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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

From beginning to end, the State's Answer Brief engages in sophistry and word games. In the motion to vacate at issue in this appeal, Mr. Franqui presented his claim that Hall v. Florida, 134 S. Ct. 1986 (2014), was retroactive and required the circuit court afford Mr. Franqui an evidentiary hearing so that he could prove his entitlement to relief under Hall. Contrary to Rule 3.851, the circuit court summarily denied Mr. Franqui's motion to vacate without affording Mr. Franqui a case management in which to orally argue his Hall v. Florida claim and address and/or correct any defects in the manner in which he had pled the claim. Bryant v. State, 901 So. 2d 810, 819 (Fla. 2005); Davis v. State, 26 So. 3d 519 (Fla. 2009). Contrary to Rule 3.851, the circuit court held that Mr. Franqui could not seek a rehearing of its order summarily denying his Hall v. Florida claim entered without affording Mr. Franqui a case management hearing. Because of the circuit court's refusal to provide Mr. Franqui with the process required by Rule 3.851, Mr. Franqui's claim was erroneously denied by the circuit court without conducting an evidentiary hearing.

Rather than address the forest (that under Hall, Mr. Franqui was entitled to an evidentiary hearing on his claim), the State seeks to hide behind individual trees (that the denial of a case management hearing is per se harmless error, that Mr. Franqui did

not adequately plead his claim that Hall was retroactive, that a motion for rehearing "cannot be used to reargue an issue or raise a new issue," (AB at 17), and that Hall v. Florida has not been held to be retroactive). The State's rhetorical maneuvering cannot hide the simple fact that under Hall v. Florida, Mr. Franqui was and is entitled to an evidentiary hearing on his claim that his intellectual disability precludes the imposition of a death sentence.

A. What Mr. Franqui alleged in his motion to vacate as to why it was properly filed

The State contends that Mr. Franqui did "not claim below, and does not claim in this Court, that the issuance of Hall satisfied the requirement of Rule 3.851(d)(2)(B)." (Answer Brief at 25). Of course, Rule 3.851(d)(2)(B) concerns whether a decision by the United States Supreme Court is retroactive. The State even concedes that Rule 3.851(d)(2)(B) implicates Witt v. State, 387 So. 2d 922 (Fla. 1980). (Answer Brief at 28). When a United States Supreme Court decision is retroactive under Witt, the benefit of the decision is given to those whose convictions and/or sentences were final before the issuance of the new Supreme Court decision. See Falcon v. State, 162 So. 3d 954 (Fla. 2015).

The motion to vacate that Mr. Franqui filed on May 27, 2015, was premised upon the United States Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014), which issued on May 27,

2014. Hall was new law from the United States Supreme Court that had overturned this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), which had served as the basis for the denial of Mr. Franqui's claim for relief under Atkins v. Virginia, 536 U.S. 304 (2002). Mr. Franqui alleged in his May 27th motion to vacate that his death sentence violated Hall. He indicated that Hall was a decision from the United States Supreme Court that had been applied by this Court in the case of Jerry Haliburton, a death sentenced individual whose sentence of death was final in 1990 when this Court denied Mr. Haliburton's direct appeal. Haliburton v. State, 561 So. 2d 248 (Fla. 1990). This Court afforded Mr. Haliburton the benefit of Hall in a February 5, 2015, order that Mr. Franqui attached to the motion to vacate as Attachment B (3PC-R 148).[1] In fact, Mr. Franqui asserted in his 2015 motion to vacate: "the Florida Supreme Court gave Mr. Haliburton the benefit of Hall and the "fair opportunity to show that the Constitution prohibits [his] execution" as required by Hall v. Florida, 134 S. Ct. at 2001." (3PC-R 140). This Court afforded Mr. Haliburton the benefit of Hall; it applied Hall retroactively. That is the definition of retroactive application, according someone whose death sentence was final before a new United States Supreme Court ruling issued, the benefit of the

[1]The Haliburton order was omitted from the record sent to this Court for some unknown reason. However, Mr. Franqui did attach the order to his Initial Brief for this Court's convenience.

ruling.[2]

As best as Mr. Franqui can understand, the State's position in its Answer Brief is that by citing a decision from the United States Supreme Court that this Court has applied retroactively to someone whose death sentence was final some twenty-four years before the new decision issued, Mr. Franqui did not adequately plead that he was entitled to the benefit of Hall. Yet, in its response to the motion filed in circuit court, the State clearly understood that Mr. Franqui was arguing that Hall was retroactive and that he was entitled to the benefit of it. There, the State asserted: "[Mr. Franqui] simply cites to Hall and an order in a different defendant's case. To the extent these citations are an attempt to suggest that Hall is a retroactive change in the law that makes his motion timely, they do not do so." (3PC-R 160-61).

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[2]In Asay v. State, Case No. SC16-223, the State filed an Answer Brief on February 19, 2016, in which the State discussed Hurst v. Florida, 136 S. Ct. 616 (2016), and asserted that:

> Retroactivity is determined from the date of the *Hurst* opinion on January 12, 2016, not the date of the *Ring* opinion in June 24, 2002. * * *
>
> * * *
>
> *Hurst*, therefore, will ***not*** apply to any case that was final before January 12, 2016. No case in the postconviction proceedings stage as of January of 2016 should be affected by *Hurst*.

Asay v. State, Case No. 16-223, Answer Brief at 79, 81. Under the argument that the State made in Asay, the fact that this Court afforded Mr. Haliburton the benefit of Hall v. Florida means that this Court applied Hall retroactively in accordance with Witt v. State.

The State then wrote:

> [Mr. Franqui] asks this Court to make that determination in the first instance. As the Florida Supreme Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. [Citation]. Thus, Defendant cannot 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 must show that it has been held retroactive for the exception to apply.**

(3PC-R 161) (emphasis added).

But of course, Mr. Franqui had shown that Hall had been applied retroactively by this Court when it issued the order in Haliburton giving Mr. Haliburton the benefit of the Hall ruling even though his sentence of death was final in 1990, some 24 years before Hall issued.[3] Mr. Franqui specifically cited to and relied upon this Court's order as an instance in which this Court had applied Hall retroactively. See Davis v. State, 26 So. 3d 519, 527 (Fla. 2009) ("There is an important distinction between form and substance with regard to matters in this type of case.").

Without addressing this Court's order in Haliburton, the State then argued in its circuit court response to the motion to

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[3]Mr. Franqui was never given the opportunity to reply to the State's response and point out that the Haliburton order that he had attached to the motion to vacate was an instance where Hall had been applied retroactively in a case in which the death sentence had been final for 24 years before Hall issued. Mr. Franqui was never given the opportunity to appear at a case management hearing to explain that Hall had been applied retroactively in Haliburton.

vacate that "even if this Court could make the determination itself, the motion would still be untimely because **the alleged change in Hall** would not be retroactive."[4] (3PC-R 162) (emphasis added). By using the phrase "the alleged change in Hall" to refer what Mr. Franqui had asserted in his motion to vacate, the State clearly understood that the motion to vacate was premised upon the allegation that Hall was a retroactive change in law.

Contrary to the State's disingenuous arguments in its Answer Brief, the State clearly did know that Mr. Franqui's motion to vacate was premised upon the claim that Hall was a decision from the United States Supreme Court that was to be applied retroactively in his case under Witt v. State.

The circuit court also understood that Mr. Franqui's claim was that he was entitled to the benefit of Hall:

> While Defendant contends he is now entitled to bring this claim under Hall v. Florida, 134 S. Ct. 1986 (2014), he is incorrect. Hall does not create a new right. He was never precluded from filing a motion under Atkins v. Virginia, 536 U.S. 304 (2002).

(3PC-R 171).[5] But in fact, this Court had addressed the merits of

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[4]Ignoring that Hall had been applied retroactively in Haliburton, the State's argued that Hall did not qualify for retroactive application under Witt (3PC-R 162).

[5]The circuit court used the phrase "never precluded from filing a motion." And while Mr. Franqui did in fact file a motion under Atkins, his claim was rejected by this Court on the basis of Cherry v. State, 959 So. 2d 702 (Fla. 2007). The semantic difference between being precluded from filing and being precluded from making an Atkins claim because the IQ score was above 70 does not seem to Mr. Franqui to be a significant one. He

Mr. Franqui's Atkins claim in 2013 and ruled that because his IQ score was above 70, "Mr. Franqui cannot demonstrate that he is mentally retarded under Florida law." (3PC-R 136); Franqui v. State, 118 So. 3d 807 (Fla. 2013) (Table); Initial Brief Appendix A. On the basis of Cherry v. State, 959 So. 2d 702 (Fla. 2007), this Court held that Mr. Franqui could not present a meritorious Atkins claim. Hall held that this Court's decision in Cherry was contrary to the Eighth Amendment. The circuit court's order failed to grasp that Mr. Franqui's Atkins claim was denied upon the basis of Cherry which the United States Supreme Court overturned in Hall.

Both the State and the circuit court understood that Mr Franqui's motion relied on Hall v. Florida as new law that was retroactive. The State's assertions to the contrary in its Answer Brief are belied by the record.

B. To the extent that the State or the circuit court genuinely believed that Mr. Franqui had not adequately pled that Hall v. Florida was a retroactive change in law, he was entitled to an opportunity to correct any pleading deficiency

In its Answer Brief, the State now maintains that Mr. Franqui's motion to vacate was "insufficiently pled." (AB at 24). Specifically, the State contends that Mr. Franqui "did not claim below ... that the issuance of Hall satisfied the requirement of

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was precluded from having his Atkins claim heard on the basis of a decision that was found to violate the Eighth Amendment in Hall v. Florida.

Fla. R. Crim. P. 3.851(d)(2)(B).” (AB at 25). While that was not the contention in the State’s response, if the State’s contention is that Mr. Franqui failed to use magic words or phrases when presenting his claim based on Hall, this Court has held that a Rule 3.851 movant must be afforded an opportunity to correct the pleading deficiency: “we hold that when a defendant's initial postconviction motion fails to comply with the requirements of rule 3.851, the proper procedure is to strike the motion with leave to amend within a reasonable period.” Bryant v. State, 901 So. 2d 810, 819 (Fla. 2005).[6] This principle applies to successive motions to vacate as well. Davis v. State, 26 So. 3d 519 (Fla. 2009).

In its Answer Brief, the State also claims: “Defendant does not suggest that Hall has been held to be retroactive, and no court has held that it is.” (AB at 26). Mr. Franqui thought he had suggested that Hall had been applied retroactively when he relied upon this Court’s order in Haliburton. Had he known that the State did not understand that, he could have easily clarified that had he been given an opportunity to correct the pleading deficiency.

In its Answer Brief, the State maintains that Mr. Franqui “had to show that [Hall] has been held retroactive” and “he could

[6]While Mr. Franqui specifically cited to and relied upon Bryant v. State in his Initial Brief, the State does not address Bryant in its Answer Brief.

not make that showing." (AB at 26, 27). Once again to the extent that Mr. Franqui had failed to make it clear that this Court had applied Hall retroactively in Haliburton, a case in which the death sentence was final some 24 years before Hall issued, the technical deficiency could have been readily corrected had Mr. Franqui been afford the opportunity to amend, which this Court in Bryant said Rule 3.851 movants should be provided. See also Davis v. State, 26 So. 3d at 527 ("Here, the technical omissions were easily curable and clearly a matter of form over substance which could be included in an amended motion.").

Because neither the State nor the circuit court ever notified Mr. Franqui of any deficiency in his Rule 3.851 motion, he was deprived of any opportunity to cure the deficiencies, despite jurisprudence requiring that he be afforded such an ooprtunity.

C. The failure to hold a case management hearing was error which in Mr. Franqui's case was not harmless

With a semantic sleight of hand, the State argues that the failure to hold "a Huff hearing or to entertain a motion for rehearing do not entitle [Mr. Franqui] to relief." (Answer Brief at 16). The State cites a string of cases without acknowledging what the cases actually said. One of the cited cases is Davis v. State, 736 So. 2d 1156 (Fla. 1999). There, this Court held: "In view of the fact that the instant motion is successive and legally insufficient on its face, we find this error harmless."

Davis, 736 So. 2d at 1159 n.1. Thus, this Court in Davis found the failure to conduct a Huff hearing was in fact error. It then concluded in the circumstances presented there, the error was harmless. There is no indication that Mr. Davis made any showing of how he was prejudiced by the trial court's failure to conduct a Huff hearing.

In Sochor v. State, 22 So. 3d 68 (Fla. 2009) (table), this Court wrote: "given that Sochor's successive postconviction claims are legally insufficient and without merit, the trial court's failure to hold a case management conference was harmless error." Once again, this Court called the failure to conduct a Huff hearing **error**. But in the circumstances presented in Sochor, the **error** was found harmless. There is no indication that Mr. Sochor made any showing of how he was prejudiced by the trial court's failure to conduct a Huff hearing.

In Marek v. State, 14 So. 3d 985 (Fla. 2009), an evidentiary hearing was conducted on a successive motion to vacate. After the evidentiary hearing had concluded, but before Rule 3.851 relief had been denied, Mr. Marek filed another Rule 3.851 motion. On this later motion, the circuit court did not conduct a Huff hearing. Once again, this Court did not contest that the failure to conduct a Huff hearing was **error**. However, it concluded that the **error** was harmless. There was no indication that Mr. Marek made any showing of how he was prejudiced by the trial court's

failure to conduct a Huff hearing.

The State also cites Groover v. State, 703 So. 2d 1035 (Fla. 1997). However, there this Court specifically relied upon the fact that the requirement in Rule 3.851 that a Huff hearing be conducted on successive Rule 3.851 motions had not gone into effect at the time of the circuit court proceedings. Groover, 703 So. 2d at 1038 n.2 ("We note that this Court recently amended Florida Rule of Criminal Procedure 3.851 to require Huff hearings prior to ruling on any rule 3.850 motion filed by a death row inmate. See Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253, 1254 (Fla.1996). However, that rule change applies only to 3.850 motions that had not been ruled on as of January 1, 1997. Id. at 1254, 1272."). Thus, the mandatory language set forth in Rule 3.851(f)(5)(B), which governed the circuit court proceedings in Mr. Franqui's case, did not govern Mr. Groover's case.

In an opinion not mentioned by the State, this Court held that defects in a Rule 3.851 motion can be corrected during the mandatory case management hearing:

> Furthermore, when confronted about the technical omissions Davis attempted to cure any deficiencies through an oral presentation of information during the Huff hearing and also in his motion for rehearing which included the witnesses' respective phone numbers, addresses, and relevancy to the issues presented. Davis offered to submit a written response to amend the asserted pleading deficiencies and the postconviction trial court never indicated that an amended motion was necessary to avoid denial of the motion based on the

> pleadings. **Under these circumstances, the postconviction trial court erroneously concluded that the motion was facially insufficient without providing Davis an opportunity to cure these deficiencies through an amended motion.**

Davis v. State, 26 So. 3d at 527 (emphasis added). Because Mr. Franqui could have corrected the alleged deficiencies now argued by the State at a case management hearing, he was clearly prejudiced by the circuit court's error in not holding a case management hearing as Rule 3.851 requires.

Here, Mr. Franqui submitted a notice of proffer in which he demonstrated the prejudice that he suffered because the circuit court in violation of the requirement set forth in Rule 3.851(f)(5)(B) did not conduct a case management hearing. Mr. Franqui's notice of proffer included a report by Dr. Gordon Taub that Mr. Franqui was prepared to file at the case management hearing in light of the State's response to the motion to vacate. In its Answer Brief, the State refuses to address Dr. Taub's report. Obviously, the State has nothing to say as to Dr. Taub's report which at this juncture must accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).[7] This principle

[7]Where as here, a Rule 3.851 motion was denied without evidentiary development, the issue on appeal is whether accepting the factual allegations as true the movant has demonstrated a basis for relief. If so, an evidentiary hearing must be ordered in order to give the movant an opportunity to prove his factual allegation. Rivera v. State, 995 So. 2d 191 (2008), Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Scott v. State, 652 So. 2d 1129 (Fla. 1995).

applies in an appeal from the summary denial of a successive Rule 3.851. Mungin v. State, 79 So. 3d 726, 733 (Fla. 2011). Accepting Dr. Taub's report as true, it is clear that an evidentiary hearing on Mr. Franqui's Hall v. Florida claim was required. Dr. Taub's report provided:

> 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) (emphasis added).

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) (emphasis added).

Had Mr. Franqui been afforded a case management hearing, the circuit court could not have summarily denied his Hall v. Florida

claim without conducting an evidentiary hearing.

D. Rule 3.851 provided Mr. Franqui with a right to file a motion for rehearing

Rather than address the fact that the circuit court in violation of Rule 3.851 peremptorily held that Mr. Franqui could not file a motion for rehearing. The State argues that "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." (AB at 17).[8] According to the State, a motion for rehearing cannot be used to object to a circuit court's refusal to grant a Rule 3.851 movant the opportunity to reply to the State's response to his motion, to object a circuit court's refusal to conduct a case management hearing that Rule 3.851 mandates, and/or to correct any deficiencies that either the State or the circuit court identify as present in the Rule 3.851 motion itself. In other

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[8]For this proposition, the State cites two cases: Cleveland v. State, 887 So. 2d 362, 364 (Fla. 5th DCA 1993), and Lawyers Title Ins. V. Reitzes, 631 So. 2d 1100, 1100-01 (Fla. 4th DCA 1993). Both these cases dealt with a rehearing filed in an appellate court under Fla. R. App. Pro. 9.330. In Cleveland, the State sought a rehearing after an adverse ruling that followed full briefing, which is unlike the situation here where the State filed a response to the motion to vacate on June 8, 2015, and **two days later** the circuit court denied the motion to vacate without affording Mr. Franqui the opportunity to reply to the response in writing or orally at a case management hearing.

In Lawyers Title Ins., the Appellant filed a motion for rehearing after an adverse ruling in a case in which he had filed an initial and a reply brief and been afforded oral argument. Again here, Mr. Franqui was not afforded an opportunity to reply to the State's response to his motion or orally argue his Hall claim at a case management hearing, a right guaranteed in Rule 3.851.

words, the State's position is that Mr. Franqui was not entitled to notice of the State's response to his motion and an opportunity to be meaningfully heard in reply.

The State's position conflicts with this Court's ruling in Huff v. State, 622 So. 2d 982, 984 (Fla. 1993) ("While we do not address the merits of Huff's claims, we do note that he has raised specific objections to the contents of the order before this Court and that the motion for rehearing that he submitted to the trial court incorporates by reference the specific claims contained in his 3.850 motion and supporting memoranda."). There, this Court specifically found that Mr. Huff properly included in his a motion for rehearing his objection to the circuit court's failure to grant him an opportunity to argue his claims after the State filed a response to his motion to vacate.

The State's position is that Mr. Franqui was not entitled to reply to the State's response, was not entitled to orally argue his Hall claim, and was not entitled to object to the denial of due process when circuit court refused to let him be meaningfully heard after the State filed its response. 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). The circuit court's action and the State's argument before this Court in defense of the

circuit court's action violates the basic bedrock constitutional imperative that court's must afford litigants a meaningful opportunity to be heard. Indeed, this Court so held in Huff v. State, 622 So. 2d at 983 ("'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."). Due process was violated here as well.

E. Hall v. Florida is retroactive

Stripped of its verbiage and diversionary rhetoric, the State's position comes down to an argument that Hall v. Florida is not retroactive. The State's position in this regard does not withstand scrutiny.

While briefly noting that Mr. Franqui did rely in his motion to vacate on this Court's order in Haliburton v. State, Case No. SC12-893, remanding for an evidentiary hearing on Mr. Haliburton's intellectual disability claim, the State never addresses the meaning of this Court's February 5, 2015, order. However, it does at one point in its answer brief rely upon this Court's decision in Haliburton v. State, 935 So. 2d 1219 (Fla. 2006) (table), as supporting the summary denial of Mr. Franqui's claim (AB at 48). Though the text of this Court's July 10, 2006,

order reported at 935 So. 2d 1219 does not appear there, this Court's online docket shows the content of the order:

> Jerry Leon Haliburton, a prisoner under sentence of death, appeals the circuit court's denial of his successive motion for postconviction relief under rule 3.850. We have jurisdiction. See art. V, §§ 3(b)(1), Fla. Const. The court denied relief because Haliburton failed to comply with Florida Rule of Criminal Procedure 3.203(c)(2), which requires that, in a motion for determination of mental retardation, the defendant must state the names and addresses of the experts who evaluated or tested him. Finding no merit to Haliburton's claim, we affirm the denial of his 3.850 motion. This affirmance is **without prejudice** to Haliburton's right to file a motion that complies with Rule 3.203(c)(2).

(Emphasis added).[9]

Because of this Court's February 5, 2015, order, Mr. Haliburton was afforded an evidentiary hearing as a result of Hall v. Florida, a decision that issued 24 years after Mr. Haliburton's death sentence was final. That means that this Court applied Hall retroactively within the meaning of Witt v. State. This fact is simply ignored by the State.

Three days after the State filed its Answer Brief in Mr. Franqui's current appeal, this Court issued its decision in Oats v. State, 181 So. 3d 457, 460 (Fla. 2015), wherein this Court afforded Mr. Oats the benefit of Hall v. Florida ("A remand of this proceeding is particularly necessary in light of the

[9]The denial of Mr. Haliburton's claim **without prejudice** hardly supports the State's argument that Mr. Franqui was not entitled to an opportunity to correct any defects in his Rule 3.851 at the case management hearing or in an amended motion.

dispositive opinion in Hall, in which the United States Supreme Court disapproved our opinion in Cherry and provided additional guidance pertaining to the necessary showing under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for establishing ineligibility for the death penalty as a result of an intellectual disability."). Mr. Oats' death sentence became final in 1985. Oats v. State, 472 So. 2d 1143 (Fla. 1985).

While it is true that this Court did specifically engage in a Witt analysis in the course of its Oats opinion, there can be no dispute that Hall was applied retroactively to a death sentence that was final 29 years before Hall issued.[10] Moreover, this Court has found a United States Supreme Court decision retroactive sub silencio. James v. State, 615 So. 2d 668 (Fla. 1993).[11] In light of this Court's order in Haliburton v. State and this Court's opinion in Oats v. State, it is clear that Hall v. Florida has been and is to be applied retroactively under Witt v. State.

Even though Witt v. State sets forth the Florida law

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[10]Mr. Oats' death sentence was final in 1985. Mr. Haliburton's death sentence was final in 1990. Mr. Franqui's death sentence was not final until 2002 when rehearing of this Court's affirmance was denied. Franqui v. State, 804 So. 2d 1185 (Fla. 2001). To grant Mr. Oats and Mr. Haliburton the benefit of Hall while denying it to Mr. Franqui would violate the Eighth Amendment principles of Furman v. Georgia, 408 U.S. 238 (1972).

[11]In James, a justice of this Court dissented from the retroactive application of Espinosa v. Florida, 505 U.S. 1079 (1992). In Oats, there was no dissent.

governing the retroactive application of a United States Supreme Court decision, the State also cites to federal retroactivity law which is governed by an entirely different standard, Teague v. Lane, 489 U.S. 288 (1989). The State relies upon In re Henry, 757 F.3d 1158 (11th Cir. 2014), and Kilgore v. Sec'y, Fla. Dep't of Corrs., 805 F.3d 1301 (11th Cir. 2015), as establishing that Hall has not been found retroactive under the Teague federal retroactivity standard. However, the United States Supreme Court on January 25, 2016, issued its decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016). There, Justice Scalia in his dissent said that the majority had "rip[ped] Teague's first exception from its moorings, converting an equitable rule governing federal habeas relief to a constitutional command governing state courts as well, the majority proceeds to the merits." Montgomery, 136 S. Ct. at 742-43. Justice Scalia wrote that the majority had significantly changed Teague as it applied to the Eighth Amendment's evolving standards:

> Teague's central purpose was to do away with the old regime's tendency to "continually force the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S.Ct. 1060. Today's holding thwarts that purpose with a vengeance. **Our ever-evolving Constitution changes the rules of "cruel and unusual punishments" every few years.**

Montgomery, 136 S. Ct. at 742 (emphasis added).

As issue in Montgomery v. Louisiana was the retroactivity of

the Eighth Amendment decision that juveniles cannot be sentenced to life without parole without procedural safeguards that insure that only a juvenile whose crime reflects irreparable corruption would receive such a sentence. Id. at 734. Thus without the procedural safeguards required by the Eighth Amendment, a juvenile could no longer be sentenced to life without parole. In Montgomery, this was found to be substantive law. As explained in Montgomery, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Id. at 729. Montgomery explained: "Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." Id. at 729-30. Montgomery noted, "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." Id. at 731. Montgomery elaborated that concern for finality "has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose." Id. 734.

It is clear under Montgomery, that the decision in Hall declaring this Court's decision in Cherry v. State to be violative of the Eighth Amendment was a substantive rule of constitutional law. As such, it must be applied retroactively.

As Justice Scalia argued, Montgomery changed the Teague standard. The decisions in In re Henry and Kilgore v. Sec'y, Fla. Dep't of Corrs., do not comport with the ruling in Montgomery.

Under Oats v. State, and this Court's order in Haliburton v. State, Hall v. Florida applies retroactively. Under Hall v. Florida, Mr. Franqui is entitled to what has been afforded Mr. Oats and Mr. Haliburton, an evidentiary hearing compliant with Hall v. Florida.

ADDITIONAL ARGUMENT NOT PREVIOUSLY AVAILABLE

On January 12, 2016, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016). The Court in Hurst held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. Section 921.137(2), Fla. Stat., provides: "**A sentence of death may not be imposed upon a defendant** convicted of a capital felony if it is determined in accordance with this section that **the defendant is intellectually disabled**." (Emphasis added). Thus under Florida statutory law, a defendant convicted of first degree murder who is intellectually disabled is not eligible to

receive a death sentence. Thus, a defendant's intellectual disability is a factual issue that must be resolved before a death sentence may be imposed. When a defendant's intellectual disability is raised, there must a determination of fact that the defendant is not intellectually disabled before a death sentence can be imposed.

In Hurst, Mr. Hurst had asserted before this Court that he was intellectually disabled. See Hurst v. State, 147 So. 3d 435, 445 (Fla. 2014) ("We have repeatedly held that a defendant has no right under Atkins to a jury determination of whether he is mentally retarded."). The United States Supreme Court did not grant certiorari review of this Court's ruling regarding the intellectual disability issue. In its opinion in Hurst v. Florida, the United States Supreme Court did not address Mr. Hurst's intellectual disability claim and whether he was entitled to a jury's determination of his intellectual disability. However, the holding of the Hurst decision is that the Sixth Amendment right to a jury must attach to "each fact necessary to impose a sentence of death." Hurst v. Florida, 136 S. Ct. at 619.

Since it must be found as a matter of fact that a defendant is not intellectually disabled before a death sentence may be imposed, the holding in Hurst that the Sixth Amendment right to a jury attaches to "each fact necessary to impose a sentence of death" logically applies to the necessary factual determination

as to Mr. Franqui's intellectual disability. Mr. Franqui is not eligible for a death sentence if he is intellectually disabled under § 921.137(2). Thus once there is evidence raising a question of fact as to a defendant's intellectual disability (as there is here), Florida statute requires that there be a factual finding that the defendant is not intellectually disabled before a death sentence may be imposed. Such a fact finding under the Sixth Amendment is for a jury to make. Hurst v. Florida.

Not only is Mr. Franqui entitled to have his intellectual disability claim evaluated in conformity with Hall v. Florida, under Hurst v. Florida the Sixth Amendment right to trial by jury attaches to the ultimate factual determination of Mr. Franqui's intellectual disability. Thus, this Court in conformity with Hurst should remand for a jury trial of Mr. Franqui's intellectual disability claim.

CONCLUSION

Based upon the record and the arguments presented herein and in his Initial Brief, Mr. Franqui respectfully urges the Court to reverse the circuit court's summary denial of his motion to vacate and remand for an evidentiary hearing and/or jury trial of his intellectual disability claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by email service to Sandra.Jaggard@myfloridalegal.com which is the primary email address given for opposing counsel, Sandra S. Jaggard, Assistant Attorney General, on February 25, 2016.

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CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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