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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1630

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS... i

TABLE OF AUTHORITIES.. ii

STATEMENT OF CASE AND FACTS.................................. 1

SUMMARY OF THE ARGUMENT..................................... 15

ARGUMENT... 16

I. THE LACK OF A *HUFF* HEARING AND REFUSAL TO ALLOW REHEARING PROVIDES NO BASIS FOR RELIEF. 16

II. THE LOWER COURT PROPERLY DENIED DEFENDANT'S UNTIMELY, SUCCESSIVE AND INSUFFICIENTLY PLED MOTION FOR POST CONVICTION RELIEF. 24

CONCLUSION... 50

CERTIFICATE OF SERVICE..................................... 50

CERTIFICATE OF COMPLIANCE.................................. 51

TABLE OF AUTHORITIES

Cases

Amendments to Fla. R. Crim. P. & Fla. R. App. P.,
875 So. 2d 563 (Fla. 2004) 34

Arbelaez v. State,
898 So. 2d 25 (Fla. 2005) 36, 45, 46

Archer v. State,
151 So. 3d 1223 (Fla. 2014) 16

Atkins v. Virginia,
536 U.S. 304 (2002) 31, 34

Bobby v. Bies,
556 U.S. 825 (2009) 31

Bottoson v. State,
813 So. 2d 31 (Fla. 2002) 38

Brumfield v. Cain,
135 S.Ct. 2269 (2015) 27, 41, 42

Bunkley v. State,
882 So. 2d 890 (Fla. 2004) 30

Cleveland v. State,
887 So. 2d 362 (Fla. 5th DCA 2004) 17

Danforth v. Minnesota,
552 U.S. 264 (2008) 30

Davis v. State,
736 So. 2d 1156 (Fla. 1999) 16

Doorbal v. State,
983 So. 2d 464 (Fla. 2008) 21, 25, 43

Florida v. Franqui,
523 U.S. 1040 (1998) 4

Franqui v. Florida,
132 S. Ct. 2110 (2012) 6

Franqui v. Florida,
2008 WL 2747093 (S.D. Fla. Jul. 10, 2008) 5

Franqui v. Florida,
562 U.S. 1188 (2011) 6

Franqui v. Florida,
638 F.3d 1368 (11th Cir. 2011) 6

Franqui v. State,
118 So. 3d 807 (Fla. 2013) 11, 18, 36, 43

Franqui v. State,
14 So. 3d 238 (Fla. 2009) 46

Franqui v. State,
699 So. 2d 1312 (Fla. 1997) 44

Franqui v. State,
699 So. 2d 1332 (Fla. 1997) 1, 2, 4

Franqui v. State,
804 So. 2d 1185 (Fla. 2001) 4

Franqui v. State,
965 So. 2d 22 (Fla. 2007) 5, 44

Franqui v. State,
59 So. 3d 82 (Fla. 2011) 38

Gaskin v. State,
737 So. 2d 509 (Fla. 1999) 40

Gentile v. Bauder,
718 So. 2d 781 (Fla. 1998) 39

Geralds v. State,
111 So. 3d 778 (Fla. 2010) 25

Griffin v. State,
866 So. 2d 1 (Fla. 2003) 25

Groover v. State,
703 So. 2d 1035 (Fla. 1997) 16

Haliburton v. State,
935 So. 2d 1219 (Fla. 2006) 48

Hall v. Florida,
134 S. Ct. 1986 (2014) 12, 13, 14, 25, 26,
.... 28, 29, 31, 32, 38,
.... 40, 44

Hamilton v. State,
875 So. 2d 586 (Fla. 2004) 40

Hill v. State,
921 So. 2d 579 (Fla. 2006) 23, 42, 46, 47, 48

Hitchcock v. Dugger,
481 U.S. 393 (1987) 33

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 45

Huff v. State,
622 So. 2d 982 (Fla. 1993) 16

In re Henry,
757 F.3d 1151 (11th Cir. 2014) 26, 29

In re Hill,
777 F.3d 1214 (11th Cir. 2015) 26

Jimenez v. Florida Dep't of Corrections,
481 F.3d 1337 (11th Cir. 2007) 35

Jimenez v. State,
997 So. 2d 1056 (Fla. 2008) 24, 25, 34, 45

Kansas v. Crane,
534 U.S. 407 (2002) 32

Kilgore v. Sec'y, Florida Dep't of Corrections,
805 F.3d 1301 (11th Cir. 2015) 26, 29

Kormondy v. State,
154 So. 3d 341 (Fla. 2015) 24

Lankford v. Idaho,
500 U.S. 110 (1991) 19, 20, 21

Lawyers Title Ins. v. Reitzes,
631 So. 2d 1100 (Fla. 4th DCA 1993) 17

Lopez v. Smith,
135 S. Ct. 1 (2014) 20

Marek v. State,
14 So. 3d 985 (Fla. 2009) 16

Mays v. Stephens,
757 F.3d 211 (5th Cir. 2014), *cert. denied*,
135 S. Ct. 951 (2015) 29

Morton v. State,
689 So. 2d 259 (Fla. 1997) 49

Nelson v. State,
875 So. 2d 579 (Fla. 2004) 40

New v. State,
807 So. 2d 52 (Fla. 2001) 28

Nixon v. State,
2 So. 3d 137 (Fla. 2009) 29, 45, 49

Phillips v. State,
984 So. 2d 503 (Fla. 2008) 41, 43

Porter v. McCollum,
558 U.S. 30 (2009) 7, 8, 9, 10, 33

Puryear v. State,
810 So. 2d 901 (Fla. 2002) 23

Roberts v. State,
568 So. 2d 1255 (Fla. 1990) 40

Rodriguez v. State,
919 So. 2d 1252 (Fla. 2005) 45

Schriro v. Smith,
546 U.S. 6 (2005) 46

Sims v. State,
753 So. 2d 66 (Fla. 2000) 26

Sochor v. Florida,
504 U.S. 527 (1992) 48

Sochor v. State,
22 So. 3d 68 (Fla. 2009) 16

State v. Gunsby,
670 So. 2d 920 (Fla. 1996) 20

State v. McBride,
848 So. 2d 287 (Fla. 2003) 39

State v. Williams,
831 So. 2d 835 (La. 2002) 42

Swafford v. State,
125 So. 3d 760 (Fla. 2013) 21

Thompson v. Dugger,
515 So. 2d 173 (Fla. 1987) 33

Tompkins v. State,
994 So. 2d 1072 (Fla. 2008) 45

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 11

Tyler v. Cain,
533 U.S. 656 (2001) 26

Vining v. State,
827 So. 2d 201 (Fla. 2002) 21

Walls v. State,
926 So. 2d 1156 (Fla. 2006) 46

Walton v. State,
77 So. 3d 639 (Fla. 2011) 33

Witt v. State,
387 So. 2d 922 (Fla. 1980) 28, 29, 30

Wright v. State,
857 So. 2d 861 (Fla. 2003) 34, 38

Zack v. State,
911 So. 2d 1190 (Fla. 2005) 47

Statutes

§921.137(1), Fla. Stat... 41

§921.137, Fla. Stat.. 25

Fed. R. Civ. P. 60(b).. 6

Fla. R. Crim. P. 3.203.................... 25, 34, 42, 46, 47, 48

Fla. R. Crim. P. 3.203(b)...................................... 41

Fla. R. Crim. P. 3.851............................... 42, 47, 48

Fla. R. Crim. P. 3.851(d).................................. 24, 25

Fla. R. Crim. P. 3.851(d)(1)(B)............................ 25, 26

Fla. R. Crim. P. 3.851(d)(2)(B)...................... 25, 26, 28

Fla. R. Jud. Admin. 2.215...................................... 8

Rule 60.. 6

Fla. Admin. Code 65G-4.011..................................... 41

STATEMENT OF CASE AND FACTS

On February 14, 1992, Defendant, Pablo San Martin, Ricardo Gonzalez, Pablo Abreu and Fernando Fernandez were charged by indictment with committing, on January 3, 1992: (1) first degree murder of a law enforcement officer, North Miami police officer Steven Bauer, (2) armed robbery, (3) aggravated assault, (4) two counts of grand theft and (5) two counts of burglary.[1] (R. 1-5)[2]

The matter proceeded to trial on May 23, 1994. (R. 24) After considering the evidence presented, the jury found Defendant guilty as charged on all counts. (T. 2324-25) The trial court adjudicated Defendant in accordance with the verdicts. (T. 2333) After a penalty phase, the jury recommended a sentence of death for the murder of Off. Bauer by a vote of 9

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[1] Defendant was also charged with possession of a firearm during a criminal offense and an additional count of aggravated assault. (R. 1-4) However, the State entered a nolle prosequi to these charges after opening statement at Defendant's original trial. *Franqui v. State*, 699 So. 2d 1332, 1333 n.1 (Fla. 1997).

[2] The symbol "R." and "T." will refer to the record on appeal and transcripts of proceedings from Defendant's original direct appeal, Florida Supreme Court case no. SC84,701. The symbols "RSR." and "RST." will refer to the record on appeal and transcripts of proceedings from Defendant's resentencing appeal, Florida Supreme Court case no. SC94,269. The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental records on appeal from the appeal from the denial of Defendant's first motion for post conviction relief, Florida Supreme Court case no. SC04-2380. The symbol "PCR2." will refer to the record on appeal in the appeal from the denial of his second motion for post conviction relief, Florida Supreme Court case no. SC12-182. The symbol "PCR3." will refer to the record in the instant appeal.

to 3. (R. 480) The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 588-601)

Defendant appealed his conviction and sentences to this Court, raising 5 issues, including a claim that the trial court improperly permitted the presentation of his codefendants' confessions at a joint trial. This Court affirmed Defendant's convictions but reversed Defendant's death sentence. *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997). It found that the trial court had erred in admitting the other codefendants' confession at the joint trial, that such error was harmless in the guilt phase but that the error was harmful in the penalty phase. *Id.* at 1335-36. In issuing its opinion, it found the following historical facts:

> The defendant, [], along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were 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, grand theft third degree, and burglary. [Defendant], Gonzalez, and San Martin were tried together before a jury in May, 1994.
>
> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.
>
> Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told

police that [Defendant] had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that [Defendant] had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that [Defendant] was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how [Defendant] had shouted at the victim not to move before shooting him.

[Defendant] was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, [Defendant] initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. [Defendant] stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to [Defendant], San Martin, Fernandez and Abreu had stolen the vehicles. [Defendant] did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. [Defendant] denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of [Defendant], the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to [Defendant], upon the trial court's finding that their confessions "interlocked" with [Defendant's] own confession. In addition, an eyewitness identified [Defendant] as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the

> vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that [Defendant] had shot the victim in the leg with his .9 mm handgun.
>
> [Defendant] was convicted on all counts, and after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced [Defendant] to death.

Franqui, 699 So. 2d at 1333-34 (footnotes omitted). Both parties sought certiorari review in the United States Supreme Court, which was denied. *Franqui v. Florida*, 523 U.S. 1097 (1998); *Florida v. Franqui*, 523 U.S. 1040 (1998).

On remand, the matter proceeded to the new penalty phase on August 24, 1998. (RST. 1) After considering all of the evidence, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (RSR. 155, RST. 1172) The trial court followed the jury's recommendation and sentenced Defendant to death. (RSR. 158-75, 225-47)

Defendant again appealed his sentence to this Court. It affirmed Defendant's sentence on October 18, 2001. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001).

On April 7, 2003, Defendant filed a motion for post conviction relief. (PCR. 100-61) The motion contained a list of 18 issues, none of which concerned ineffective assistance of counsel for failing to investigate and present mitigation or retardation. (PCR. 110-12) After conducting an evidentiary

hearing on claims of ineffective assistance of counsel related to litigating issues regarding his confession, the trial court denied the motion for post conviction relief on November 9, 2004. (PCR. 290-329)

Defendant appealed the denial of his motion for post conviction relief to this Court and also filed a state habeas petition. Even though Defendant had not raised a claim of ineffective assistance of counsel regarding mitigation in the trial court, Defendant raised the argument that such a claim had been improperly denied on appeal. On May 3, 2007, this Court affirmed the denial of post conviction relief and denied state habeas relief. *Franqui v. State*, 965 So. 2d 22 (Fla. 2007). It denied the penalty phase ineffective assistance claim because it is barred, counsel was not deficient and Dr. Toomer's testimony was not credible. *Id.* at 32-33.

On September 12, 2007, Defendant filed a federal habeas petition, raising 6 claims, including one in which he averred that his sentence was unconstitutional and mentioned an IQ score lower than 60. Petition, Case No. 07-CV-22384 (S.D. Fla. Sept. 12, 2007). On July, 10, 2008, the district court denied the petition. *Franqui v. Florida*, 2008 WL 2747093 (S.D. Fla. Jul. 10, 2008). In doing so, it treated the statement about Defendant's IQ as an attempt to raise a claim that Defendant was

retarded and denied it as unexhausted, procedurally barred and meritless. *Id.* at *11. Defendant attempted to appeal the denial of his petition but was denied leave to appeal. He sought certiorari review of the Eleventh Circuit's May 18, 2010 order denying leave to appeal, which was denied on January 18, 2011. *Franqui v. Florida*, 562 U.S. 1188 (2011).

On April 6, 2009, Defendant filed a *pro se* motion for relief from judgment in federal court, claiming that his federal habeas counsel had acted improperly by failing to raise an issue about the admission of the codefendants' confessions in his federal habeas petition after indicating that she would do so. The district court denied the motion, assuming that the claim was properly brought under Fed. R. Civ. P. 60(b) and finding the claim regarding the admission of the confessions would be meritless. On appeal from the denial of the Rule 60 motion, the Eleventh Circuit found that the Rule 60 motion should have been treated as a successive federal habeas petition over which the district court had no jurisdiction. *Franqui v. Florida*, 638 F.3d 1368 (11th Cir. 2011). As such, it vacated the order denying the motion and remanded with instructions to dismiss the motion for lack of jurisdiction. *Id.* at 1375. Certiorari review regarding that decision was denied on April 30, 2012. *Franqui v. Florida*, 132 S. Ct. 2110 (2012).

On November 29, 2010, Defendant filed a successive motion for post conviction relief, raising three claims:

I.

[DEFENDANT'S] SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER PORTER V. MCCOLLUM.

II.

[DEFENDANT'S] SENTENCE VIOLATES THE EIGHTH AMENDMENTS UNDER *ATKINS V. VIRGINIA*.

III.

NEWLY DISCOVERED EVIDENCE REQUIRES THIS COURT TO VACATE [DEFENDANT'S] SENTENCE AND THAT MANIFEST INJUSTICE WARRANTS THE INVOCATION OF THIS COURT'S EQUITABLE POWER AND THE ISSUANCE OF RULE 3.851 RELIEF.

(PCR2. 47-77) In support of Claim I, Defendant argued that *Porter v. McCollum*, 558 U.S. 30 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel were reviewed and that the alleged change should be applied retroactively. (PCR2. 48-68) According to Defendant, this alleged change was significant with regard to the denial of the claim of ineffective assistance of counsel regarding the investigation and presentation of mitigation. *Id.*

In Claim II, Defendant asserted that he was retarded based on Dr. Toomer's testimony from the penalty phase in Defendant's other capital case. (PCR2. 68-69) Claim III was based on an affidavit from Abreu that had been presented in the other capital case. (PCR2. 69-75)

On December 2, 2010, Martin McClain filed a motion to be

appointed as counsel for Defendant. (PCR2. 81-84) In this motion, Mr. McClain noted that the registry attorney who had represented Defendant during his initial post conviction and his federal habeas proceedings had been discharged as federal habeas counsel during his federal habeas appeal, and he had been appointed to represent Defendant in that appeal. *Id.* He then suggested that Defendant was somehow without counsel to represent him in state court and sought to be appointed because he was familiar with the case. *Id.* At a hearing that day, Judge Trawick, who had not been assigned to hear the case, denied the motion and appointed the Public Defender. (PCR2. 251-54) By order dated December 8, 2010, the Chief Judge of the Eleventh Judicial Circuit assigned Judge Blake to preside over this matter pursuant to Fla. R. Jud. Admin. 2.215. (PCR2. 87)

On December 13, 2010, the State served its response to this motion. (PCR2. 122-84) In responding to Claim II, the State pointed out that Defendant was required to attach the reports of all experts who had evaluated his mental state in raising a retardation claim and noted that Defendant had not attached any reports. (PCR2. 140-41) It then corrected Defendant's pleading deficiency by attaching the reports of Dr. Toomer, Dr. Block-Garfield and Dr. Suarez to its response. (PCR2. 149-84)

At a hearing on January 13, 2011, this Court permitted

Defendant’s original post conviction counsel to withdraw and appointed Mr. McClain to represent Defendant over the State’s objection. (PCR2. 283-92) On January 21, 2011, the lower court denied the second motion for post conviction relief. (PCR2. 187-91) Regarding Claim I, it found that *Porter* did not change the law and that any change in law that might have occurred would not be retroactive or applicable to Defendant. (PCR2. 186-91) Regarding Claim II, it found that claim was time barred and meritless, since Defendant had been found not to be retarded in his other case. (PCR2. 191) The order was filed with the clerk’s office and rendered on January 27, 2011. (PCR2. 186)

On February 24, 2011, Defendant filed a motion seeking leave to file an amendment to his post conviction motion in the future. (PCR2. 193-200) In the motion, Defendant admitted that his motion had already been denied but claimed that he had new evidence to support a claim that Florida’s lethal injection protocol was unconstitutional. *Id.* The new evidence consisted of a letter from several state Attorneys General to the United States Attorney General requesting assistance in obtaining sodium thiopental. (PCR2. 196, 199-200) On February 23, 2011, the lower court denied the motion because it did not comply with the rule and it lacked jurisdiction because the time to file a motion for rehearing or a notice of appeal had expired. (PCR2.

214)

On February 24, 2011, Defendant filed a motion for rehearing. (PCR2. 206-10) In this motion, Defendant claimed that the motion was timely because it was served within 18 days of when he alleged he was served with the order denying the motion for post conviction relief and argued that the lower court should have found that *Porter* changed the law. *Id.* On March 7, 2011, the lower court denied the motion as untimely and improper. (PCR2. 215)

On April 15, 2011, Defendant filed a notice of appeal regarding the denial of the second motion for post conviction relief. (PCR2. 216-17) On July 12, 2011, this Court dismissed this appeal as untimely. (PCR2. 229) It denied rehearing of that order on September 13, 2011. (PCR2. 229) On October 18, 2011, Defendant petitioned this Court for a belated appeal. (PCR2. 233) On January 31, 2012, this Court granted a belated appeal, noting that Mr. McClain had been ineffective in filing an untimely notice of appeal "due to [his] failure to properly comprehend the provisions of the rules of criminal procedure and rules of appellate procedure." (PCR2. 234) In his belated appeal, Defendant claimed that the lower court had erred in denying all three of the claims in his second motion. On April 9, 2013, this Court affirmed the denial of the second motion for

post conviction relief. *Franqui v. State*, 118 So. 3d 807 (Fla. 2013). It affirmed the denial of the retardation claim because the IQ score Defendant relied upon was not from an admissible IQ test, his scores on the admissible IQ tests that had been presented in Defendant's other case were too high and he did not even pled he could satisfy the third element of retardation. *Id.*

On May 23, 2014, Defendant served a second motion for relief from the judgment denying his federal habeas petition. In this motion, Petitioner asserts that the United States Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), constitutes "a significant development in procedural law" that permits the district court to reopen the judgment and reconsider the determination that certain claims, which included the assertion that he was retarded, were procedurally barred regardless of the nature of the claim asserted or the reason for the bar. The motion was signed by Martin McClain but filed by Linda McDermott. On September 10, 2014, the district court denied the motion because it was filed by a person who was not a member of the court's bar and who had not been given leave to appear pro hac vice. The district court subsequently appointed Linda McDermott to represent Defendant.

On October 20, 2014, Defendant filed a third motion for relief from judgment that was substantially the same as the

second motion for relief from judgment. On April 9, 2015, the district court denied the motion, assuming that there was a valid basis for relief from judgment but finding that it had already provided the relief that Defendant would be entitled to under *Trevino*. Defendant attempted to appeal that ruling but was denied leave to do so by both the district court and the Eleventh Circuit.

On May 27, 2015, Defendant filed a third motion for post conviction relief. (PCR3. 121-44) In this motion, Defendant contended that he was entitled to reconsideration of his claim that he is retarded because the United States Supreme Court issued *Hall v. Florida*, 134 S. Ct. 1986 (2014), and this Court ordered an evidentiary hearing in a different inmate's case. *Id.* He further contends that the hearing on the claim should be conducted before a jury, that he should be able to raise post conviction claims regarding the denial of his retardation claim and that he should not be required to bear the burden of proof. *Id.* However, he did not allege either that the motion was based on newly discovered evidence or a fundamental change of constitutional law that had been held to be retroactive. *Id.* The only factual support for Defendant's assertion that he was retarded was a statement that he had relied on Dr. Toomer's testimony regarding retardation in Defendant's other capital

case as support for the retardation claim in the second motion for post conviction relief. *Id.*

On June 8, 2015, the State responded to Defendant's motion. (PCR3. 149-68) It argued that the motion was untimely and successive. *Id.* On June 10, 2015, the lower court denied the motion, finding that the claim was barred because Defendant failed to raise a retardation claim in a timely manner and that *Hall* did not excuse this failure. (PCR3. 171-79) It also noted that Defendant had been granted an evidentiary hearing in his other capital case and that he had presented evidence at that hearing that he did not have concurrent deficits in adaptive functioning. *Id.* *Id.* It stated that since the claim was so clearly barred, it would not hold a *Huff* hearing or entertain a motion for rehearing. *Id.*

On June 25, 2015, Defendant filed a pleading he entitled "Notice of Proffer." (PCR3. 180-91) In this pleading, Defendant complained that the lower court's refusal to conduct a *Huff* hearing or allow him to file a motion for rehearing denied him notice and the opportunity to be heard. *Id.* He also complained about the lower court's mentioning the expert whose report he had presented in his other capital case because he had relied on Dr. Toomer in presenting his claim, averred that he had a new expert who criticized the opinion of the defense

expert from his other case by adjusting her IQ scores based on the Flynn effect and practice effect and himself criticized the expert's opinion about adaptive functioning. *Id.* In discussing the expert from the other case, he admitted that he was aware of her report and averred that he had been prepared to proffer facts from his new expert at a *Huff* hearing. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Defendant's successive motion for post conviction relief because it was untimely, successive and insufficiently pled. Because the summary denial was proper, Defendant is entitled to no relief based on the lower court's failure to hold a *Huff* hearing and its refusal to allow a motion for rehearing.

ARGUMENT

I. THE LACK OF A *HUFF* HEARING AND REFUSAL TO ALLOW REHEARING PROVIDES NO BASIS FOR RELIEF.

Defendant first asserts that the denial of his successive motion should be reversed because the lower court refused to conduct a *Huff* hearing or allow him to file a motion for rehearing. He avers that he was prejudiced because he did not get the opportunity to argue that this Court had not affirmed the lower court's prior determination that the claim was barred and that he had no opportunity to address Dr. Block-Garfield's report. However, these assertions provide no basis for relief.

Defendant's complaints about the lower court's refusal to hold a *Huff* hearing or to entertain a motion for rehearing do not entitle him to any relief. As this Court has held, the "failure to hold a hearing on a successive postconviction motion that is legally insufficient on its face is harmless error." *Marek v. State*, 14 So. 3d 985, 999 (Fla. 2009); *see also Archer v. State*, 151 So. 3d 1223 (Fla. 2014); *Sochor v. State*, 22 So. 3d 68 (Fla. 2009); *Davis v. State*, 736 So. 2d 1156, 1159 n.1 (Fla. 1999); *Groover v. State*, 703 So. 2d 1035, 1038 (Fla. 1997) ("[E]ven if a *Huff [v. State*, 622 So. 2d 982 (Fla. 1993),] hearing had been required in the instant case, the court's failure to do so would be harmless as no evidentiary hearing was required and relief was not warranted on the motion."). Here,

as argued below, Defendant's motion was untimely, successive and insufficiently pled on its face. As such, any error in not holding a *Huff* hearing was harmless. The lower court should be affirmed.

The same rationale would apply to the refusal to consider a motion for rehearing. In fact, since a motion for rehearing is limited to showing an error in a ruling and cannot be used to reargue an issue or raise a new issue, *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004), *Lawyers Title Ins. v. Reitzes*, 631 So. 2d 1100, 1100-01 (Fla. 4th DCA 1993), a refusal to consider a rehearing of a correct ruling would be even more harmless. Since the lower court properly summarily denied the motion, it should be affirmed.

While Defendant repeatedly claims that he was prejudiced because he had no notice that the lower court would consider what had occurred regarding a retardation claim in his other case and no access to the record in that case, the record in this case refuted that claim. When he filed his second motion for post conviction relief, Defendant expressly relied on, and specifically cited to, transcripts from his other capital case in raising his retardation and other claims. (PCR2. 69, 71-75) In responding to this motion, the State pointed out that defendants claiming to be retarded were required to attach

copies of all reports from mental health evaluations and that Defendant had failed to do so. (PCR2. 140-41) It then remedied Defendant's pleading failure by attaching the reports that Defendant was required to attach, including the report of Dr. Block-Garfield, which clearly shows that she was retained on Defendant behalf. (PCR2. 148-84) As such, the record clearly demonstrates that Defendant had access to the record from the other capital case.

Moreover, both the lower court and this Court relied on that information in rejecting the second motion for post conviction relief. *Franqui v. State*, 118 So. 3d 807 (Fla. 2013)(relying on the opinion from Defendant's other capital case to find that the scores on admissible IQ tests was above 70); (PCR2. 191) Since both this Court and the lower court had relied on information from Defendant's other capital case to deny his retardation claim the first time it was raised, Defendant should have realized that the lower court would do so again, particularly as Dr. Block-Garfield's report was part of this record. Since Defendant had notice that the litigation of the retardation issue in his other case had already been considered in rejecting the retardation claim in this case and had access to the records, including Dr. Block-Garfield's report, Defendant's suggestion that he was prejudiced by the

lack of a *Huff* hearing because of a lack of such notice and such access is specious. The lower court should be affirmed.

Defendant's repeated reliance on *Lankford v. Idaho*, 500 U.S. 110 (1991), does not compel a different result. In *Lankford*, a defendant had proceeded to trial on first degree murder charges and been convicted after a trial court had refused to accept a plea that had been agreed to by the parties. *Id.* at 112-14. Prior to the sentencing hearing, the defendant had moved the trial court to require the state to declare whether it was seeking the death penalty and provide notice of the aggravators it believed applied if it was doing so to assist in his preparation for the sentencing hearing. *Id.* at 114. The motion was granted, and the state responded that it would not be seeking the death penalty. *Id.* at 114-15. At the sentencing hearing, "there was no discussion of the death penalty as a possible sentence." *Id.* at 115. Instead, the trial court merely stated at the end of the hearing that it had various options regarding the length of a prison sentence it might impose and that it believed the sentence the state had recommended was too lenient. *Id.* at 116-17. The Court determined that the defendant's due process right to notice that death was a possible sentence was violated because the only reason for entry of the presentencing order requiring the state

to provide notice of its intention to seek a death sentence was to limit the issue to be argued at the sentencing hearing and the trial court did not inform the defendant that it was still considering the death penalty. *Id.* at 119-22. However, it expressly indicated that there would be no due process violation had the order not been entered or had the trial court warned the defendant that it was still considering the death penalty after the state's response to the order. *Id.* at 119. In fact, the Court has itself noted that *Lankford* was based on specific actions by the trial court that suggested that the death penalty was not being considered. *Lopez v. Smith*, 135 S. Ct. 1, 4 n.1 (2014).

Here, Defendant does not point to any actions or statements by the lower court that would have suggested to him that he did not need to be concerned with what had happened in his other case. Instead, the fact that both the lower court and this Court had expressly relied on the rejection of the retardation claim in Defendant's other case when they rejected the claim the first time Defendant raised the claim in this case put Defendant on notice that he needed to address the issue. This is all the more true as this Court has repeatedly held that a court must consider all of the information in a record cumulatively in ruling on a motion for post conviction relief. *State v. Gunsby*,

670 So. 2d 920, 924 (Fla. 1996)(granting relief based on the cumulative effect of claims while expressing doubt that the individual claims had been proven); *see also Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013). Since Dr. Block-Garfield's report was part of the record from the second motion for post conviction relief, Defendant was on notice that the trial court had to consider it in ruling on this claim. As such, Defendant's reliance on *Lankford* does not show he is entitled to relief based on an alleged due process violation. The lower court should be affirmed.

Further, since Defendant had notice of Dr. Block-Garfield's report and the courts' reliance on it, his assertion that the lack of a *Huff* hearing precluded him from presenting a report from a different expert to impeach Dr. Block-Garfield's findings is specious. As this Court has recognized, motions for post conviction relief are to be fully pled when they are filed. *Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008); *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). Since Dr. Block-Garfield's report was part of the record in this case and had to be considered by the lower court, any information Defendant wanted to present about that report should have been included in his motion when he filed it; not presented at a *Huff* hearing. Thus, Defendant's assertion that he was prejudiced by the lack

of a *Huff* hearing because he did not present his challenge to Dr. Block-Garfield's report in motion is meritless and should be denied.

Moreover, while Defendant asserts that he could have shown at a *Huff* hearing or in a motion for rehearing that the lower court had erred in finding that this Court had affirmed its prior time bar ruling, this entire assertion is based on a misreading of the lower court's order. The lower court never stated that this Court discussed the time bar ruling in affirming its prior order. Instead, the order merely states that it had previously denied the motion as untimely and that this Court had affirmed its order without discussing the content of this Court's order. (PCR3. 172) It then discussed at length, quoted from and relied upon orders from the federal courts regarding the federal habeas petition connected to this case. (PCR3. 172-73) As such, when read in context, the lower court's statement about higher courts agreeing the claim was time barred the first time it was raised were not incorrect. As such, Defendant's complaints about the inability to claim that it was are meritless. The lower court should be affirmed.

Moreover, Defendant's implicit suggestion that this Court somehow overruled the lower court's initial finding that a claim was untimely is also meritless. This Court did not hold that

the lower court had erred in finding the motion untimely the first time it was raised. Instead, this Court merely cited to other grounds in affirming the prior order. As such, Defendant's entire claim that this Court overruled the lower court's time bar finding is based on an assertion that this Court did so sub silentio. Moreover, since the ruling was based on this Court's decision in *Hill v. State*, 921 So. 2d 579 (Fla. 2006), any alleged finding of an error in barring the claim would be inconsistent with the holdings of *Hill*. However, as this Court has held, it does not issue rulings, particularly ruling in conflict with other decision of this Court, sub silentio. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). As such, Defendant's assertion that this Court did so in this case should be rejected, and the lower court affirmed.

II. THE LOWER COURT PROPERLY DENIED DEFENDANT'S UNTIMELY, SUCCESSIVE AND INSUFFICIENTLY PLED MOTION FOR POST CONVICTION RELIEF.

Defendant next asserts that the lower court erred in summarily denying his claim that he is retarded. He insists that the lower court should not have found his claim untimely and should have found his claim sufficiently pled. However, the lower court properly summarily denied this claim because it is untimely, successive and insufficiently pled.[3]

Pursuant to Fla. R. Crim. P. 3.851(d), a motion for post conviction relief must be filed within one year of when the defendant's convictions and sentences became final. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Here, Defendant's convictions and sentences became final on April 8, 2002, when the time for seeking certiorari review after resentencing expired without Defendant seeking certiorari. As that was well more than one year before the filing of this motion, it was untimely. While Fla. R. Crim. P. 3.851(d) does contain exceptions for claims that are based on newly discovered evidence or fundamental changes of constitutional law that have been held to be retroactive, Defendant did not claim below and does not assert on appeal that any evidence supporting his claim

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

could not have been discovered earlier through an exercise of due diligence. *See Geralds v. State*, 111 So. 3d 778, 801 (Fla. 2010). In fact, he relied exclusively on a report from Jethro Toomer dated March 24, 1993, which Defendant's trial counsel admitted was in his possession before Defendant was ever tried in this matter. (PCR-SR. 499-500, PCR2. 148-51) As such, any assertion that the motion was based on newly discovered evidence would be meritless. *Jimenez*, 997 So. 2d at 1064-65.

While Defendant did rely on the issuance of *Hall v. Florida*, 134 S. Ct. 1986 (2014), he also did not claim below, and does not claim in this Court, that the issuance of *Hall* satisfied the requirement of Fla. R. Crim. P. 3.851(d)(2)(B). Instead below, he claimed that he was similarly situated to Jerry Haliburton. On appeal, he seems to contend that *Hall* was always the law because *Hall* involved this Court's interpretation of the plain language of §921.137, Fla. Stat. and Fla. R. Crim. P. 3.203. Since Defendant has not argued that he satisfies the requirements of Fla. R. Crim. P. 3.851(d)(1)(B), his motion cannot be considered timely under that section either. *See Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008); *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Since the motion did not qualify for either of the exceptions to Fla. R. Crim. P. 3.851(d), it was untimely and properly denied as such.

Even if Defendant's reliance on the issuance of *Hall* could be deemed an attempt to invoke Fla. R. Crim. P. 3.851(d)(1)(b), the lower court would still have properly denied the motion as untimely. While Fla. R. Crim. P. 3.851(d)(2)(B) does recognize an exception to the one year limitations period, that section provides "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Defendant does not suggest that *Hall* has been held to be retroactive, and no court has held that it is. In fact, the Eleventh Circuit held that *Hall* is not a retroactive change in constitutional law. *Kilgore v. Sec'y, Florida Dep't of Corrections*, 805 F.3d 1301, 1312-16 (11th Cir. 2015); *see also In re Hill*, 777 F.3d 1214, 1223-24 (11th Cir. 2015); *In re Henry*, 757 F.3d 1151, 1158-61 (11th Cir. 2014). Instead, he would have had to ask the lower court to make that determination in the first instance. However, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Defendant could not use the assertion that the alleged change in law in *Hall* should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he had to show that it has been held retroactive for the exception to apply. *See Tyler v. Cain*,

533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). Since he could not make that showing, this motion was untimely and properly denied as such.

To the extent that Defendant may claim that the fact the United States Supreme Court cited *Hall* in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), shows that it is retroactive, this is not true. In *Brumfield*, the Court merely cited to *Hall* for the fact that it was consistent with Louisiana law at the time that Brumfield's case was in state court. *Id.* at 2278. Moreover, contrary to Defendant's repeated assertion, the Court did not find that the Louisiana courts' decisions were contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent. *Id.* at 2276. Instead, it addressed only whether the Louisiana courts had made an unreasonable factual determination. *Id.* at 2276. In doing so, it did not apply any national standard for determining what facts needed to be pled to allege a retardation claim. Instead, it looked at what was required under Louisiana law. *Id.* at 2274, 2777-81. Thus, any attempt to assert that *Brumfield* held that *Hall* is retroactive should be rejected, and the lower court affirmed.

Even if making a request for retroactive application was proper under Fla. R. Crim. P. 3.851(d)(2)(B), the motion would still have been untimely because the alleged change in *Hall* would not be retroactive. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or this Court had made a significant change in constitutional law, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52, 53 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30. It further stated that new cases that merely concerned evidentiary standards and procedural fairness were evolutionary refinements that did not apply retroactive. *Id.* at 929.

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

defendants with IQs above 70 but within the range of 70 considering the standard error of measure the opportunity to present evidence regarding the other elements of retardation. *Kilgore*, 805 F.3d at 1314; *In re Henry*, 757 F.3d at 1158, 1161 (11th Cir. 2014); *see also Mays v. Stephens*, 757 F.3d 211, 217-19 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015)(rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). As a result, it did not place anyone beyond the State's power to punish anyone. In fact, the Court recognized its holding did not even render Hall's own death sentence unconstitutional. *Hall*, 134 S. Ct. at 2001. Moreover, even before *Hall*, this Court had held that a defendant could present evidence regarding the other elements of retardation even if he could not prove the first element. *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009). As such, *Hall* actually did little more than refine and apply this law to require that the additional evidence be given consideration when a defendant's IQ score might be 70 or below after consideration of the standard error of measure. Thus, *Hall* merely refined and applied the law to the facts of Hall's case. Such refinements and applications of the law do not apply retroactively. *Witt*, 387 So. 2d at 929-30. Since *Hall* does not satisfy *Witt*, it does not apply retroactively and does not make

this motion timely. Since the motion was not timely, it was properly summarily denied.

Rather than attempting to argue that *Hall* is a retroactive change in law, Defendant appears to argue that he is entitled to relief based on *Hall* because the requirements of *Hall* were always the law and "relate back" to the time *Atkins* was issued. However, the United States Supreme Court has made clear that the determination of whether a right existed earlier is not the proper test for whether a defendant is entitled to relief based on a retroactive application of a decision because:

> the source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule.

Danforth v. Minnesota, 552 U.S. 264, 271 (2008). Instead, the Court emphasized that whether a defendant was entitled to rely on new case law that issued after his conviction became final was an issue concerning redressibility that concentrated on whether the defendant could show that new law met the test for retroactivity. *Id.* at 271 & n.5. Similarly, this Court has limited the availability of a remedy based on new decisions to those that meet the standard for retroactivity. *Witt*, 387 So. 2d at 925-27. This Court has applied this standard even when the change in decisional law concerned the meaning of a statutory provision. *Bunkley v. State*, 882 So. 2d 890 (Fla.

2004). As such, Defendant's attempt to assert that he can raise an issue based on *Hall* because it was always the law is meritless. Instead, he needed to show that *Hall* applies retroactively. Since he has not done so and cannot do so, the lower court was correct to summarily deny his motion. It should be affirmed.

This is all the more true as Defendant simply misstates the law in claiming that *Hall* was always the law. While Defendant asserts that *Atkins v. Virginia*, 536 U.S. 304 (2002), adopted the clinical definitions of retardation and only gave the states the authority to develop procedures, this is not true. In *Bobby v. Bies*, 556 U.S. 825, 831 (2009), the Court expressly stated that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within Atkins' compass].'" Instead, it averred that it had left both the procedural and substantive standards for retardation to the states. *Id.* In fact, the Court reiterated that it had left both the procedural and substantive aspects of determining who was retarded to the states in *Hall*. *Hall*, 134 S. Ct 1998. As the Court itself recognized that it had not adopted a substantive definition of retardation in *Atkins*, Defendant's assertion that the Court adopted the clinical definition of

retardation as the substantive, legal definition of retardation is simply false.

This is all the more true as the Court did not even adopt the clinical definitions of retardation in *Hall*. There, the Court directly stated that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct at 2000. It also noted that the medical community's "views do not dictate the Court's decision." *Id.* Instead, the Court merely stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993. These statements are entirely consistent with the Court's prior recognition that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Given these statements, the Court did not even adopt the medical community's views regarding retardation in *Hall*. As such, Defendant's attempt to claim that the clinical definitions of retardation were always the legal definitions is meritless. The denial of his motion should be affirmed.

Moreover, while Defendant claims that this Court has held that a claim can be timely presented anytime the United States

Supreme Court has issued an opinion about Florida law that found error in one of this Court's decisions and cites to this Court's response to the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this assertion is incorrect as well. Instead, this Court permitted defendants to raise claims based on *Hitchcock* because this Court determined that the change in law found in *Hitchcock* was sufficient to satisfy *Witt*. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). In contrast, when the Court determined that this Court had erred in rejecting an ineffective assistance of counsel claim in *Porter v. McCollum*, 558 U.S. 30 (2009), this Court refused to allow all defendants to re-raise their claims of ineffective assistance of counsel because this Court determined that *Porter* did not satisfy *Witt*. *Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011). Thus, whether a motion is timely when it is based on a United States Supreme Court decision turns not on whether the Court has reversed this Court but whether the Court announced a retroactive change in law under *Witt*. Since Defendant has not and cannot show that *Hall* is retroactive under *Witt*, the lower court was correct to find the motion untimely and should be affirmed.

Additionally, this motion was barred as successive. As this Court has held, claims raised in prior post conviction proceedings cannot be relitigated in a successive post

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

Here, *Atkins* was decided on June 20, 2002. *Atkins*, 536 U.S. at 304. This was before Defendant filed his initial motion for post conviction relief. (PCR. 100-61) Further, this Court promulgated Fla. R. Crim. P. 3.203 on May 20, 2004, to take effect on October 1, 2004. *Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). Under that rule, individuals, such as Defendant, who had motions for post conviction relief pending at the time were permitted to raise retardation claims through an amendment to their motions within 60 days of October 1, 2004. *Id.* at 570. However, Defendant raised no claim that he was retarded such that he could not be sentenced to death in his initial motion for post conviction relief. In fact, contrary to Defendant's assertion, he did not even claim that his counsel was ineffective for failing to present mitigation at the penalty phase. Instead, Defendant presented a list 18 claims, none of which concerned mitigation

or retardation. (PCR. 110-12)

While the motion did include random statements about having an IQ less than 60 and counsel not having presented Dr. Toomer's testimony at sentencing and cited to *Atkins* in a footnote (PCR. 110, 134-37), Defendant expressly disavowed that he was raising any claim regarding retardation or mitigation when the State treated these statements and citation as attempts to raise such claims. (PCR. 165) Instead, he averred that he was only raising the claims in the 18 item list. (PCR-SR. 178) As such, any claim that Defendant was retarded was available at the time of his initial post conviction proceedings. Since he did not raise the claim in that motion, it was successive.

Further, Defendant previously claimed that he was retarded and exempt from the death penalty in a successive motion for post conviction relief he filed on November 29, 2010, based on the same 1993 report by Dr. Toomer that he relies upon here.[4]

[4] While Defendant's counsel now claims to have filed this successive motion to exhaust claims for litigation in federal court, this claim is specious. The Eleventh Circuit has previously explained to Defendant's counsel that he must exhaust a claim before raising it in federal court and that it would not consider his attempt to exhaust a claim after the federal habeas petition was filed. *Jimenez v. Florida Dep't of Corrections*, 481 F.3d 1337, 1342 & n.3 (11th Cir. 2007). Here, by the time Defendant filed his successive motion, not only had his federal habeas petition been filed, but also the district court had denied the petition and both the district court and Eleventh Circuit had denied leave to appeal. As such, it was too late to exhaust the claims for presentation in federal court.

(PCR2. 68-69) The lower court denied the motion as untimely and barred because Defendant had just been given an evidentiary hearing on the claim in his other capital case and the claim had just been rejected on the merits. (PCR2. 191) This Court affirmed that decision finding that Dr. Toomer's report was insufficient to raise a post conviction claim that Defendant was retarded because Dr. Toomer's IQ score was not based on an admissible IQ test, Defendant had failed to allege that his asserted condition onset before age 18 and information from Defendant's other case showed that he was not retarded. *Franqui v. State*, 118 So. 3d 807 (Fla. 2013). Since the claim was previously raised, it was clearly available at the time of Defendant filed his second motion for post conviction relief.

Moreover, the assertions regarding a jury trial and the burden of proof were clearly available when Defendant previously litigated this issue, as other defendants raised these claims while Defendant's original post conviction proceedings were pending. *See Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005). Thus, Defendant was doing nothing more than attempt to relitigate claims that were previously rejected or that were available but unraised earlier. As such, the claims were barred as successive. The summary denial was proper and should be affirmed.

Defendant attempts to claim that he is entitled to relitigate the claim based on the same information he presented in his prior motion because this Court was allegedly wrong to find that his claim was insufficiently pled when it was raised in his second motion for post conviction relief, this Court's alleged basis for rejecting Dr. Toomer's IQ score was that it exceeded 70 and this Court allegedly did not rely on what had occurred in his other case such that *Hall* allows him to relitigate the claim. However, this Court did not reject Dr. Toomer's IQ score because it exceeded 70. In fact, the IQ score from Dr. Toomer upon which Defendant has relied was a score of less than 60 on a Revised Beta IQ test. (PCR2. 60, 149, 135-36) Instead, this Court rejected that score because it was from an inadmissible IQ test. *Franqui v. State*, 118 So. 3d 908 (Fla. 2013)("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."). *Hall* says nothing regarding whether it is constitutional for the State to require that an IQ score be from a particular test. As such, *Hall* has no effect on that holding and does not show that this claim is not successive. The denial of the claim should be affirmed.

Hall also says nothing regarding what is necessary to plead

the other elements of retardation sufficiently. Instead, it merely held that a defendant cannot be precluded from presenting evidence on the other elements of retardation when his IQ is above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. As such, *Hall* does not provide a basis for relitigating this finding either. Instead, Defendant's attempt to claim that this Court erred in finding that he did not sufficiently pled the third element of retardation merely demonstrates that his claim was procedurally barred as successive. *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003); *see also Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002). The lower court should be affirmed.

Further, while Defendant insists that this Court did not uphold the lower court's finding that the claim was barred because it had already been found meritless in his other case, this assertion is belied by the language of this Court's order. This Court expressly stated that Defendant's "scores on the acceptable IQ tests were above 70. *See Franqui [v. State]*, 59 So. 3d [82,] 92[(Fla. 2011)]." As this language shows, this Court expressly relied on a finding from Defendant's other case to preclude relitigation of the retardation claim in this case. As this Court has explained, collateral estoppel applies when "'the identical issue has been litigated between the same

parties or their privies.’ *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998),” because the purpose of collateral estoppel is to “preclude[] relitigation of an issue in a subsequent but separate cause of action.” *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003). Moreover, this Court has held that collateral estoppel principles do apply to post conviction litigation in Florida even when language regarding collateral estoppel is not expressly included in the applicable post conviction rule. *Id.* at 290. Because Defendant and the State are the same parties in both of Defendant’s capital cases and his alleged retardation is the same, it was entirely appropriate for this Court to have applied its holding from Defendant’s other capital case to precluding relitigation of the retardation claim in this case and for both this Court and the lower court to continue to do so.

In fact, Defendant’s entire argument that *Hall* actually had any effect on the denial of his claim in this case is based on an attack of the finding from the other case. As such, if collateral estoppel did not apply, Defendant would have no basis for claiming that *Hall* applied. As the lower court alluded to by referring to Dr. Block-Garfield’s report in the order under review, it had previously denied Defendant’s retardation claim not only because his IQ was too high but also because the

evidence he presented on adaptive functioning disproved his claim. Since *Hall* merely required the State to permit defendants to present evidence of their adaptive functioning deficits and the onset of their condition before 18, Defendant was permitted to do so in his other case and Defendant failed to prove any element of retardation, *Hall* did not provide a basis for relitigation of the claim in the other case and collateral estoppel still bars Defendant's claim. The lower court should be affirmed.

Even if Defendant's claim could be considered timely and not successive, it should still be denied because it was insufficiently pled. As this Court has recognized, a defendant must allege sufficient facts that are not refuted by the record that would entitle him to relief if those facts were proven to sufficiently plead a claim for post conviction relief. *See Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004); *Hamilton v. State*, 875 So. 2d 586, 591 (Fla. 2004); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990). To be entitled to relief regarding a retardation claim, a defendant must prove that he has (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18.

§921.137(1), Fla. Stat.; *see also* Fla. R. Crim. P. 3.203(b). The IQ score presented to satisfy the first element must be obtained on either a Stanford-Binet or WAIS IQ test. *See* §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); Fla. Admin. Code 65G-4.011. Moreover, as this Court was has recognized, adaptive behavior "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008)(internal quotations omitted). Thus, Defendant needed to allege facts showing that he could prove these requirements that were not refuted by the record.

Defendant's quotation from *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), does not support his assertion that he did not have to meet these pleadings requirements. In *Brumfield*, the Court did not attempt to establish a national standard for pleading retardation claims. Instead, it recognized that because it had left the task of implementing *Atkins* to the states, it needed to look at what the law of the state from which the claim arose (Louisiana) required, to determine what facts a defendant needed to allege. *Brumfield*, 135 S. Ct. at 2274. Louisiana law only required defendants who had timely raised retardation claims to

"provide objective factors" that would raise a reasonable doubt about whether he was retarded. *State v. Williams*, 831 So. 2d 835, 857, 858 n.33, 861 (La. 2002). As a result, the United States Supreme Court applied these requirements of Louisiana law in analyzing whether the Louisiana courts had made an unreasonable factual determination that Brumfield had not alleged sufficient facts to be entitled to an evidentiary hearing. *Brumfield*, 135 S. Ct. at 2277-82. As such, *Brumfield* does not support Defendant's assertion that he only needed to allege sufficient facts to raise a doubt about whether he was retarded. Instead, *Brumfield* shows that even after *Hall*, the Court has not adopted a national standard regarding retardation and has continued to look to state law.

Here, Defendant did not assert a retardation claim within the time limits under Fla. R. Crim. P. 3.203 and, thus, had to satisfy the pleading requirement under Fla. R. Crim. P. 3.851. *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006). His only factual allegations made in his present motion were:

> In his Rule 3.851 motion filed in November of 2010, [Defendant] challenged his death sentence under *Atkins v. Virginia*. [Defendant] 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 ("[Defendant] did poorly in school and dropped out in the 8th grade"). Specifically, [Defendant] relied on Dr. Toomer's diagnosis of [Defendant] as mentally retarded and his

> conclusion that each of the three prongs of the test for mental retardation were present.

(PCR3. 135-36) However, as this Court has held, such conclusory allegations are insufficient to state a claim for post conviction relief. *Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008). This is all the more true as this Court had already determined that reliance on Dr. Toomer's report and the allegations in the second motion for post conviction relief did not satisfy either the first or third element of retardation. *Franqui v. State*, 118 So. 3d 807 (Fla. 2013). Thus, the claim was insufficiently pled and properly denied as such.

Moreover, it should be remembered that even Defendant's conclusory allegations are refuted by Dr. Toomer's actual report. (PCR2. 148-51) In his report, Dr. Toomer never diagnosed Defendant as retarded and did not even analyzed whether Defendant had deficits in adaptive behavior based on "how effectively [he] cope[d] with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Phillips*, 984 So. 2d at 511. Instead, he merely opined that "[r]esponses on the Revised Beta Examination, reflect that the subject's level of intellectual functioning is mentally defective range with a Beta I.Q. of less than 60." (PCR2. 149) Moreover, Dr. Toomer

actually noted that Defendant had "functioned on his own with little guidance" from the age of 12, which would be inconsistent with Defendant having deficits in adaptive functioning before 18. (PCR2. 149) Thus, even Defendant's conclusory allegations about the content of Dr. Toomer's report are refuted by the report itself, which is in the record. Moreover, Dr. Toomer's opinion about Defendant's IQ score on the revised Beta has already been rejected on credibility grounds and that finding has been affirmed by this Court. *Franqui v. State*, 699 So. 2d 1312, 1325-26 (Fla. 1997). Even though that finding was made in Defendant's other capital case, this Court has previously relied upon it in denying post conviction claims in this case. *Franqui*, 965 So. 2d at 30-31 & n.7, 33 n.8. In fact, this Court noted that the IQ score Defendant obtained on the WAIS, an admissible IQ test, that Dr. Toomer administered was 83. *Id.* at 31 n.7. Even in *Hall*, the Court did not question the constitutionality of denying *Atkins* claims without any further consideration of any evidence regarding the other elements of retardation when a defendant's IQ was above 75. *Hall*, 134 S. Ct. at 1996. Since Defendant only made conclusory allegations concerning the elements of retardation, this Court had already determined that the allegations Defendant made were insufficient to raise the claim, that the conclusory allegations were refuted

by the very report on which they claimed to have been based and that evidence based on the report has already been determined to be incredible, these allegations were not sufficient to raise a claim. As such, the lower court properly summarily denied the motion and should be affirmed.

Defendant's suggestion that this Court's prior determination that Dr. Toomer's report was insufficient should not be considered binding because it was the result of ineffective assistance of post conviction counsel should be rejected. This Court has rejected the assertion that a defendant can claim ineffective assistance of post conviction counsel as a basis for relitigating a prior ruling. *Tompkins v. State*, 994 So. 2d 1072, 1088 (Fla. 2008); *Jimenez*, 997 So. 2d at 1065 n.5, 1066. This Court has rejected the assertion that a defendant has a right to a jury trial on retardation and the assertion that a defendant should be entitled to rights applicable to trials in raising retardation claims in post conviction proceedings. *Nixon*, 2 So. 3d at 146-47; *Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005); *Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005). As such, Defendant's claim that he can relying on a claim of ineffective assistance of post conviction counsel to relitigate his retardation claim based on *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), is meritless.

This is all the more true as the Tenth Circuit's decision would be inconsistent with the United States Supreme Court's holding in *Schriro v. Smith*, 546 U.S. 6, 7-8 (2005), if it is read as imposing procedural requirements for consideration of *Atkins* claims on the states. The denial of the claim should be affirmed.

Defendant's suggestion that his claim was sufficiently pled because this Court ordered an evidentiary hearing on a retardation claim in his other case is meritless. As the order from Defendant's other case shows, this Court ordered the evidentiary hearing under Fla. R. Crim. P. 3.203 and express no opinion on his claim that he was retarded. *Franqui v. State*, 14 So. 3d 238, 238-39 (Fla. 2009). This Court has previously determined that the plain language of Fla. R. Crim. P. 3.203 requires an evidentiary hearing on a claim made under that motion. *Arbelaez v. State*, No. SC05-1610, order (Fla. Nov. 6, 2006); *see also Walls v. State*, 926 So. 2d 1156, 1174 (Fla. 2006). However, as this Court has held, defendants who did not raise their retardation claims within 60 days of October 1, 2004, are not entitled to proceed under Fla. R. Crim. P. 3.203 in raising their retardation claims. *Hill*, 921 So. 2d at 584. Here, Defendant did not raise his retardation claim in state court until 2010. As such, he needed to plead a facial

sufficient claim under Fla. R. Crim. P. 3.851. Thus, Defendant's assertion that this Court had ordered an evidentiary hearing in Defendant's other case shows that he sufficiently pled his claim is meritless. The denial of the claim should be affirmed.

While Defendant insists that *Hill* only found the claim untimely because it was not meritorious, this is not true. What this Court actually said about the retardation claim in *Hill* was:

> Under Florida Rule of Criminal Procedure 3.203, Hill was required to raise any claim he may have under Atkins within sixty days of October 1, 2004. He failed to do this; therefore, his claim is procedurally barred.
>
> In addition, the trial court correctly determined that this claim is also procedurally barred under rule 3.851(e)(2)(B). As stated in its December 23, 2005, order, "the *Atkins* decision was rendered in 2002, and [Hill] has provided no reason as to why he could not have raised this claim in his successive motion filed in 2003." The psychological evaluation Hill primarily relies upon to establish this claim was conducted in 1989. Hill does not claim that this study was not available to him at an earlier time, nor is there any indication that this evaluation was inadequate. 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, 921 So. 2d at 584. As the United States Supreme Court has made clear, the use of the phrases such as "in addition" shows that there are alternative holdings. *See Sochor v. Florida*, 504 U.S. 527, 534-35 (1992). Thus, this Court's statements in *Hill* establish both that the motion was untimely under Fla. R. Crim. P. 3.203 and not based on newly discovered evidence under Fla. R. Crim. P. 3.851. Defendant's contrary assertion should be rejected, and the lower court affirmed.

Further, any assertion that Defendant is attempting to make that the criticism of Dr. Block-Garfield's report from Defendant and his new expert makes the claim facially sufficient is meritless. While Defendant insists that Dr. Block-Garfield was not his expert, a review of her report clearly shows that Dr. Block-Garfield was retained at Defendant's request to provide an opinion on whether he was retarded. (PCR2. 179) Moreover, this Court has required defendants properly raising retardation claims to attach reports regarding all evaluations of their mental state when raising the claim. *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006). Thus, Defendant should not be permitted to disown Dr. Block-Garfield simply because he was hired by a different one of his attorneys in a situation in which retardation was not properly raised.

Under Florida law, Defendant bears the burden of proving retardation. *Nixon*, 2 So. 3d at 145. As this Court has recognized, presenting evidence to impeach testimony from one's own witnesses does not assist a party in carrying a burden of proof. *See Morton v. State*, 689 So. 2d 259, 263 (Fla. 1997). As such, alleging that a new expert would criticize the opinion of an expert a defendant previously presented would not show that the defendant would prove his claim if he proved his allegations. Thus, even presenting the criticism would not show that the claim was sufficiently pled. Since the claim was not sufficiently pled, the lower court properly summarily denied the motion and should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Martin McClain, martymcclain@earthlink.net, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 14th day of December 2015.

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CERTIFICATE OF COMPLIANCE

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

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