were above 70. *See Franqui,* 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence-two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations-to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

***3** Accordingly, for the foregoing reasons we affirm the circuit court's order summarily denying Franqui's claims.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

Parallel Citations

2013 WL 2211675 (Fla.)

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APPENDIX B

Supreme Court of Florida

THURSDAY, FEBRUARY 5, 2015

CASE NO.: SC12-893
Lower Tribunal No(s).: 81-5015 CFA 02;
82-1893 CFA 02

JERRY LEON HALIBURTON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Upon reconsideration of this matter as ordered by the United States Supreme Court in Haliburton v. Florida, 135 S. Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

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Served:

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HON. JOSEPH GEORGE MARX, JUDGE
PAUL H. ZACKS