IN THE SUPREME COURT OF FLORIDA

LEONARDO FRANQUI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC15-1630
L.T. No. F92-2141B
DEATH PENALTY CASE

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

SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Following this Court's decisions in Walls v. State, No. SC15-1449, 2016 WL 6137287 (Fla. Oct. 20, 2016), and Hall v. State, 201 So. 3d 628 (Fla. 2016), Appellant sought and obtained permission from this Court to file a second supplemental brief addressing the impact of these decisions to his case. Appellant subsequently requested to expand the scope of his supplemental briefing to include the impact of the recent decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). Appellee files this Second Supplemental Answer Brief in response to this Court's orders of November 14, 2016 and December 5, 2016.

STATEMENT OF THE CASE AND FACTS

Appellee will rely on the Statements of the Case and Facts contained in its Answer Brief and Supplemental Answer Brief previously filed in this case but will expand where necessary.

SUMMARY OF THE ARGUMENT

Appellant is entitled to no relief based on this Court's decisions in Hall v. State, Walls, or Thompson v. State, No. SC15-1752, 2016 WL 6649950 (Fla. Nov. 10, 2016). While the State concedes that the holding in Hall v. State can be applied retroactively, Appellant is not entitled to a second determination as to his intellectual disability claim. The record is clear that Appellant was already afforded the opportunity to present all of

the evidence on all three prongs of the test pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), but failed to present clear and convincing evidence. The trial court's summary denial of an additional evidentiary hearing in Appellant's case was not based solely on the bright-line rule overturned in Cherry v. Jones, No. SC15-957, 2016 WL 7013866 (Fla. Dec. 1, 2016). Applying Hall v. State, it is clear that Appellant had ample time to prepare his presentation of evidence of which the lower court considered. Appellant still has not proffered any new evidence that would have changed the outcome of the lower court's finding that Appellant did not meet the criteria for intellectual disability.

Additionally, Appellant's arguments for grounds of relief based on the Hurst holding are untimely and improper. Even if they were properly made before this Court, the remanded Hurst opinion is not subject to retroactive application to cases decided after the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). Because Appellant's case was final and affirmed by this Court in 2001, Appellant's supplemental arguments based on Hurst are moot and he is not entitled to relief. Therefore, this Court should affirm the denial of Appellant's post-conviction motion.

ARGUMENT

I. APPELLANT'S REQUEST FOR RELIEF BASED ON HALL V. FLORIDA, WALLS V. STATE AND THOMPSON V. STATE SHOULD BE REJECTED.

Appellant contends that he is entitled to challenge the summary denial of his intellectual disability claim in light of the decisions in Hall v. Florida, 134 S. Ct. 1986 (2014); Hall v. State; and Walls. While the State would concede that Hall now applies retroactively based on this Court's decision in Walls, the actual holding of Hall and the recent holding in Cherry v. Jones, No. SC15-957, 2016 WL 7013866 (Fla. Dec. 1, 2016), are simply inapplicable to this case.

In Hall, the Court merely held that states have to allow defendants to present evidence regarding the other elements of intellectual disability if their IQs might be 70 or below, if the standard error of measure was considered. Hall v. Florida, 134 S. Ct. at 2001. In Cherry v. Jones, this Court found that the lower court precluded Cherry and did not consider the remaining Atkins factors after he could not prove the first prong of IQ. 2016 WL 7013866 at *1.

Unlike the defendants in Cherry and Hall, Appellant was not prohibited from presenting evidence of his adaptive functioning or the manifestation below age 18 even though the expert reports Appellant stipulated to indicated his IQ was above 70. Instead,

this Court denied the claim because it was untimely and because the lower court in Appellant's Hialeah case already had an evidentiary hearing on this exact claim, finding Appellant presented all of his evidence at that hearing and that Appellant did not satisfy any of the elements of intellectual disability. See Franqui v. State, 118 So. 3d 807, *1, 2 (Fla. 2013).

Appellant asserts that Walls requires an automatic reversal of the summary denial and suggests this permits another review of that final decision; however, the facts and evidence presented to the lower court in Walls leading to the summary denial are distinguishable from Appellant's case.

In his first evidentiary hearing held on July 10, 2007, Walls presented the testimony of the same defense expert in Appellant's SC15-1441 case, Dr. Jethro Toomer. 2016 WL 6137287 at *7. After Dr. Toomer and the State's expert Dr. Harry McClaren testified to Walls' mental condition, the circuit court denied relief finding "Walls' lowest IQ score of 72 did not meet the definition of subaverage intellectual functioning." Id.

On May 26, 2015, Walls' defense counsel filed a second successive 3.851 motion and argued that he was entitled to a new hearing based on the change of the subaverage intellectual functioning definition to include scores that are 75 or below. Defense counsel argued that Walls' first intellectual disability

hearing "was directed at satisfying the unconstitutional definition of an IQ that is 70 or below." Id. at *7-8. It was also clear from the record that defense counsel did not come prepared for that status hearing as he was also about to ask to withdraw from Walls' case. Id. at *6.

However, the circuit court summarily denied Walls' motion without granting a hearing, and found that even if Hall applied retroactively, "Walls would not be entitled to relief because his only IQ scores below 75 were received after he had turned 18: his scores were 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at about age 40." Id. at *8.

In holding that Hall did apply retroactively, this Court found that Walls "did not receive the type of holistic review to which he was now entitled" and importantly noted:

> Walls' prior hearing was conducted under standards he could not meet because he did not have an IQ score below 70—a fact which may have affected his presentation of evidence at the hearing. Because Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability and was reviewed by the circuit court with the former IQ score cutoff rule in mind, we remand for the circuit court to conduct a new evidentiary hearing as to Walls' claim of intellectual disability.

Id. at *6.

The facts and evidence upon which the lower court in this case summarily denied Appellant's successive post-conviction

motion are distinguishable. The record is clear in this case that the lower court considered all of the prongs of intellectual disability in tandem (as Hall requires)[1]; thus, Appellant did indeed receive a "holistic review." Unlike the presentation of the IQ scores in Walls, defense counsel at the evidentiary hearing in this case **did** have a score that indicated Appellant's IQ in 1993 was less than 60, which was below the former IQ cutoff of 70. Franqui v. State, 965 So. 2d 22, 30-31 & n.7 (Fla. 2007). Dr. Toomer also previously testified that Appellant suffered mental problems since childhood. Id.

In 2009, this Court granted Appellant an evidentiary hearing after the lower court summarily denied his intellectual disability claim in February 2008. With knowledge that Dr. Toomer's opinion about Appellant's IQ score on the revised Beta had already been rejected on credibility grounds,[2] the State and Appellant

[1] Even though the finding of no intellectual disability was made in Appellant'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 denying Appellant's successive motion for post-conviction relief, the lower court in that case found that Hall merely required that a court consider all three elements when the defendant's IQ score might be two or more standard deviations below the mean if the standard error of measure was considered, and that Appellant had already received that consideration after an evidentiary hearing in that case.

[2] That finding has been affirmed by this Court. Franqui v. State, 699 So. 2d 1312, 1325-26 (Fla. 1997).

stipulated into evidence the expert reports prepared by Dr. Enrique Suarez and Dr. Trudy Block-Garfield, a licensed clinical psychologist specializing in forensic psychology, who evaluated Appellant in 2003. See Franqui v. State, 59 So. 3d 82, 90 (Fla. 2011). Dr. Block-Garfield was aware of Dr. Toomer's review and testing. Id. at 91.

Unlike the defense counsel in Walls, defense counsel for Appellant had adequate time to prepare for this hearing and yet after reading the contents of the reports, counsel indicated that he could not and did not present any further evidence regarding the third prong as to whether the Appellant's intellectual disability manifested before he was 18 years of age. Franqui, 118 So. 3d at *2. Appellant nonetheless alleged that his IQ score was under 70 and relied on the report prepared in 1993, which again Appellant was aware was not an acceptable test using the Wechsler Intelligence Scale or the Stanford-Binet Intelligence Scale. Id. (finding the circuit court had competent substantial evidence from the two separate doctors who utilized rule-approved psychological examinations). Therefore, contrary to the concern voiced by this Court in Walls, Appellant's defense counsel's presentation was NOT affected at the hearing, as he was able to provide some evidence that Appellant's IQ was below 70 and had adequate time to prepare

evidence showing the intellectual disability manifested before Appellant was 18, but chose not to.

The factual determination that Appellant had the opportunity, but failed to prove all prongs of intellectual disability is the law of the case and Appellant cannot show manifest error to recede from that determination made by the lower court.

Under the law of the case doctrine, consideration of those issues actually considered and decided in a former appeal in the same case are barred from a second review. Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001) (stating "[u]nder the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision[s] are based continue to be the facts of the case."). The exception to this rule arises where manifest injustice would result. State v. Owen, 696 So. 2d 715, 720 (Fla. 1997); see also Thompson v. State, 2016 WL 6649950 (Fla. Nov. 10, 2016).

Recently, in the context of an intellectual disability claim, this Court considered whether manifest injustice would result should the doctrine be applied to the defendant in Thompson. In finding manifest injustice, this Court focused on the directions it gave to the trial court as to how to apply Cherry v. State, 959 So. 2d 702 (Fla. 2007). It found that the trial court's major focus on the IQ score and the "bright line" cutoff score recognized in

Cherry v. State prohibited the lower court from considering the other two prongs. Thompson, at *8-10. It was also concerned that this bright-line rule may have caused the trial court to reject the defense expert's IQ finding even though the trial court believed the defense expert credible. Thompson, at *10. This was supported by the trial court's finding that "[Thompson's] own expert, Dr. Sultan testified that his IQ is 71, which is above the threshold of 70." Id. The fear that manifest injustice would result was summed up as:

> Simply put, it is impossible to know the true effect of this Court's holding in Cherry on the circuit court's review of the evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71–88. What is clear is that this Court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to Cherry, a case that has since been abrogated by the United States Supreme Court in Hall. The circuit court took Cherry into consideration at Thompson's intellectual disability hearing and in denying Thompson's intellectual disability claim, and this Court relied on Cherry to affirm the circuit court's order. Because of this reliance on Cherry's bright-line cutoff of 70 for IQ scores, Thompson has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." Hall, 134 S. Ct. at 2001.

Thompson, at *10.

While Appellant heavily relies on Thompson, these concerns just like in Walls are not present in Appellant's case, rendering Thompson distinguishable. In fact, a review of the hearing, resulting order, and this Court's affirmance on appeal establish

unequivocally that Appellant had a full and fair hearing, and that manifest injustice would not result, should the law of the case doctrine be applied. Unlike the findings in Thompson where the Defendant was practically prevented a fair opportunity to present all evidence given he could not meet the first prong of IQ, neither the State nor this Court prevented Appellant from presenting any evidence regarding the other two prongs of intellectual disability. Indeed, both the State and this Court actively encouraged Appellant to present his evidence even if he could not prove the first prong of intellectual disability.

The lower court made credibility and factual findings that are supported by the record as set forth in the State's answer brief in this case and relied upon here. Simply put, Appellant chose not to present further evidence and admitted that he had no evidence other than licensed clinical psychologists' expert reports of which Appellant stipulated. Those reports indicated that Appellant's IQ was in the borderline range of intelligence and that he was not intellectually disabled. Accordingly, the lower court found that Appellant had not met his burden and that none of the prongs of intellectual disability was satisfied. The lack of evidence on all three prongs viewed in tandem makes the summary denial in this case appropriate. It is clear that the rejection of Appellant's intellectual disability claim in this case was not

based on the Cherry v. State bright-line test, but on the fact that Appellant was unable to produce clear and convincing evidence of the any of the prongs as set forth in Atkins. Therefore, regardless of the retroactive application of Hall, Appellant has already received the benefit of Hall and was given a fair opportunity to present evidence on all three prongs of intellectual disability.

Post-conviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses. See Cox v. State, 966 So. 2d 337, 357–58 (Fla. 2007). This Court has repeatedly explained that it is "highly deferential to a trial court's judgment on the issue of credibility" given the trial court's "superior vantage point." Archer v. State, 934 So. 2d 1187, 1196 (Fla. 2006) (quoting State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997)). Even now, Appellant does not currently allege that there is existing evidence available to satisfy any of the prongs of intellectual disability and the intervening law does not undercut the trial court's resolution of the IQ, adaptive functioning deficit, and manifestation prongs.

Therefore, since the evidence was considered in concert and rejection of the intellectual disability claim was not based on one prong to the exclusion of the others, this Court should find

that Appellant had a full and fair airing of his claim, and that airing met constitutional muster even though it was conducted prior to the issuance of Hall v. Florida and Walls. As such, the summary denial of relief should be affirmed.

II. APPELLANT'S REQUEST FOR RELIEF BASED ON HURST V. STATE SHOULD BE REJECTED.

Appellant is entitled to no relief based on the United States Supreme Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016), or this Court's decision in Hurst v. State. The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief and Supplemental Answer Brief, with the following additions pertinent to the issue on which this Court ordered additional supplemental briefing.

Appellant's claims are not preserved and are procedurally barred. Pursuant to Florida Rule of Criminal Procedure 3.851(d), a motion for post-conviction relief must be filed within one year from when a defendant's conviction and sentence become final. Fla. R. Crim. P. 3.851(d)(1)(A). The rule provides an exception for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. Id. at 3.851(d)(2)(A), (B).).

Appellant did not raise any sixth amendment constitutional claim concerning the issue of jury unanimity during his trial or

on direct appeal. At issue is Appellant's appeal of the denial of his third motion for post-conviction relief, which **only** contended that he was entitled to reconsideration of his claim that he is intellectually disabled based on the United States Supreme Court issued Hall v. Florida. As this Court has recognized, it is not proper to raise an issue in a post-conviction appeal that was not presented in the post-conviction motion. Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). As such, appellate review is limited to consideration of the propriety of the ruling entered below. Because these decisions were not cited to or addressed by the court below in the post-conviction motion at issue, the new arguments now offered to this Court are unpreserved and procedurally barred. See Jimenez v. State, 997 So. 2d 1056, 1072 (Fla. 2008); Brown v. State, 755 So. 2d 616, 636 (Fla. 2000).

Even if Appellant had raised a Hurst claim in the motion at issue, this Court just issued an opinion in the recent decision of Asay v. State, Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016), holding that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring.

Appellant's sentence was final and affirmed by this Court on October 18, 2001. See Franqui v. State, 804 So. 2d 1185 (Fla. 2001). Further, in his direct appeal from the resentencing,

Appellant did not seek certiorari in the United States Supreme Court; as such, the case was final when his rehearing was denied by the Florida Supreme Court in 2001. Therefore, because the holding in Hurst is not retroactive to Appellant's case, Appellant's argument in his supplemental brief is moot. Appellant's further assertion regarding the Edmund/Tison findings is also subject to Hurst, and as Hurst does not apply to him, that argument is also irrelevant in his case. Additionally, Perry v. State, SC16-547, 2016 WL 6036982 (Fla. Oct. 14, 2016) is irrelevant as it involves the sentencing statute, as amended in 2016, and not the statute as applied to Appellant. Therefore, Appellant is entitled to no relief based on these grounds.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the denial of Appellant's post-conviction motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Martin J. McClain, Esq., 141 N.E. 30th Street, Wilton Manors, Florida 33334, **martymcclain@earthlink.net** and to Todd G. Scher, Esq., 398 E. Dania Beach Boulevard, #300, Dania Beach, Florida 33001, **TScher@msn.com.**

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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