DOCKET NO. _____

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARDO FRANQUI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Florida Supreme Court's understanding of the proper holistic evaluation to be conducted in order to assess a capital defendant's intellectual disability consistent with *Hall v. Florida* and the Eighth Amendment?
2. Does the Florida Supreme Court's statutory construction in *Hurst v. State* constitute substantive law and, if so, does the Due Process Clause of the Fourteenth Amendment require that this substantive law govern the law in existence in 1992, when Mr. Franqui's offenses were charged?
3. Whether the Florida Supreme Court's recession from *Hurst v. State* in *State v. Poole* violates the Eighth Amendment as it relates to the jury's role of finding statutorily required facts beyond a reasonable doubt in order to authorize a sentence of death?

PARTIES TO THE PROCEEDINGS

Petitioner Leonardo Franqui was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent State of Florida was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Hialeah Case:

Underlying Trial:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-006089-B
Judgment Entered: November 24, 1993

Direct Appeal:

Florida Supreme Court
Franqui v. State, 699 So.2d 1312 (Fla. 1997)
Judgment Entered: October 6, 1997

Supreme Court of the United States
Franqui v. Florida, 523 U.S. 1097 (1998)
Florida v. Franqui, 523 U.S. 1040 (1988)

First Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-006089-B
Judgment Entered: March 31, 2005, and Feb. 21, 2008

Florida Supreme Court
Franqui v. State, 59 So.3d 82 (Fla. 2011)
Judgment Entered: Apr. 11, 2011

Second Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-006089-B
Judgment Entered: June 26, 2015

Florida Supreme Court
Franqui v. State, 211 So.3d 1026 (Fla. 2017)
Judgment Entered: Jan. 26, 2017

Proceedings on Remand for Evidentiary Hearing

Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Leonardo Franqui, No. F92-006089-B
Judgment Entered: Sept. 28, 2018

Florida Supreme Court
Franqui v. State, 301 So.3d 152 (Fla. 2020)
Judgment Entered: Sept. 17, 2020

North Miami Case:

Underlying Trial:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-2141-B
Judgment Entered: Oct. 11, 1994

First Direct Appeal:

Franqui v. State, 699 So.2d 1312 (Fla. 1997)
Judgment Entered: Oct. 7, 1997

Underlying Resentencing:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-2141-B
Judgment Entered: Oct. 15, 1998

Second Direct Appeal:

Florida Supreme Court
Franqui v. State, 804 So.2d 1185 (Fla. 2002)
Judgement Entered: Jan. 8, 2002

First Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-2141-B
Judgment Entered: Nov. 9, 2004

Florida Supreme Court
Franqui v. State, 965 So.2d 22 (Fla. 2007)
Judgment Entered: Sept. 10, 2007

Supreme Court of the United States
Franqui v. McNeil, 553 U.S. 1040 (2008)
Judgment Entered: May 12, 2008

Second Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-2141-B

Judgment Entered: Jan. 27, 2011

Florida Supreme Court
Franqui v. State, 118 So.3d 807 (Fla. 2013) (unpub. opinion)
Judgment Entered: April 9, 2013

Third Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Leonardo Franqui, No. F92-2141-B
Judgment Entered: June 10, 2015

Florida Supreme Court
Franqui v. State, 211 So.3d 1026 (Fla. 2017)
Judgment Entered: Jan. 26, 2017

Proceedings on Remand for Evidentiary Hearing

Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Leonardo Franqui, No. F92-006089-B
Judgment Entered: Sept. 28, 2018

Florida Supreme Court
Franqui v. State, 301 So.3d 152 (Fla. 2020)
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PETITION FOR WRIT OF CERTIORARI

Petitioner Leonardo Franqui respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The two most recent opinions of the Florida Supreme Court address both of Mr. Franqui's capital cases, which were consolidated for the purpose of addressing Mr. Franqui's intellectual disability claim. One case is known as the Hialeah case, the other the North Miami case. The opinion under review (App. A) is reported at 301 So.3d 152. The prior opinion of the Florida Supreme Court consolidating the two cases and remanding for the evidentiary hearing is reported at 211 So.3d 1026 (App. D). The order by the circuit court rejecting Mr. Franqui's intellectual disability claim is unreported (App. C).

The other opinions in the case address Mr. Franqui's appeals in each of his separate cases. In the Hialeah case, the opinion on Direct Appeal is reported at 699 So.2d 1312 (App. J), and the opinion affirming the denial of Mr. Franqui's first postconviction motion is reported at 59 So.3d 82. In the North Miami case, the opinion on Direct Appeal affirming Mr. Franqui's convictions but remanding for a resentencing is reported at 699 So.2d 1312 (App. I); the opinion affirming the death sentence following the resentencing is reported at 804 So.2d 1185 (App. H). The two other opinions affirming the denial of Mr. Franqui's previous postconviction motions are reported at 965 So.2d 22 (App. G), and 118 So.3d 807 (App. E).

STATEMENT OF JURISDICTION

The Florida Supreme Court issued its opinion on May 7, 2020 and denied Mr. Franqui's timely motion for rehearing on September 17, 2020 (App. B). On March 19, 2020, this Court extended the time to file any petition for certiorari to 150 days.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV.

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[1] The 150th day from the denial of rehearing fell on Sunday, February 14, 2021, thus making a certiorari petition due on the following day that is not a Saturday or Sunday, meaning Monday, February 15, 2021. *See* Sup. Ct. Rule 30.1. However, Monday February 15, 2021 was a federal holiday listed in 5 U.S.C. §6103 (President's Day), and thus the petition is timely filed the following day, Tuesday February 16, 2021. *Id.*

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. Conviction and Trial Proceedings

Mr. Franqui has two separate capital cases named for the location in Miami-Dade County, Florida, where each charged murder took place: the Hialeah case and the North Miami case.

1. The Hialeah Case

Mr. Franqui, along with co-defendants Pablo San Martin and Pablo Abreu, was charged by Indictment issued in January 1992, with one count of first-degree murder and related offenses arising from the death of Raul Lopez in a shooting occurring in Hialeah, Florida, on December 6, 1991. Along with co-defendant San Martin,[2] Mr. Franqui proceeded to trial in September 1993. The jury returned guilty verdicts for one count of first-degree murder and the related offenses. At a joint penalty phase, the jury returned a death recommendation by a vote of 9-3. On November 4, 1993, the trial court imposed the death penalty on Count I.

In sentencing Mr. Franqui to death, the trial court found four aggravating circumstances: (1) prior violent felony, (2) murder committed during the course of an attempted robbery; (3) murder committed for pecuniary gain; and (4) the murder was committed in a cold, calculated, and premeditated manner. The court found no statutory mitigating circumstances but did find two non-statutory mitigating factors: (1) Mr. Franqui had a poor family background and deprived childhood, including abandonment by his mother, the death of his mother, and being raised by a man who

[2] Abreu negotiated a plea with and testified for the State at the penalty phase.

was a drug addict and alcoholic, and (2) Mr. Franqui was a caring husband, father, brother, and provider.

On direct appeal, the Florida Supreme Court affirmed[3] Mr. Franqui's convictions and sentences, with the exception of the convictions for attempted first-degree murder (App. J).

On January 15, 1999, Mr. Franqui, through state-appointed counsel, filed a verified motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, later amended (PCR37-129; 136-179). On January 7, 2002, the trial court issued an order summarily denying the motion but granted a hearing on a newly-discovered evidence claim (PCR478-487). On October 18, 2002, Mr. Franqui filed a supplemental motion alleging a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002), and one based on *Atkins v. Virginia*, 536 U.S. 3043 (2002), 122 S.Ct. 2242 (2002) (PCT316-17).

The circuit court denied relief, and, on appeal, the Florida Supreme Court relinquished jurisdiction for a hearing on the *Atkins* claim (App. F). But because none of Mr. Franqui's IQ scores were above 70, he conceded an inability to make out a prima facie case of intellectual disability due to the then-existing Florida precedent setting 70 as the cut-off for intellectual disability claims. *See Cherry v. State*, 959 So.2d 702 (Fla. 2007). He also conceded that the only way that the lower court could entertain his claim was to conclude that the Florida Supreme Court's cutoff score of 70 was unconstitutional, and Mr. Franqui accordingly moved the court to declare that

[3] Two justices dissented from the affirmance of Mr. Franqui's convictions because of harmful Confrontation Clause violations.

Cherry violated the Eighth Amendment (Supp. R. P399). The lower court ruled that Mr. Franqui did not meet *Cherry*'s strict cut-off and denied his motion to declare *Cherry* unconstitutional (Supp. R. P442, P483).

The Florida Supreme Court affirmed, strictly adhering to the *Cherry* standard (App. F).

Mr. Franqui thereafter sought habeas relief in the United States District Court for the Southern District of Florida. That petition was denied, and an appeal taken to the Eleventh Circuit. The sole issue pending in that appeal was Mr. Franqui's claim of intellectual disability. However, while the appeal was pending, Mr. Franqui filed another Rule 3.851 motion in state court after this Court decided *Hall v. Florida*, 134 S.Ct. 1986 (2014) (PCR-2 at 11-48); in light of that filing the Eleventh Circuit vacated the district court's denial of relief and instructed it to abate the habeas proceedings pending the outcome of the state court litigation.

Shortly after Mr. Franqui's *Hall*-based postconviction motion it was filed, the lower court entered an order summarily denying it (PCR-2 at 75-76). On appeal, the Florida Supreme Court, recognizing *Hall*'s abrogation of the *Cherry* standard, remanded for an evidentiary hearing to allow Mr. Franqui to present evidence on all three prongs of the intellectual disability test (App. D). It also ordered the circuit court to conduct a "holistic" evaluation of Mr. Franqui's intellectual disability claim. 211 So.3d at 1032. Further, it held in abeyance Mr. Franqui's claims, raised in supplemental briefing, that he was entitled to relief pursuant to the then-recently decided cases of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d

40 (Fla. 2016).

Following the remand, an evidentiary hearing took place, after which the circuit court denied relief (App. C). Neglecting to engage in any analysis whatsoever about factual disparities in the lower court's order,[4] the Florida Supreme Court affirmed, conducting only deferential review to determine if the lower court's order was supported by "competent, substantial evidence." 301 So.3d at 154-55. The Court concluded that Mr. Franqui received a sufficient "holistic" evaluation of his intellectual disability claim despite the fact that the lower court did not consider the evidence supporting each of the prongs in tandem or interdependently but rather as independent factors, in isolation from each other. 301 So.3d at 154-55.

The Florida Supreme Court also denied relief on Mr. Franqui's claims under *Hurst v. Florida* and *Hurst v. State*, concluding that "neither case provides a basis for relief because in each of Franqui's cases, a jury unanimously found the existence of an aggravating factor beyond a reasonable doubt." 301 So.3d at 155.

Mr. Franqui's rehearing motion was later denied without comment (App. B).

2. The North Miami Case

On January 3, 1992, a bank was robbed by four gunmen in North Miami,

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[4] For example, the trial court found that Mr. Franqui's true IQ score was a 71 based on an assessment of all of the testing performed over the years. However, Mr. Franqui's briefing in the Florida Supreme Court argued—and the State in is appellate brief did not disagree—that Dr. Gordon Taub had testified that Mr. Franqui's IQ score was most likely "between 70 and 80," a determination with which the State's expert, Dr. Enrique Suarez, did not disagree (2019-R 925, 1263). The trial court, however, simply did not discuss this testimony at all. The Florida Supreme Court likewise failed to address the factual record establishing that Mr. Franqui's IQ score was 70, not 71. It simply deferred to the higher number.

Florida. During the robbery, Officer Steven Bauer, a police officer, was shot and killed (T. 956-60). Mr. Franqui, along with 4 codefendants, was charged with the first-degree murder of Officer Bauer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, third degree grand theft, and burglary (R.1-5).

In May 1994, Mr. Franqui went to trial with two of his codefendants (R.24). Over Mr. Franqui's objection, the State was permitted to introduce statements by the two codefendants with whom he was being jointly tried. Mr. Franqui was convicted (T. 2324-25), and the jury later recommended a death sentence which the judge later imposed (R. 480, 588-601).

On direct appeal, the Florida Supreme Court found that the introduction of one of the codefendant's statements was constitutional error (App. I). 699 So.2d at 1335-36. However, a majority of the justices determined that the error was harmless at the guilt stage, reversing only as to the penalty phase. *Id.* at 1336.[5]

A new jury sentencing hearing occurred in August 1998 (R2.1). The jury returned a 10-2 recommendation for death and the sentencing judge followed the recommendation (R2. 155, 158-75). In his sentencing order, the judge found 3 aggravating circumstances: (1) Mr. Franqui's prior conviction for a capital or violent felony, (2) the murder was committed during the course of a robbery and for pecuniary gain (merged), and (3) the murder was committed to avoid arrest and hinder law

[5] Two justices dissented as to the failure to grant a new trial. 699 So.2d at 1337-38.

enforcement, merged with the victim was a law enforcement officer.

On appeal, the Florida Supreme Court affirmed the death sentence (App. H). The Court did find that the trial judge had "misstated the law" when he "comment[ed] that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances . . ." 804 So.2d at 1193. Over the objection of three dissenters, the Court concluded that Mr. Franqui had not been prejudiced by the error. *Id.*

In 2003, Mr. Franqui sought postconviction relief pursuant to Fla. R. Crim. P. 3.851 (PC-R. 100-161). An evidentiary hearing was conducted, after which the lower court denied relief (PC-R. 290-329). The Florida Supreme Court affirmed the denial of relief (App. G).

Mr. Franqui thereafter sought habeas relief in the United States District Court for the Southern District of Florida. The petition was later denied, and the Eleventh Circuit denied leave to appeal. This Court denied certiorari review. *Franqui v. Florida*, 562 U.S. 1188 (2011).

While Mr. Franqui was litigating additional matters in federal court, he also filed a successive Rule 3.851 motion in state court on November 29, 2010, alleging, *inter alia*, that he was intellectually disabled and entitled to relief under *Atkins v. Virginia* (PC-R2. 47-77). The lower court summarily denied the motion, and on appeal, the Florida Supreme Court affirmed, relying on the strict cut-off of an IQ of 70 for intellectual disability claims it announced in *Cherry* (App. E).

On May 27, 2015, Mr. Franqui filed another Rule 3.851 motion in light of this

Court's decision in *Hall* (PC-R3. 121-44). The motion was denied, but on appeal, the Florida Supreme Court, after consolidating the North Miami case with the Hialeah case, remanded for an evidentiary hearing on Mr. Franqui's intellectual disability claim.[6] As in the Hialeah case, the lower court denied relief following the evidentiary hearing (App. C), and the Florida Supreme Court affirmed the denial of the intellectual disability claim along with the claims based on *Hurst v. Florida* and *Hurst v. State* (App. A). This Petition follows.

B. Postconviction Evidentiary Hearing on Intellectual Disability

Mr. Franqui called two witnesses: Dr. Gordon Taub and Dr. Jethro Toomer. The State called one witness: Dr. Enrique Suarez. Documentary evidence was also introduced, including transcripts from prior proceedings and school records.

Dr. Gordon Taub. Dr. Taub has a Ph.D. in school psychology, an area of psychology dealing with psychometrics and test development, administration, and interpretation (2019-R 401). He has published numerous articles on the efficacy of intelligence testing instruments, including the Wechsler Scales, as well as research on the Flynn effect. He has testified in Florida courts as an expert in the field of intelligence testing, measurement, and development and interpretation of intelligence test scores (*Id.* at 4020-04).

In 2015, Dr. Taub was contacted by one of Mr. Franqui's attorneys to review

[6] As in the Hialeah case, the appellate briefing in the North Miami case also challenged the constitutionality of Mr. Franqui's death sentence in light of the recent decisions in *Hurst v. Florida* and *Hurst v. State*.

the written report authored by Dr. Trudy Block-Garfield in 2003 (*Id.* at 405-06).[7] Dr. Block-Garfield had administered the Stanford-Binet Intelligence Scale IV, and the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) (*Id.*). The WAIS-III has since been revised and the most current version is the WAIS-IV (*Id.* at 407).[8]

Dr. Taub explained that tests are re-normed to formulate a current representation of the entire United States population (*Id.* at 409-10). Mr. Franqui was given the Stanford-Binet IV in 2003 when he was 32 years old; this test was normed in 1985 and therefore his performance was compared to other individuals who were 32 years old in 1985 (*Id.* at 410). The WAIS-III was normed in 1995 and published in 1997, when it was administered to Mr. Franqui, his results were compared to the normative sample's results in 1995 (*Id.* at 411).

As Dr. Taub explained, this "test date/norm date" mismatch is problematic because someone who was 32 in 1990 had difference life experiences than someone who was 32 in 2015 (*Id.*). In fact, each year there has been an increase in population IQ scores by about one third of an IQ point. The average score for someone tested in 2007 on a test that was normed in 2007 would be 100; but, if that test were to be administered in 2017, the average score on that same test would be 103 (*Id.* at 412). In other words, "people are getting bonus IQ points, because the population is scoring higher by one-third of a point every year" (*Id.*). The exact cause for this established

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[7] Mr. Franqui had listed Dr. Block-Garfield as a witness (2019-R 168), but she could not be located to testify at the hearing (*Id.* at 1070, 1088, 1091, 1093).

[8] The WAIS-IV was administered by Dr. Suarez, the State's expert. Mr. Franqui obtained a full-scale IQ score of 75 (2019-R 1265).

fact (often called the Flynn Effect) has not been established, but it is a "very stable construct and the effect is as reliable as any other effect within psychometrics and psychology" (*Id.* at. 414). As of 2014 there have been about 4,000 studies on the Flynn Effect. The Flynn Effect caught the attention of test publishers because it meant that over time the meaning of an IQ result changed. As a result, the test instruments have to be revised and re-normed on a regular basis (*Id.* at 414-16).

The Stanford-Binet IV administered to Mr. Franqui in 2003 was normed in 1985 and published in 1986 (*Id.* at 420). The 18-year difference between 1985 and 2003 is substantial. The increase of one-third of an IQ point per year from the Flynn Effect means that the result in 2003 is a 5.4 (lowered to 5) point overestimate (*Id.* at 421). The observed score of 76 in 2003 translates into a score of 71 in 1985 (*Id.*).

Dr. Block-Garfield also administered the WAIS-III in 2003, on which Mr. Franqui scored a 75 (*Id.* at 426-28). The difference between the date Mr. Franqui was tested (2003) and the norming date (1995) was 8 years (*Id.* at 429). Given the Flynn Effect, the score translates into a 73 IQ in 1995 (*Id.*).

The standard error of measurement [SEM] is the known unreliability in each test's measurement of intelligence (*Id.* at 431). The SEM for the WAIS-III is plus or minus 5 points (*Id.* at 433). This means that with Mr. Franqui's IQ score on the WAIS-III of 75, pursuant to the SEM, there is a confidence level of plus or minus 5 points, i.e. the test results shows an IQ **between 70 and 80**.

This range does not take into account the Flynn Effect. Under the Flynn Effect, Mr. Franqui's score of 75 translates into a 73 when the test was normed (Mr.

Franqui's observed score was 75; a 2-point reduction for the Flynn Effect, results in a score of 73). When factoring in the SEM, Mr. Franqui's true IQ on the WAIS-III was **between 68 and 78** (*Id.* at 435). These calculations are considered the best practice for evaluating a capital defendant's ID because "no one's life should depend on the date that a test is normed" (*Id.*).

The State asked Dr. Taub about an IQ score of 83 that Mr. Franqui obtained on a WAIS-R given by Dr. Jethro Toomer in 1993 (*Id.* at 475). Dr. Taub agreed that the 83 would actually be 78 if the Flynn Effect were taken into account (*Id.* at 476).

As to the WAIS-IV test administered by the State's expert, Dr. Suarez, Mr. Franqui's full-scale IQ score was 75 (*Id.* at 477). Dr. Taub noted that because the WAIS-IV was normed in 2007, this results in a one-point Flynn Effect adjustment, as the prosecutor even noted (*Id.* at 477-78). Thus, the result on the test given by Dr. Suarez was 74 when adjusted for the Flynn Effect (*Id.* at 480). This meant that the entire range of the scores obtained by Mr. Franqui on the tests administered to him over the years, corrected for the Flynn Effect, was consistent (*Id.* at 514-15).

Dr. Jethro Toomer. Dr. Toomer is a clinical and forensic psychologist and is board certified in organizational and industrial psychology (*Id.* at 522-23).[9] He was retained in March 1992 to examine Mr. Franqui in anticipation of possible penalty phase testimony (*Id.* at 526). He prepared a report on March 24, 1993, and later

[9] The Eleventh Circuit Court of Appeals describes Dr. Toomer as "imminently [sic] qualified." *Mendoza v. Fla. Dep't. of Corrections*, 761 F.3d 1213, 1222 (11th Cir. 2014).

testified at the penalty phase in the Hialeah case (*Id.* at 527).

Dr. Toomer saw Mr. Franqui on 3 occasions in 1992 and 1993. He gave him a number of psychological tests including the Revised Beta Examination and a WAIS-R, a standardized test normed in 1978 (*Id.* at 529-30).

Dr. Toomer interviewed Mr. Franqui and his uncle, Mario Franqui Suarez (*Id.* at 533-35). Mr. Suarez told Dr. Toomer that Mr. Franqui's father was unknown, and his mother was generally absent (*Id.* at 536).[10] Mr. Suarez said that his nephew had trouble in school in Cuba and those troubles continued when he arrived in Miami, where he manifested additional difficulties in terms of functional capacity relating to education, interpersonal relationships, and isolation from family members (*Id.* at 537-38). Ultimately, Mr. Franqui dropped out of school (*Id.* at 538-39).

In diagnosing intellectual disability, a holistic evaluation of three prongs is undertaken: (1) IQ test, generally a 70 to 75, plus or minus 5 (the SEM), (2) adaptive functioning deficits, and (3) onset prior to the age of 18 (*Id.* at 541). Mr. Franqui had a score of 60 on the Revised Beta, which relies primarily on the test subject manipulating objects and symbols. It is a test used on individuals where there may be some question about fluency in English or where English is not the individual's native tongue (*Id.* at 544). In contrast to the Beta, the WAIS-R, on which Mr. Franqui obtained a full-scale score of 83, is broader in terms of areas identified in functioning and verbal skills (*Id.* at 545).

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[10] Mr. Suarez testified at the penalty phase in the Hialeah case and his testimony was introduced at the evidentiary hearing (2019-R 252-91; 623-24).

Dr. Toomer explained that the Flynn Effect is the observed increase in IQ scores on a specific IQ test that occurs over time. It is the result of a number of factors (*Id.*). Dr. Toomer has no reason to dispute Dr. Taub's calculation that the full scale 83 on the WAIS-R administered in 1993 should be adjusted due to the Flynn Effect to a 78 (*Id.* at 547).

Adaptive functioning refers to a collection of conceptual, social, and practical skills that an individual develops over time to function adequately in the environment and culture in which they find themselves (*Id.* at 549). Each person has strengths and weaknesses, and one looks to deficits in adaptive functioning as opposed to strengths or what the person can do (*Id.*). Thus, a person with intellectual disability is not always "completely helpless, babbling without comprehension" but rather can drive and get a driver's license, maintain certain kinds of employment, write letters, plan crimes[11], complain when they do not feel well, and seek medical attention (*Id.* at 551-52).

Deficits in two of the ten domains of adaptive functioning is the marker for intellectual disability (*Id.* at 556). The ten domains break down into in three broad categories: conceptual, social, and practical (*Id.*). Dr. Toomer emphasized that "the focus is not on what the individual can maximally achieve, but it's on the limitations and what this person can't achieve within that environment" (*Id.* at 557). Persons with intellectual disability function most effectively when in a regimented structured

[11] In the Hialeah and North Miami cases, Mr. Franqui had co-defendants; he did not act (or plan) alone (2019-R 626).

environment (*Id.* at 553-54).

Based on Mr. Franqui's uncle's accounting of Leonardo's troubles in school both in Cuba and after his arrival in the United States at the age of 9 or 10, the onset of his low mental functioning was before Leonardo reached 18 years of age, the third prong of the test for intellectual disability (*Id.* at 558).[12] Moreover, the subpar performance and difficulties in school reflected deficits in the conceptual domain of adaptive functioning (*Id.*).[13]

Childhood abandonment and other domestic issues are factors to consider when looking at the social and practical domains (*Id.* at 559). Disarray in the home or other domestic difficulties precluded Mr. Franqui from progressing in the area of

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[12] Mr. Suarez was the brother of Leonardo's father, Fernando, although Leonardo did not find out until the day before the penalty phase that Fernando was not his biological father (T. Pen. Phase, No. 92-6089-B at 1583). Leonardo's mother was named Syria Rivera, who he (Suarez) met in Cuba when she was pregnant with his nephew Leonardo (*Id.* at 1584). Syria was unstable and "a person who you can notice that is not normal" (*Id.* at 1587). She was a "good worker," but was also someone who "laughs at anything" and "walks tripping on things" (*Id.*). Syria had a second child, Fernando Jr., whose biological father was Fernando (*Id.* at 1588). Fernando Jr. was born with severe physical problems. When Leonardo was about 2 years old, his mother took Fernando Jr. and left the house and the family behind (*Id.*). Fernando Jr. was brought back to live with the family about a year later but without Syria (*Id.* at 1590). Leonardo was never properly attended to, was a "slow child, somewhat retarded to understand things" (*Id.* at 1591). "He was very slow always and in school the same" (*Id.*). Leonardo came to the United States in the 1980s with some family members including his brother; however, after a surgical procedure, Fernando Jr. passed away about a year after arriving in Miami (*Id.* at 1593). Leonardo would later do some work for us uncle at an auto tire shop (*Id.* at 1598). He always considered his nephew to be "retarded" and "slow in understanding" (*Id.* at 1600, 1609).

[13] School records show not only Mr. Franqui's poor academic achievement but confirmed his placement in special remedial classes *in Spanish*, classes in which he achieved unsatisfactory grades (2019-R 1310-13).

learning and obtaining the skills necessary for adequate functioning (*Id.*). Mr. Franqui's school records noted how his tumultuous family life was adversely impacting on his adjustment and functioning in the school (*Id.* at 559-60). This is evidence of deficits in adaptive functioning extant prior to the age of 18 (*Id.* at 560). Furthermore, the death of Mr. Franqui's younger brother was a trauma that can contribute to deficits in adaptive functioning. Dr. Toomer observed, "it's not just the trauma, it's the issue of whether the trauma occurs, early onset versus in terms of how individuals manage a trauma" (*Id.*). In other words, the younger the individual is who suffers the trauma, the more pronounced the symptomology of maladaptive attempts at coping (*Id.* at 561). Indeed, Dr. Toomer noted that Leonardo's uncle had testified that Leonardo became increasingly isolated and his behavior more erratic after his younger sibling's death because Leonardo's father had abandoned him and embarked on his own manner of grieving through substance abuse (*Id.*).

The time leading to Mr. Franqui dropping out of school corresponded with the disruption and disarray in his home family life in the wake of his brother's death (*Id.*). This period of time was marked by a number of factors including learning that his father was unknown, the abandonment by his mother, being shuffled between different homes of different family members, and the sharp cultural transition from moving from Cuba to the United States; "all of those kinds of things impacted on his – his impaired functioning over time in those areas" (*Id.* at 561-62).

Individuals with intellectual disability can have a significant other, maintain a romantic relationship, have children, and work (*Id.* at 562). It is not just the ability

to form a continuous a relationship but rather "the quality of his overall interpersonal relationships, not just with a particular individual" like Mr. Franqui's relationship with Vivian Gonzalez (*Id.* at 580). There was evidence that Mr. Franqui became isolated, removed himself from familiar relationships, and would sometimes look confused (*Id.*).[14] While Mr. Franqui did work, his menial jobs did not require abstract reasoning, were repetitive in nature, and comprised "basic task-oriented kinds of jobs" (*Id.* at 562).

At Mr. Franqui's 1993 penalty phase, Dr. Toomer had opined that Mr. Franqui functioned in the "mentally retarded" range. At the 2017 evidentiary hearing, he testified that his opinion has not changed even given the advancements in the understanding and diagnosis of ID (*Id.* at 563).

The State questioned Dr. Toomer repeatedly about Mr. Franqui's possession of a driver's license (*id.* at 583-84), and about grievances he had purportedly written in prison (*Id.* at 583). Dr. Toomer said that there was no evidence that Mr. Franqui wrote the grievance to which the prosecutor was referring or whether Mr. Franqui had assistance in writing it if one assumed that Mr. Franqui put the written words that appeared (*Id.* at 583-84). Dr. Toomer explained: "You say he's done this, but there's no basis for that, so I have no way of knowing that" (*Id.* at 584).

Dr. Toomer was asked if there was any evidence that Mr. Franqui "needed

[14] Vivian Gonzalez's father, Alberto Lopez, testified in a pretrial deposition that "every once in a while, Mr. Franqui looked like kind of childish, like a child, a boy, a kid" (2019-R 241). He would race little scooters around "like if he was a kid" (*Id.*). Mr. Lopez stated "I'm not crazy. It shocked me" (*Id.* at 241-42).

assistance in any way in daily activity" (*Id.* at 585). Dr. Toomer responded: "whether you need assistance or not, has nothing to do with intellectual disability. . . . The issue is whether they can do them effectively, whether they can function effectively" (*Id.* at 585-86). The prosecutor then asked about Mr. Franqui's ability to steal cars effectively "because they drove," to which Dr. Toomer responded that that was not an example of functioning effectively in society (*Id.* at 586). When asked about Mr. Franqui dropping out of school, Dr. Toomer replied that the school records revealed trauma in the home situation and erratic functioning, and that perhaps those were the reasons underlying why Mr. Franqui became a dropout (*Id.* at 589). The prosecutor retorted that just because Mr. Franqui dropped out of school "doesn't make him ***stupid or dumb*** or mentally disabled" (*Id.*) (emphasis added).

Dr. Enrique M. Suarez. Dr. Suarez is a licensed psychologist with his primary business being the field of neuropsychology (2019-R 1203). He is not board certified in any field (*Id.* at 1205). At the State's behest, Dr. Suarez evaluated Mr. Franqui on August 31 and September 4, 2009 (*Id.*). He also reviewed background materials and interviewed correctional officers (*Id.* at 1216).

Dr. Suarez testified that Mr. Franqui's accounts of his family and work history were consistent with what he had told Dr. Toomer and with Mr. Franqui's uncle's recollections (Id. at 1219-28). Mr. Franqui told Dr. Suarez that he had been placed in special classes in Cuba (*Id.* at 1223). However, Dr. Suarez claimed that school records

did not reflect placement in special education class (*Id.* at 1226).[15]

Dr. Suarez said that Mr. Franqui told him he had a driver's license, explaining "it's very statistically infrequent that you find someone with [intellectual disability] that actually has a driver license" because "it involves a lot of behaviors that are implicate[d] in adaptive functioning of people with even mild mental retardation, or intellectual disability would find very difficult" (*Id.* at 1229). Dr. Suarez did admit, however, that "a lot of people get help with" the written driver's test, including having another person read the questions to you;[16] but he insisted that "that's still, you know, that's a big challenge for people with intellectual disability" (*Id.*).[17]

Dr. Suarez's understanding of the Flynn Effect was that it was premised merely on the obsolescence of a testing instrument rather than describing what was observed, the increase in IQ scores on a test instrument over time (*Id.* at 1253-54). Ultimately, he conceded that the Flynn Effect "was observed, and it was there, it was measured" (*Id.* at 1254).

As to Mr. Franqui's score of 83 on the WAIS-R performed by Dr. Toomer in 1993, the Flynn Effect adjusted score would be 78 without also considering the SEM (plus or minus 5 points) (*Id.* at 1258). In Dr. Suarez's view, there is no SEM on a score

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[15] This was incorrect, as was revealed in Dr. Suarez's cross-examination.

[16] The State did not ask Dr. Suarez if this occurred when Mr. Franqui took the written test. And Dr. Suarez did not ask Mr. Franqui if he had to take the test on multiple occasions.

[17] Dr. Suarez's understanding is wrong. "[M]ildly intellectually disabled individuals can obtain driver's licenses, fill out job applications, and obtain and maintain employment." *Pruitt v. Neal*, 788 F.3d 248, 268 (7th Cir. 2015).

already adjusted by the Flynn Effect (*Id.* at 1260-62). Dr. Suarez does not believe that mental health experts should make Flynn Effect adjustments to an IQ score. He believes the better approach is give the court the observed score, and then advise the Court of the Flynn Effect. He would leave to the court to decide what to do with the information.

Mr. Franqui obtained a full-scale score of 75 on the WAIS-IV that Dr. Suarez administered (*Id.* at 1264-65). Considering the SEM, the range would be 71-80 (*Id.* at 1266).

Dr. Suarez also did telephonic interviews of death row guards (*Id.* at 1280). One guard said that Mr. Franqui walks, does pull ups, and dips on the parallel bars in the recreation yard (*Id.* at 1280-81). He speaks with Mr. Franqui in English. The guard told Dr. Suarez that Mr. Franqui plays card games and has books and magazines (*Id.*). Mr. Franqui was also capable of painting the floor and walls of his cell using two colors, grey and beige (*Id.* at 1282). Another guard told Dr. Suarez that Mr. Franqui talks to other inmates about their cases and exchanges legal materials with them (*Id.*). Yet another guard, who had only been assigned to death row for about 6 months, told Dr. Suarez that Mr. Franqui plays basketball, checkers, chess and cards (*Id.* at 1284).

Dr. Suarez saw nothing to suggest that before reaching the age of 18, Mr. Franqui "ever had either a diagnosis of, or any type of support, because he was unable to function on his own" (*Id.* at 1286).[18] He said that there were no deficits in adaptive

[18] This is not the proper analysis. *Oats v. State*, 181 So. 3d 457, 469 (Fla. 2015)

functioning, "especially in view of my interviews with the officers and what he told me about his life" (*Id.*). Mr. Franqui had friends and accomplices although "they didn't always do very nice and positive things in the community" (*Id.* at 1287). He had a wife and children and cars (*Id.*).[19] Mr. Franqui had appropriate hygiene, "he showers by himself" and "gets his own hair cut" (*Id.* at 1288). Mr. Franqui "was able to pay his rent"[20] and maintain his prison canteen account (*Id.*). In short, Dr. Suarez did not believe that Mr. Franqui had any adaptive deficits "or low intelligence at all" (*Id.* at 1289).

Dr. Suarez was asked about Mr. Franqui's school records which he had said he had thoroughly reviewed (*Id.* at 1309-10). Some of the school records, which had been introduced into evidence at the penalty phase in the Hialeah case, contained an entry "SR" (*Id.* at 1310). Dr. Suarez did not know "what that is." When pushed to carefully review the school record, he discovered that the entry "SR" stood for "Satisfactory Progress in **Remedial Basic Skills**" (*Id.*) (emphasis added). Another entry on the school records relating to the "SR" explained:

Students who are not achieving within the range appropriate or

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(statute only requires a showing that ID "manifested" prior to age 18; "[a]ccepting the position that 'manifested' equates to 'diagnosed' would render the first two prongs . . . moot").

[19] The State saw apparent significance to Mr. Franqui obtaining cars (2019-R 1229-31; 1287). But Dr. Suarez admitted that Mr. Franqui's uncle gave him the first car, and his cousin gave him the second car. The other cars were simply obtained as a result of trade-ins (*Id.* at 1312-13).

[20] However, as Dr. Suarez later conceded, Mr. Franqui's uncle actually deducted the rent from his paycheck; and the cottage where Mr. Franqui lived with Ms. Gonzalez was owned by a friend of Ms. Gonzalez's father (2019-R 1309).

> acceptable for their grade level may not meet the Dade County Public School's basic skill standards for promotion will receive a grade of satisfactory, remedial, or unsatisfactory remedial.

(*Id.* at 1310-11). This record regarding Mr. Franqui performance when he was in the 5th grade (*Id.* at 1311). Dr. Suarez opined that "that was probably right after he came from Cuba" before fully reviewing Mr. Franqui's school records from the 6th grade (*not* "right after" Mr. Franqui came from Cuba) which had several entries of "U.R." (*Id.*). The 6th grade record explained that "U.R." signified "Unsatisfactory progress in remedial basic skills program" (*Id.*). There was also the following explanation:

> Students who are not achieving within the range of appropriate or acceptable for their grade level and may not meet Dade County Public Schools basic skill standards for promotion will receive a grade of satisfactory remedial, or unsatisfactory remedial.

(*Id.*). Another school record from 1986 said that Mr. Franqui's report card was being withheld because "student owes for textbook." There was a notation that a notice mailed to the address for Mr. Franqui was returned to the school (*Id.* at 1312).

Ultimately, Dr. Suarez agreed that the 75 obtained by Mr. Franqui on the WAIS-IV in 2009, the 75 obtained on the WAIS-III given by Dr. Block-Garfield in 2003, and the 76 obtained on the Stanford-Binet given by Dr. Block-Garfield in 2003 were "all in the same area" of consistency (*Id.* at 1350).

C. The Florida Supreme Court's 2020 Opinion

1. Intellectual Disability

The Florida Supreme Court explained that, in its view, this Court did three things in *Hall*. First, it held unconstitutional Florida's strict IQ test score cutoff of 70. 301 So.3d at 154. Second, it mandated that courts take into account the standard

error of measurement [SEM] when assessing the subaverage intellectual functioning prong. *Id.* And third, it held that when a defendant's score falls within the test score's SEM, the defendant must be allowed to present additional evidence of intellectual disability, including evidence about adaptive deficits. *Id.*

Based on this strict interpretation of *Hall*, the Florida Supreme Court rejected Mr. Franqui's claim that the lower court had not performed the requisite "holistic" analysis of all the evidence presented to support his claim of intellectual disability because "the circuit court evaluated each of the three intellectual disability prongs." *Id.* at 155. It went on to address the manner in which the lower court "evaluated" each of the three prongs, agreeing with its prior precedent that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Id.* at 154 (quoting *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016) (citation omitted)). Because "competent substantial evidence" supported the lower court's conclusions as to each of the three prongs, the Florida Supreme Court affirmed, noting that its conclusion did not contravene this Court's decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017), because the trial court "considered" other evidence of intellectual disability and "evaluated the second and third prongs of the intellectual disability analysis." 301 So.3d at 155.

2. *Hurst v. Florida* and *Hurst v. State*

In his briefing to the Florida Supreme Court, Mr. Franqui also contended that he was entitled to sentencing relief in both cases for a variety of reasons grounded in the Sixth, Eighth, and Fourteenth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Specifically, he argued that in *Hurst v. State*, the Florida Supreme Court's

opinion on remand from this Court, that court held that the statutorily defined facts "necessary for the jury to essentially convict a defendant of capital murder . . . are also elements that must be found unanimously by the jury." 202 So.3d at 53-54. Because judicial decisions construing substantive criminal law or identifying the elements of a criminal offense is substantive law, not a procedural rule, and should apply to Mr. Franqui.

However, between the time that Mr. Franqui briefed his case and the time the Florida Supreme Court decided it, a newly constituted Florida Supreme Court receded from *Hurst v. State*. *See State v. Poole,* 297 So.3d 487 (Fla. 2020). In the Florida Supreme Court's view, neither *Hurst v. Florida* nor *Hurst v. State* provided a basis for relief because "in each of Franqui's cases, a jury unanimously found the existence of an aggravating factor beyond a reasonable doubt." 301 So.3d at 155 (citing *Poole*).[21] Moreover, the Florida Supreme Court determined that a jury is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. *Id.* (citing *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020)). This was despite the fact that before the relevant sentencing range included a death sentence which could be imposed on a defendant convicted of first degree murder, the judge "shall set forth in

[21] In the Hialeah case, Mr. Franqui had also been convicted of armed robbery, which was found as an aggravating factor. In the North Miami case, Mr. Franqui was also convicted of robbery, which also was found as an aggravating factor. In the Florida Supreme Court's view, "[t]hese findings satisfy the requirements of *Hurst v. Florida* and *Hurst v. State*." 301 So.3d at 156.

writing its findings upon which the sentence of death is based **as to the facts**:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

§ 921.141(1)–(3), Fla. Stat. (2012) (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S CRAMPED UNDERSTANDING OF THE KIND OF "HOLISTIC EVALUATION" REQUIRED TO EVALUTE AN INTELLECTUAL DISABILITY CLAIM DOES NOT COMPORT WITH *HALL V. FLORIDA* OR THE EIGHTH AMENDMENT BECAUSE IT FAILS TO MANDATE AN INTERRELATED ANALYSIS OF THE THREE PRONGS OF THE INTELLECTUAL DISABILITY ANALYSIS.

In *Hall v. Florida*, 134 S.Ct. 1986 (2014), this Court explained that the test for assessing a defendant's intellectual disability (and thus his or her eligibility to be executed consistent with the Eighth Amendment) is a "conjunctive and interrelated assessment" because "a person with an IQ score above 70 may have such severe adaptive problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." 134 S.Ct. at 2001. In remanding Mr. Franqui's case for an evidentiary hearing, the Florida Supreme Court directed the lower court to conduct a "holistic" evaluation of Mr. Franqui's intellectual disability claim as mandated by *Hall* and by its own decision in *Oats v. State*, 181 So. 3d 457 (Fla. 2015). *See also Brumfield v. Cain*, 135 S.Ct. 2269, 2278-82 (2015). A "holistic" analysis demands that "all three prongs of the intellectual disability test be considered *in tandem*" because "the *conjunctive and interrelated nature of the test* requires no single factor be considered dispositive." *Walls v. State*, 213 So. 3d 340, 346-47 (Fla.

2016) (emphasis added) (citing *Oats*, 181 So. 3d at 459, 467) (receded from on other grounds in *Phillips v. State*, 299 So.3d 1013 (Fla. 2020)).

The trial court in Mr. Franqui's case did purport to *address* the three prongs of the intellectual disability test, as the Florida Supreme Court noted. 301 So.3d at 155 (discussing how the trial court "considered" each of the three prongs). But it did not *perform* a "holistic" analysis; nor did the Florida Supreme Court. Rather, the trial assessed each prong *independently* and found that because Mr. Franqui did not prove each prong by clear and convincing evidence, he was not intellectually disabled, an analysis the Florida Supreme Court endorsed. Merely addressing the three prongs independently is not a "holistic" evaluation, as this Court explicitly observed in *Hall*. 134 S.Ct. at 2001 ("a person with an IQ score above 70 may have such severe adaptive problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score").

The most troublesome aspect of the Florida Supreme Court's view of a "holistic" analysis is its insistence that an evaluation of each prong, independently of each other, *is a "holistic" evaluation*. 301 So.3d at 154 ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled") (quoting *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016) (*citing Nixon v. State*, 2 So.3d 137, 142 (Fla. 2009)). This is essentially a repackaged pre-*Hall* analysis of intellectual disability claims and permits a court to outright reject an intellectual disability claim solely based on an IQ score of above 70. Allowing a defendant to present, and requiring a court to consider, additional evidence on the other prongs

when an IQ score is within the range of intellectual disability is meaningless if a court does not evaluate that evidence *together* when evaluating all three prongs.[22]

To a degree, the trial court in Mr. Franqui's case may have been confused by some seemingly conflicting language used by the Florida Supreme Court when discussing "holistic" evaluations. For example, the trial court determined that Mr. Franqui did not establish the first prong because, in its view, the lowest score he achieved was a 71, which exceeded a score of 70 (2019-R 928). This conclusion appears to be drawn from opinions issued by the Florida Supreme Court (both pre-*Hall* and post-*Hall*). *See, e.g. Wright v. State*, 213 So. 3d 881, 885 (Fla. 2017) ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled"); *accord Salazar; Nixon.*

But a "holistic" analysis requires consideration of the first prong in an interrelated fashion ***along with*** the evidence as to the other two prongs. *See Hall*, 134 S.Ct. at 1994 ("the medical community accepts that all of this evidence [on all three

[22] The Florida Supreme Court also insisted that *Moore v. Texas*, 137 S.Ct. 1039 (2017), merely requires a court to "consider other evidence" and "evaluate" the other prongs of the ID test. 301 So.3d at 155. But this begs the question. If a "holistic" analysis can be performed prong by prong rather than in a conjunctive interrelated sense and that failure of proof on one prong is fatal to the entire analysis, 301 So.3d at 155, then what was the point of mandating a court to evaluate the other two prongs in an interdependent fashion, as *Hall* and *Moore* require? Both of those cases stand for the proposition that one prong, standing alone, does not provide a medically sound (or constitutional) intellectual disability analysis. "Considering other evidence" and "evaluating" the other prongs does not mean paying lip service to the other prongs if the first one is not met; rather, in order for these additional steps to have any meaning, a court must, in a real and meaningful sense, "consider" evidence as to the other prongs and "evaluate" the other prongs *all together.* This has still yet to happen in Mr. Franqui's case.

prongs] can be probative of intellectual disability, including for individuals who have an IQ test score above 70"); *id.* at 2001 (ID test is a "conjunctive and interrelated assessment" and "a person with an IQ score above 70 may have such severe adaptive problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). The Florida Supreme Court in its 2015 decision in *Oats* correctly noted that "these factors are interdependent" and that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." *Oats*, 181 So. 3d at 467-68. The subsequent decisions in *Wright* and *Salazar* do not reference the language in *Oats* and have sowed confusion, confusion which the Florida Supreme Court did not resolve in Mr. Franqui's case. Rather, it "reject[ed] Franqui's argument that this Court should recede from *Salazar*." 301 So.3d at 155. This Court should grant certiorari to the Florida Supreme Court and resolve this confusion.

Mr. Franqui's case is a perfect example of how the confusion in the Florida courts directly affects the outcome of a case. The trial court found that Mr. Franqui's average full-scale IQ was 71, one point above the 70 score; but it did not assess that 71 in conjunction with the other evidence presented on the other prongs, evidence which may well have pushed the court to give less weight to the 71 number. By its analysis in Mr. Franqui's case the Florida Supreme Court is seemingly reverting to pre-*Hall* jurisprudence and not requiring courts to conduct interdependent evaluations of each of the ID prongs. The IQ number in Florida once again becomes dispositive as it was pre-*Hall*. The Florida Supreme Court credited the lower court's

"finding" that Mr. Franqui's lowest IQ score on a recognized testing instrument was 71—one point above the 70 cut off for two standard deviations below the norm of 100—while at the same time overlooking the actual record indicating that Mr. Franqui's lowest score could be a 70 *and then* failing to evaluate the first prong along with the other two in reaching a holistic conclusion about the true state of Mr. Franqui's intellectual. This is a pre-*Hall* analysis in the guise of a post-*Hall* analysis and calls to mind Freddie Hall. *Hall*, 134 S.Ct. at 2001 ("Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test"). Mr. Hall is no longer under a sentence of death because a proper holistic evaluation was performed. *See Hall v. State,* 201 So.3d 628 (Fla. 2016).

In addressing the second prong (adaptive deficits), the Florida Supreme Court devoted one short paragraph, consisting of three sentences, to a summary conclusion that the circuit court's determination that Mr. Franqui did not meet the second prong of the IQ test was supported by competent substantial evidence. 301 So.3d at 156 This is a perfect example of the point Mr. Franqui was making above; the evidence of this second prong was never considered in an *interrelated fashion* with the fact that Mr. Franqui's score on the first prong was, at best a 70, at worst a 71. This is the exact reason why a holistic evaluation is required by the Constitution: "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." *Oats*, 181 So.3d at 467-68.

To make matters worse, the Florida Supreme Court baldly deferred to the the lower court's determination that "no evidence was presented regarding the

Defendant's preschool experience" (2019-R 929). The record reveals **ample unrefuted evidence**; just because the lower court ignored it does not mean it did not exist. Expert and documentary evidence presented at the evidentiary hearing established that Mr. Franqui had been placed in special classes in Cuba before he arrived in the United States as a young child; that he had troubles in school while in Cuba, which continued when he arrived in Miami by the manifestation of difficulties in terms of functional capacity relating to education, interpersonal relationships, and isolation from other family members (2019-R 537, 538, 1219, 1223). How can it be that there is competent and substantial evidence to support this "finding" when the lower court did not review the record, which revealed the testimony of Mr. Franqui's uncle, about extensive relevant information about the second prong? For example, Mr. Franqui's uncle testified that Leonardo's mother was unstable, a "person who you can notice is not normal" (T. Pen. Phase, No. 92-6089-B at 1583). Mr. Franqui's uncle provided testimony that is in this record that Leonardo was a "a slow child, somewhat retarded to understand things, "he was "very slow always and in school the same" (*Id.* at 1591). Mr. Franqui's uncle considered his nephew to be "retarded" and "slow in understanding" (*Id.*). This testimony was confirmed by Mr. Franqui's Miami school records, which revealed that he was placed in special remedial classes as a child and was held back a year; these records were addressed extensively below by the parties, mentioned by the experts, and in fact were exhibits introduced at the original penalty phase during the Hialeah case. Yet the lower court wrote that there was no evidence that Mr. Franqui was in special classes. This reflects a wholesale failure by the lower

court to meaningfully evaluate the second prong, and its determination that the second prong was not met is entitled to no deference t whatsoever as it was premised on a largely fictional account of the record about Mr. Franqui's upbringing.

Finally, as to the third prong, the Florida Supreme Court repeated what the lower court wrote when rejecting this prong, namely, that Mr. Franqui functioned normally in society prior to his incarceration and has shown no adaptive deficits while incarcerated. 301 So.3d at 155. This determination reflects a failure of meaningful appellate review. *Compare Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all"). All that is required to satisfy the third prong is "evidence of the disability during the developmental period." *Oats*, 181 So.3d at 468. *See also Brumfield v. Cain*, 135 S.Ct. 2269, 2282 (2015) (third prong simply requires defendant to demonstrate that his "intellectual deficiencies manifested while he was in the 'developmental stage' – that is, before he reached adulthood"). The legal issue is decidedly not, as the lower court determined, if Mr. Franqui has "concurrent" deficits after the developmental stage of his life, "suffered from any adaptive deficits as an adult," or whether he has exhibited any deficits "in society" or "while incarcerated" (2019-R 940-41). In addressing the third prong, neither the lower court nor the Florida Supreme Court addressed Mr. Franqui's school records. No mention is made of the fact that he was placed in special remedial classes (in Spanish no less). No mention is made of the fact that he was held back a year in school. No mention is made of the fact that he was placed in special classes as

a child in Cuba.

In conclusion, Mr. Franqui submits that certiorari review is warranted in order to review the Florida Supreme Court's decision in this case upholding the putative "holistic" evaluation of his intellectual disability. Its decision contravenes the letter and spirit of *Hall* and the Eighth Amendment.

II. THE FLORIDA SUPREME COURT'S ACTION IN CONSTRUING ITS DEATH PENALTY STATUTE IN *HURST V. STATE* TO SET FORTH ELEMENTS IN CAPITAL MURDER IN 2016 ONLY TO RECEDE FROM THAT STATUTORY CONSTRUCTION IN 2020 RAISES IMPORTANT CONSTITUTIONAL ISSUES WARRANTING RESOLUTION BY THIS COURT.

In his briefing to the Florida Supreme Court, Mr. Franqui argued that the Florida Supreme Court, in *Hurst v. State*, construed §941.141, Florida Statutes. Under the Eighth and Fourteenth Amendments, the resulting construction of that statute constitutes substantive law which governs both of his capital cases. The Florida Supreme Court rejected Mr. Franqui's claim on the merits, relying on its 2020 decision in *State v. Pooler*, where it had receded in part from *Hurst v. State*. 301 So.3d at 155-56.

A. The Florida Supreme Court's decision in *Hurst v. State* constitutes substantive law applicable at the time of Mr. Franqui's offense

The Florida Supreme Court's construction of § 921.141 in *Hurst v. State* constitutes substantive law, and due process demands that the law provided thereby was the law in 1992, when the State arrested and charged Mr. Franqui with first degree murder in both the Hialeah and North Miami cases.

In *Hurst v. State*, the Florida Supreme Court construed the version of Fla.

Stat. § 921.141 that was in effect from the statute's enactment in 1973 until it was changed in 2016. It identified the requisite facts a judge was required to find in order the range of punishment available on a first degree murder conviction to be increased to include death as a sentence. *Id.* at 53. The court explained,

> [The imposition of . . . death . . . in Florida has in the past **required, and continues to require, additional factfinding** that now must be **conducted by the jury**. As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308[, 313] . . . (1991), under Florida law, "**The death penalty may be imposed only where** *sufficient aggravating circumstances* **exist that** *outweigh* **mitigating circumstances**. . . ." (quoting § 921.141(3), Fla. Stat. (1985)). Thus, **before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances**.

Id. (Emphasis in italics in original) (all other emphasis added).

Importantly, the Florida Supreme Court explained that because the statutorily defined facts were necessary to increase the range of punishment to include death, proof of those facts was necessary "to essentially convict a defendant of capital murder." *Hurst v. State*, 202 So. 3d at 53. This meant that the statutorily identified facts were, in essence, elements of a higher degree of murder. In turn that meant that under the Due Process Clause, the State had the burden of proving those statutorily identified facts beyond a reasonable doubt. The Florida Supreme Court noted,

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing . . . death, the jury in a capital case must unanimously

> and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the [aggravators] are sufficient to impose death, unanimously find that the [aggravators] outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds [aggravators] were proven, were sufficient to impose death, and that they outweigh the [mitigators].

Id. at 57–58.

The statutory construction contained in *Hurst v. State* constitutes Florida's substantive law. *Hurst v. State* read the plain language of the statute identifying the required factual determination and concluded that the factual determinations were essentially elements of a higher degree of murder which pursuant to the Sixth Amendment was subject to right to a jury trial, and pursuant to the Due Process Clause had to be proved by the State beyond a reasonable doubt. When a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law and dates to the statute's enactment. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . because our decision in *Bailey v. United States*, 516 U.S. 137 . . . (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted."); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

The Fourteenth Amendment requires that this substantive law govern the law

that existed at the time of the offense. The Florida Supreme Court's statutory construction of Fla. Stat. § 921.141 in *Hurst v. State* constitutes substantive criminal law. The court construed the meaning of the statute back to, at least, the date of the criminal offense. In Mr. Franqui's cases, that date would be 1992. *See* Savings Clause of the Florida Constitution, Art. X, § 9 ("Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal."). So—as substantive law—*Hurst v. State* was not subject to the retroactivity analysis of either *Witt*, 387 So. 2d 922, or *Teague v. Lane*, 489 U.S. 288 (1989).

After *Hurst v. State*, the Florida Legislature made changes to § 921.141 to comply with the judicial ruling. When doing so, the Legislature did not express any disagreement with the Florida Supreme Court's reading of the statute and it conclusion that the aggravating factors had to be found sufficient as a matter of fact before a death sentence could be authorized as an appropriate punishment. This shows that the Florida Legislature believed that the Florida Supreme Court correctly read § 921.141 in *Hurst v. State*. *See Fla. Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) ("The Legislature is presumed to know the judicial constructions of a law when amending that law, and . . . is presumed to have adopted prior judicial constructions . . . unless a contrary intention is expressed.").

Under *Fiore v. White*, 531 U.S. 225, 228–29 (2001), the statutory construction in *Hurst v. State*—based on the plain language of the statute—dated back to the enactment of the statute. The Fourteenth Amendment forbids the State to convict a defendant of a crime without first proving the elements of that crime beyond a

reasonable doubt. *See also, e.g., Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (courts should not only strive to determine whether a law has changed, but when it changed, or came to be enacted). Therefore, pursuant to the Fourteenth Amendment, the statutory construction set forth in *Hurst v. State* must have been the governing law in 1992, when the offenses at issue here occurred. *See, e.g., Fiore*, 531 U.S. 225 (A state court's construction of the state's statutory law is binding even on the Supreme Court of the United States).

B. In *State v. Poole*, the Florida Supreme Court retroactively rejected its construction of the statute set out in *Hurst v. State*, and thereby retroactively changed Florida's substantive criminal law.

In *State v. Poole*, the Florida Supreme Court revisited its 2016 decision in *Hurst v. State* and announced it was receding from *Hurst v. State*, stating "our Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously." *Poole* did not dispute that § 921.141 required these findings to be made before a death sentence could be imposed. Instead, it indicated that the determinations that the statute required were sentencing factors and not elements as *Hurst v. State* had held. Whether a required finding is an element of the offense or a sentencing factor was held to be a matter constitutional law in *Apprendi v. New Jersey.* But changing an element into a sentencing factor results in a change in the substantive law.

Normally, due process precludes a court from unexpectedly changing a criminal statute's construction and applying the change retroactively, something that state legislatures cannot do by virtue of the Ex Post Facto Clause. *Bouie v. City of*

Columbia, 378 U.S. 347, 362 (1964). For example, due process prohibits the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). By changing the construction of the statute, as the Florida Supreme Court did in *Poole*, and by applying that change to Mr. Franqui, as it did in the decision below, the Florida Supreme Court arguably violated the Due Process Clause of the Fourteenth Amendment.

Certainly, *Poole* was unexpected. *Poole* is also indefensible, because the statutory construction set forth in *Hurst v. State* with the conclusion that the requisite findings were elements has been applied in a large number of cases where the crime was committed pre-*Ring*, the corresponding death sentences were vacated, and unanimous juries returned binding life sentences. For example, a Florida state court applied *Hurst v. State*'s statutory construction to William Melvin White's case, which was a homicide committed in 1978. The circuit court for Orange County, Florida, vacated White's death sentence on the basis of *Hurst v. State*. *Florida v. White*, 1978-CF-1840-C-O (Circuit Court of Orange Cty., Fla. Sept. 19, 2017); *see White v. State*, 817 So. 2d 799 (Fla. 2002) (per curiam); *White v. State*, 729 So. 2d 909 (Fla. 1999) (per curiam); and *White v. State*, 415 So. 2d 719 (Fla. 1982) (per curiam).[23]

[23]*See also Card v. Jones*, 219 So.3d 47 (Fla. 2017) (applying *Hurst v. State*'s statutory construction to Card's case, which was a homicide committed in 1981, and vacated his sentence of death). By virtue of the Florida Constitution's Savings Clause, the ruling in *Card* means that the statutory construction adopted in *Hurst v. State* was Florida's substantive criminal law at the time of the offense therein, June 1981.

After the circuit court vacated White's death sentence, the State did not pursue another death sentence. Instead, the court imposed a life sentence.

Poole is likewise indefensible because the Florida Legislature demonstrated its agreement with the statutory construction of § 921.141, as set forth in *Hurst v. State*. Indeed, the Legislature did not challenge the decision as contrary to its intent when the statute was amended during the 2017 legislative session. Pursuant to separation of powers as stated in the Florida Constitution, the Legislature surely has the authority to complain when the Florida Supreme Court construes a statute contrary to legislative intent. The Florida Legislature did not indicate that *Hurst v. State* had construed Fla. Stat. § 921.141 in a manner inconsistent with, or contrary to, its legislative intent during its 2018 or 2019 legislative session.[24]

Poole arguably cannot be applied retroactively under due process pursuant to *Bouie* and *Rogers*. Surely, due process does not permit *Poole* to erase *Hurst v. State* out of existence. It cannot undo the construction of § 921.141 that *Hurst v. State* employed, because such statutory construction was and remains the binding substantive law as to offenses committed prior to January 23, 2020. In *Poole*, decided just three and a half years after *Hurst v. State*, the Florida Supreme Court chose to

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See Horsley v. State, 160 So. 3d 393, 406 (Fla. 2015) (The Florida Supreme Court determined that "the purpose of the 'Savings Clause' is to require the statute in effect at the time of the crime to govern the sentence an offender receives. . .").

[24] And, after the Florida Supreme Court issued *Poole*, the Legislature left Fla. Stat. § 921.141 intact, as adopted, to accommodate the Sixth Amendment ruling in *Hurst v. State.* The Florida Legislature's reaction to *Hurst v. State,* and *Poole,* shows that the Florida Supreme Court in *Hurst v. State* correctly read the statute and captured the legislative intent in its construction thereof.

recede from *Hurst v. State* and make it easier for the State to obtain death sentences. This change operated to the detriment of defendants and was entirely unexpected. Due process should mandate that *Poole* is not applicable to offenses committed after January 23, 2020. *See Bouie*, 378 U.S. at 362 ("We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute . . . has deprived petitioners of [due process]. If South Carolina had applied to this case its new statute prohibiting the act [in question], the constitutional proscription of ex post facto laws would clearly invalidate the convictions. [Due process] compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.").

Since the homicides at issue in Mr. Franqui's cases occurred long before January 23, 2020, *Poole* arguably is not applicable. Due process principles should not allow *Poole* to retroactively replace *Hurst v. State* as substantive law since it operates to Mr. Franqui's detriment. *Poole* should merely replace *Hurst v. State* going forward in time from January 23, 2020.

At least thirty-three inmates in Florida have been resentenced to life imprisonment under *Hurst*. Six new non-*Hurst* related defendants have been sentenced to life under the current death penalty statute left undisturbed by *Poole*. There is no meaningful difference between Mr. Franqui's cases and those cases in which the courts granted *Hurst* relief and imposed life sentences, save the arbitrariness of a date. Death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing

process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887 n. 24 (1983)). The Florida Supreme Court's zig zag in its construction of § 921.141(3) should be examined by this Court to determine whether Mr. Franqui's due process rights were violated.

In *Fiore v. White*, federal habeas relief was ordered because the construction of the statute defining the criminal offense announced after Fiore's conviction was final included an element that was not found by his to have been proven beyond a reasonable doubt. The procedural posture there is akin to the procedural posture in Mr. Franqui's case.

The confusion and chaos in Florida's substantive law screams out for certiorari review. In *Fiore v. White*, 531 U.S. at 226, the question presented on which certiorari review was granted was "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." However, this Court ultimately did not decide the question presented in *Fiore* in light of the Pennsylvania Supreme Court's subsequent explanation of Pennsylvania's substantive law. In light of the seemingly ever changing substantive law in Florida which is being haphazardly applied, this Court should grant certiorari review here to address and decided the question on which review was granted in *Fiore*, but which was left unanswered when the decision in *Fiore v. White* issued.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

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