CASE NO. 20-7205

IN THE UNITED STATES SUPREME COURT

LEONARDO FRANQUI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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Capital Case

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court correctly applied *Hall v. Florida* in its fact specific rejection of Petitioner's intellectual disability claim.

2. Whether the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which it has since receded from, made substantive clarifications to Florida's capital-sentencing scheme which must apply to all defendants on collateral review.

3. Whether it violates the Eighth Amendment to deny defendants whose sentences were final when *Hurst v. Florida*, 577 U.S. 92 (2016), was announced relief under that decision.

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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
Judgement Entered: November 24, 1993

Direct Appeal:

Florida Supreme Court
Franqui v. State, 699 So. 2d 1312 (Fla. 1997)
Judgement 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 Post-conviction Proceeding:

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

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

Second Post-conviction Proceeding:

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

Florida Supreme Court
Franqui v. State, 211 So. 3d 1026 (Fla. 2017)
Judgement 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
Judgement Entered: Sept. 28, 2018

Florida Supreme Court
Franqui v. State, 301 So. 3d 152 (Fla. 2020)
Judgement 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
Judgement Entered: Oct. 11, 1994

First Direct Appeal:

Florida Supreme Court
Franqui v. State, 699 So. 2d 1332 (Fla. 1997)
Judgement Entered: Oct. 7, 1997

Underlying Resentencing:

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

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

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

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

Second Post-conviction Proceeding:

Circuit in and for Miami-Dade County, Florida,

State of Florida v. Leonardo Franqui, No. F92-2141-B
Judgement Entered: Jan. 27, 2011

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

Third Post-conviction Proceeding:

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

Florida Supreme Court
Franqui v. State, 211 So. 3d 1026 (Fla. 2017)
Judgement 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
Judgement Entered: Sept. 28, 2018

Florida Supreme Court
Franqui v. State, 301 So. 3d 152 (Fla. 2020)
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CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

FACTS AND PROCEDURAL BACKGROUND

Franqui is in custody and under a sentence of death, subject to the lawful custody of the State of Florida. Franqui was convicted of first-degree murder and sentenced to death in two separate cases. He was convicted of the 1991 murder of Raul Lopez (the Hialeah case), and the trial court sentenced him to death after the jury recommended death by a vote of nine to three, finding four aggravators: (1) prior violent felony convictions for aggravated assault, attempted armed robbery, armed robbery, armed kidnapping, and attempted first-degree murder; (2) murder committed during the course of an attempted robbery; (3) murder committed for pecuniary gain; and (4) murder committed in a cold, calculated, and premeditated manner. *See Franqui v. State*, 699 So. 2d 1312, 1316 (Fla. 1997). On direct appeal, the Florida Supreme Court vacated Franqui's convictions for attempted murder but affirmed the remaining convictions and sentences. *Id.* at 1329. Franqui was also convicted of the 1992 murder of law enforcement officer Steven Bauer (the North Miami case). On direct appeal, the Florida Supreme Court affirmed Franqui's convictions but reversed for a new penalty phase. *See Franqui v. State*, 699 So. 2d 1332 (Fla. 1997). On resentencing, the trial court sentenced Franqui to death after

the jury recommended death by a vote of ten to two, finding three aggravators: (1) prior convictions for a capital or violent felony of armed robbery and aggravated assault; (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 enforcement and the victim was a law enforcement officer, merged. *See Franqui v. State*, 804 So. 2d 1185, 1190-91 (Fla. 2001). The Florida Supreme Court affirmed that death sentence as well on direct appeal. *Id.* at 1199.

The Hialeah case involved a robbery attempt of Danilo Cabanas who operated a check cashing business. On Friday, December 6, 1991, he along with his son and friend Raul Lopez, in two vehicles, went to the bank to pick up cash for the business; all three men were armed. After getting the money, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the Cabanases. Franqui drove the second Suburban and also opened fire, directing his shots to Lopez's pickup. When Cabanas Sr. and the others returned fire, the assailants returned to their vehicle and fled. Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. Franqui confessed to planning, including stealing the Suburbans, and participating in the robbery and shooting. *Franqui*, 699 So. 2d at 1315-16.

In the North Miami case, Franqui and three co-defendants robbed the Kislak National Bank in North Miami, Florida, on January 3, 1992. The perpetrators made

their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank. The co-defendants implicated Franqui in planning the robbery, involving the other participants, and choosing the location and date for the crime. Franqui also procured the two stolen Chevys, drove one of the cars, and supplied the guns used during the robbery. Franqui was the first shooter and shot at the victim three or four times, while a co-defendant also fired. *Franqui*, 699 So. 2d at 1333-34.

Franqui then sought post-conviction relief in both cases. In the Hialeah case, Franqui raised, among other issues, a claim that he is intellectually disabled in his initial motion for post-conviction relief. The Florida courts denied post-conviction relief. *See Franqui v. State*, 59 So. 3d 82 (Fla. 2011). In the initial post-conviction motion for the North Miami case, Franqui did not claim that he is intellectually disabled, although he raised an ineffective assistance of counsel claim alleging mental illness. *See Franqui v. State*, 965 So. 2d 22, 29-30 (Fla. 2007). Subsequent collateral challenges were likewise rejected. *Franqui v. Florida*, No. 07-22384-CIV, 2008 WL 2747093, *1 (S.D. Fla. July 10, 2008) (denying federal habeas petition and treating the statement about Franqui's IQ as an attempt to raise a claim that Franqui was intellectually disabled and denied it as unexhausted, procedurally barred and meritless); *Franqui v. Florida*, 562 U.S. 1188 (2011) (denying certiorari review of Eleventh Circuit's order denying leave to appeal); *Franqui v. Florida*, 638 F.3d 1368

(11th Cir. 2011), *cert. denied*, 566 U.S. 978 (2012) (vacating the order denying the *pro se* motion for relief from the district court's judgement and remanded with instructions to the district court to dismiss the motion for lack of jurisdiction); *Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (unpublished opinion) (affirming the denial of the second motion for post-conviction relief finding Franqui's sentence did not violate the Sixth and Eighth Amendments under *Porter v. McCollum*, 130 S. Ct. 447 (2009), and affirming denial of the intellectual disability claim because the IQ score Franqui relied upon was not from an admissible IQ test, his scores on the admissible IQ tests that had been presented in Franqui's other case were too high and he did not proffer he could satisfy the third element of intellectual disability).

Following this Court's decision in *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014), Franqui filed successive motions for post-conviction relief in both of his capital cases. Relying on *Hall*, Franqui asserted that the denials of his previous claims of intellectual disability were based on an improper interpretation of Florida's intellectual disability statute and he was entitled to an additional evidentiary hearing. The circuit court summarily denied both motions, but the Florida Supreme Court reversed and remanded both cases for a single evidentiary hearing on the issue of intellectual disability in light of *Walls v. State*, 213 So. 3d 340 (Fla. 2016) (holding that *Hall v. Florida* is to be retroactively applied). *Franqui v. State*, 211 So. 3d 1026, 1032 (Fla. 2017).

The 2017 Evidentiary Hearing

Three witnesses testified at the evidentiary hearing: Drs. Gordon Taub and Jethro Toomer for the defense and Dr. Enrique Suarez for the State. No lay witnesses were presented by either side.

Testimony of Dr. Gordon Taub

Dr. Gordon Taub stated that the defense hired him in mid-2015 to gauge the possibility of whether Franqui had an intellectual disability. (T. 1:14). He admitted he had no personal contact with Franqui, no opportunity to examine him personally, and no prior knowledge of any of Franqui's medical history, records, or police reports concerning Franqui's case. (T. 1:56-58) Dr. Taub read a single 2003 report from Dr. Trudy Block-Garfield without reviewing the report's supporting information[1] or speaking to anyone in Franqui's life; Dr. Taub also did not review the other intellectual disability evaluations on Franqui, conducted by Dr. Toomer in 1993 or Dr. Suarez in 2009. (T. 1:14-15, 56-58)

As to Dr. Block-Garfield's report, Dr. Taub indicated that he reviewed Franqui's scores from the Stanford-Binet IV intelligence test and the WAIS III intelligence test. (T. Vol. 1 at 15, 26-28) He further explained that the Flynn effect

[1] The seven specific items Dr. Block-Garfield reviewed included 1) Franqui's Dade County Public School records; 2) a Weschler Adult Intelligence Scale ("WAIS")-Revised ("R") completed November 17, 1993; 3) a Carlson psychological survey; 4) Jackson Memorial Hospital discharge summary; 5) a revised Bader Examination; 6) a report from Jethro W. Toomer, Ph.D.; and 7) a deposition of Dr. Toomer.

affects all intelligence tests, making higher scoring due to societal change, and Franqui's reported scores would also reflect that. (T. Vol. 1 at 21, 29) Specifically, the Flynn effect holds that "from the date that an intelligence test is normed, and centered at 100, the population is actually getting a little bit smarter each year by about one-third of an IQ point." (T. 1:21, 27-28) Concerning the administration of the tests conducted by Dr. Block-Garfield, Dr. Taub first opined that "on the Stanford-Binet test, it was much harder for an individual to appear gifted, and it's much easier for some to appear intellectually disabled." (T. Vol. 1 at 28) He calculated that, due to the number of years between when the Stanford-Binet test was normed in 1985 and when it was administered to Franqui in 2003, his score would be inflated by roughly five points, changing the observed score from a 76 to a 71. (T. 1:29-30)

Dr. Taub then explained how if the Flynn effect had been taken into consideration, Franqui's score of 75 on the WAIS-III (which was normed in 1995) would have inflated his score by roughly 2.4 points, thus it should be recalculated to a 73. (T. 1:37-38) Dr. Taub assumed that since Dr. Block-Garfield did not explicitly mention the Flynn effect in her report, she must have not adjusted for it because "no practitioner would ever report an IQ score using the Flynn effect as the observed score, it's just not done." (T. 1:38-40) Dr. Taub nevertheless indicated that taking standard error of measurement ("SEM") into account, Franqui's lowest score on the WAIS would still be about 70 to 80. (T. 1:67)

Testimony of Dr. Jethro Toomer

Dr. Jethro Toomer testified he was retained by the defense in March of 1992 to do a psychological evaluation for Franqui's penalty phase. (T. 2:135) Dr. Toomer met Franqui three times and administered the WAIS-R intelligence test on his third occasion. (T. 2:137-38) He conducted a clinical interview with Franqui and recalled gathering biological and chronological information about Franqui from his uncle. (T. 2:142-44)

Dr. Toomer indicated that he recalled Franqui's uncle "spoke highly of Mr. Franqui, and that he had tried to be of assistance to Mr. Franqui" to get him settled with a place to live after he arrived from Cuba at age 9. (T. 2:145, 166-67) This uncle also mentioned that Franqui's father was unknown and Franqui's mother was absent when Franqui resided in Cuba. (T. 2:145-46) This uncle also suggested that Franqui had trouble in school in Cuba and "that same trouble continued when he arrived here." (T. 2:146)

While Dr. Toomer remembered very intricate details, he could not recall whether he rendered an opinion during the penalty phase about whether Mr. Franqui was mentally retarded.[2] (T. 2:148-49) Dr. Toomer believed that he discovered there were some "intellectual cognitive issues . . . suggestion of organic impairments and also schizophrenia." (T. 2:149) Dr. Toomer acknowledged that he gave the revised Beta test, knowing however that the WAIS is the recommended test to determine IQ. (T. 2:154) Whereas Franqui received a score "in the 60s" on the Revised Beta, Dr.

[2] The term "mental retardation" has since been changed to intellectual disability.

Toomer stated that Franqui received an 83 on the WAIS-R. (T. 2:153, 155) Dr. Toomer opined that individuals who are intellectually disabled, "when you put them in a confined environment" receive an increase in scores. (T. 2:156) Referring to the State's demonstrative aid displaying the range of Franqui's scores, Dr. Toomer stated that back in 1992 and 1993, he did not consider the Flynn effect, but would now take it into account to adjust Franqui's score to 78. (T. 2:156)

Dr. Toomer indicated that adaptive deficits are categorized into three areas of skills: conceptual, social, and practical skills. (T. 2:164-65) According to Dr. Toomer, a person who is intellectually disabled may still be able to drive a car, get a license, handle certain types of employment, write letters, plan a crime, and seek medical attention. (T. 2:160-61) In addition, structured environments tend to be the most productive for people with intellectual disability. (T. 2:161-62) He testified that Franqui's subpar performances and difficulties in school were evidence of an adaptive deficit. (T. 2:167) Dr. Toomer also believed Franqui's uncle mentioned that the death of Franqui's sibling may have caused him to become isolated and his behavior became erratic, which was a detriment to his schoolwork. (T. 2:169-70)

Additionally, Franqui's home life, specifically "the fact that his mother sort of abandoned him as a child," would also play a role in his adaptive deficits. (T. 2:168) Dr. Toomer believed there were "notations from school records that the family life was adversely impacting on his adjustment and functioning in school." (T. 2:168-69) Franqui's apparent learning that his father was unknown and that he was abandoned

by his mother, which caused him to live with relatives and negatively affected his cultural transition, impaired his "functioning." (T. 2:170-71) Dr. Toomer revealed that Franqui relayed how he lived on the street and came and went at his own pleasure, that he was married and the father of two daughters, and that after dropping out of school at age 15, he went to work for the Building and Grounds Department for the City of Miami. (T. 2:179-80)

Dr. Toomer had testified at trial that Franqui was an average C student who only missed four days total during the fifth and sixth grades. (T. 2:181) Further, he was not in any special classes as far as Dr. Toomer was aware. (T. 2:181) When Franqui began to miss more days than he went to school, Dr. Toomer admitted that he would have no way of knowing whether that was because of "decompensation" or because Franqui just decided to skip school (T. 2:182) Specifically, Dr. Toomer could not answer whether Franqui's Ds and Fs may have been the result of not going to school because Franqui was hanging out with his friends on the streets. (T. 2:183)

Dr. Toomer acknowledged that Franqui worked at his uncle's tire place continuously until he got a new job at the City of Miami doing daily maintenance of mowing the greens, cutting, changing holes, and using a weed eater. (T. 2:184) Although Dr. Toomer claimed he had read the depositions of Franqui's bosses and family, he could not remember whether Franqui's boss said that he showed initiative and took care of items that needed to get done. (T. 2:184-85)

In comparing the results from the Revised Beta test and the WAIS-R test that

he administered, Dr. Toomer indicated that the Revised Beta was a more performance driven test. (T. 2:199-200) Dr. Toomer could not address the discrepancy of the poor score of 60 on the Beta test with Franqui's score of 92 on the performance portion of the WAIS-R. (T. 2:199, 201-03) Dr. Toomer claimed the 10+ point discrepancy between the scores only could "suggest the likelihood of neurological involvement" or brain damage. (T. 2:203-04) Dr. Toomer admitted that he did not conduct any further testing to be able to determine whether Franqui actually had neurological brain damage after he pointed out this discrepancy. (T. 2:206-07) Additionally, after Dr. Toomer gave the Carlson test (another personality test), Franqui displayed indications of high malingering. (T. 2:207-08)

Dr. Toomer acknowledged that he previously testified that intellectual deficit is a "lifelong condition." (T. 2:214) Dr. Toomer then conceded that Franqui specifically recounted exactly what happened in these crimes when asked open-ended questions by detectives and was able to discuss what happened in a logical manner. (T. 2:215, 224) Dr. Toomer also recalled that Dr. Fisher, who was also hired to give testimony regarding Franqui's intellectual abilities, found that Franqui's intelligence was average. (T. 2:225)

Testimony of Dr. Enrique Suarez

Dr. Enrique Suarez is a licensed psychologist whose primary business is forensic neuropsychology. (T. 3: 4, 7-8, 102)[3] Dr. Suarez used the 5th edition of the

[3] The transcript dated November 1, 2017, and labeled as "171101" will hereafter be referred to as T.

Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association ("DSM-5"), which is the primary source to gauge whether an individual has an intellectual disability. (T. 3:9)

Dr. Suarez testified that the DSM-5 indicates that a numerical score that is received on a test does not necessarily reflect what an individual can do or cannot do, but that one must look to the deficits in adaptive functioning; thus, a 70 score does not mean someone is automatically disabled. (T. 3:10-11) Dr. Suarez asserted that there are three areas of adaptive functioning: (1) academic or cognitive area of functioning; (2) social domain as in being able to initiate and maintain relationships; and (3) a practical domain which deals with being able to do things on a daily basis. (T. 3:12)

Dr. Suarez examined Franqui twice and reviewed a number of background records. (T. 3:14-15) The documents reviewed included a list of Franqui's prior arrests, a sworn statement of Franqui, the Hialeah Police Department Narrative Continuation Report, the deposition of Dr. Toomer, the deposition of Dr. Mutter, the transcripts of the trial proceedings in Mr. Franqui's cases, transcripts of the defendant's trial and post-conviction hearings, the Florida Supreme Court ruling on Mr. Franqui's post-conviction motions and hearings, copies of Mr. Franqui's handwritten post-conviction motions, psychiatric evaluation reports, the clinical notes and report of Dr. Mutter, a discharge summary from Jackson Memorial

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Hospital, a psychological evaluation report of Dr. Trudy Block-Garfield, the Psychological Evaluation Report and Raw Testing Data of Dr. Toomer, Franqui's Criminal Justice Information Services history report, the Department of Corrections Commentary Order Report, the impounded personal property list of Mr. Franqui's inmate trust account statement report, his Medical Administrative Records from the Florida Department of Corrections, and Franqui's Miami-Dade County Public School Records. (T. 3:16)

In addition, Dr. Suarez conducted interviews of three correctional officers at Florida State Prison and obtained additional information regarding Franqui's requests for certain books, dictionaries, and written materials that were listed in the prison's inventory. (T. 3:17) Dr. Suarez also reviewed Dr. Taub's report, two more statements of Franqui, and finally the additional prison records from 2009-2016, including a handwritten *pro se* motion by Franqui. (T. 3:18)

During interviews with Franqui, Dr. Suarez learned how he came to the United States from Cuba and about Franqui's adopted father, grandmother, and brother, as well as his natural family. (T. 3:20-22) Franqui related that he met his wife when he was seventeen years old and cohabited with her at age eighteen, where they lived in his uncle's home with Franqui paying rent. (T. 3:23) The couple had children and Franqui financially supported the family. (T. 3:23)

Franqui told Dr. Suarez that he was in special classes while in Cuba; upon arrival in the United States, he was placed in the sixth grade and promoted to the

seventh grade. (T. 3:24) Franqui repeated the seventh grade two or three times and stated that he eventually was expelled from school because of poor grades and absenteeism in school. (T. 3:24-25) However, in the fifth and sixth grades, Franqui received Cs and some Ds and only missed school a total of four times in those two years. (T. 3:25-26) In the seventh grade, Franqui missed a considerable amount of time, and his grades plummeted. (T. 3:26) Franqui admitted that his reason for leaving school was that he "wanted to be with other guys." (T. 3:26) Dr. Suarez also noted Dr. Toomer's report which supported the same notion from the teacher's comments that Franqui was skipping school, coming and leaving, and not participating. (T. 3:27) His absences from school began to increase as his grades began to decrease. (T. 3:27-28)

Franqui told Dr. Suarez that he worked for his Uncle Mario at his refrigeration repair shop, and that he subsequently worked for his uncle's tire shop. (T. 3:28) Franqui later got a job at the City of Miami doing lawn maintenance which transitioned to working security at the Coconut Grove Marina where he earned $800 per month until he got arrested in 1991. (T. 3:28-29)

Dr. Suarez testified that Franqui also had a driver's license when he was seventeen years old, which was infrequent with someone who is intellectually disabled, since driving involves a lot of behaviors that are implicated in adaptive functioning which would be considered difficult, including procuring a manual, studying, and taking a driver's test. (T. 3:29-30) Franqui told him that he had nine

different automobiles and could recall each vehicle, who gave it to him, and when he traded the cars in. (T. 3:30-31) Dr. Suarez recalled Franqui recounting how he stole cars and committed robberies.

Franqui stated that sometimes he wrote grievances "for other inmates, or sometimes [what] a lawyer wanted me to say." (T. 3:33-34) Dr. Suarez reviewed those grievances, filed under Franqui's name, and which all appear to have been written in the same manner with the same type of punctuation. (T. 3:34-35) Under the Flesch Kincaid Index, which analyzes sentences and numbers of words in a sentence to compute a grade level of writing, Franqui scored at a twelfth-grade level for two of the letters and an eleventh-grade level for another letter. (T.3:35-36) Dr. Suarez also reviewed Franqui's health requests which he opined were very "precise" which was very different than what Franqui told him during the evaluation. Contrary to his representations at the evaluation, Franqui wrote specific requests about the types of medications he wanted and the symptoms he was experiencing. (T. 3:36-40)

Dr. Suarez administered the WAIS-IV test to Franqui where he received a score of 75, and based on the SEM, his score may range between 71-80. (T. 3:86-87) Dr. Suarez testified that he was concerned by Dr. Taub's report, given that it was based solely on the application of theoretical concept of the Flynn effect and practice effect on the IQ tests that Franqui had taken in the past, claiming it was unusual because a psychologist should not testify on matters regarding diagnosis or conclusions about testing, without conducting an interview or doing a full review of

records and raw data. (T. 3:43-44) Unlike Dr. Taub, Dr. Suarez called Dr. Block-Garfield to get some clarification of her 2003 report. (T. 3:44-45)

Moreover, Dr. Suarez opined that the Flynn effect is not wholly accepted among all psychologists and that these adjustments are mostly made in the criminal forensic area. (T. 3:54) While the Flynn effect has been observed, the ongoing problem is that nations measure it differently and, accordingly, countries such as Finland, Norway, Spain, and several others have reversed their reliance on the Flynn effect. (T. 3:55-56) Specifically, the problem with making adjustments to scores is that there is not a consensus or a global average that can apply to one individual in a country. (T. 3:61-62) There is no additional confidence interval that should be applied to the Flynn effect, which only applies to the raw score, since the statistics would not be proper. (T. 3:63)

Even if the Flynn effect were to be taken into consideration for any of Franqui's scores, the confidence interval, which is the "reliability coefficient" or the SEM, would still not put Franqui in the range of intellectual disability. (T. 3:59-67) Dr. Suarez opined that Franqui's IQ could be higher because factors such as first language, lack of education, and culture immersion make the test harder than it would be if it were "normed" in the individual's home country. (T. 3:50-52) That is why a clinician must take into account the three areas of adaptive functioning. (T. 3:53-54)

In gathering biological information from Franqui to determine any adaptive functioning deficits, Dr. Suarez also conducted several validity tests to determine

whether Franqui was actually giving his best efforts, which revealed that he was feigning, or in other words, giving a presentation or an effort that does not represent that individual's actual effort. (T. 3:68-69) Dr. Suarez also analyzed Dr. Toomer's reported scores regarding the same validity tests. (T. 3:70) On the tests that Dr. Suarez administered, Franqui received an "irrelevant" score, which is indicative of choosing answers at random, without a pattern. (T. 3:71-76, 79-80)

In addition, Franqui also did not appear truthful in his answers regarding his activities in the recreation yard, when he only mentioned that he walked around but did not do exercise or engage with others. (T. 3:79-80) However, after conducting an interview with Lieutenant Reiser, a corrections officer who observed Franqui, Dr. Suarez discovered that Franqui does pull-ups and dips on the parallel bars and that he indeed plays card games with other inmates. (T. 3:81-82) According to Sergeant Starling, Franqui also engages with others when he plays basketball, checkers, chess, and cards with inmates in adjacent cells, having to keep track of their boards mentally and communicate their moves verbally because their cells are adjacent but do not face each other. (T. 3:85)

Dr. Suarez also spoke with Sergeant Frazier who noted that Franqui communicates with other inmates about legal issues and exchanges legal materials with them. (T. 3:83) Specifically, Franqui requested by case name and was in possession of many legal materials including but not limited to acquiring weekly the indexes of the Florida Law Weekly and the Federal Law Weekly. (T. 3:84) Based on

this information, Dr. Suarez stated that nothing indicated that Franqui had adaptive functioning deficits which were onset before age eighteen as he was never diagnosed, nor did he need any type of daily support since he was able to function on his own. (T. 3:87)

In the conceptual or academic category, Dr. Suarez, in referencing the American Association on Intellectual and Developmental Disabilities, indicated that there are three individual sub areas: communication, functional academic, and self-direction. (T. 3:87) Based on the interviews with the officers and Franqui's own recollection of his past, nothing would be considered an adaptive deficit. (T. 3:87) Dr. Suarez also noted that Franqui corresponded with a pen pal from Switzerland via the Internet. (T. 3:36-40)

Finally, Dr. Suarez opined that when he scored Franqui's testing, his scores reflected that Franqui was choosing answers at random, getting a lot of easy questions wrong and hard questions right, such that "there was no pattern to it." (T. 3:71)

In the social category of adaptive functioning, Dr. Suarez believed that based on his answers, Franqui had friends and accomplices, and a wife and children with whom he was able to interact and support. (T. 3:88) Franqui described that he was able to adapt his mode of transportation, recognizing that after he had children he needed a car that was more practical. (T. 3:88) The transcript of the testimony from Franqui's father-in-law and Franqui's uncle also supported that in the social domain,

he was a good father and husband. (T. 3:88)

As to the practical category of adaptive functioning, Dr. Suarez stated that Franqui was able to take care of himself and his personal care, including showering by himself and grooming. (T. 3:89) Regarding Franqui's abilities relating to money management, Dr. Suarez testified that Franqui had no deficits as he understands numbers and time, manages his own funds (including prior to his arrest), and had engaged in day-to-day transactions like buying food and other commissary items. (T. 3:41-43, 89) His overall ability (including his criminal activity which reflects his ability to coordinate, collaborate, and communicate) demonstrates he has no adaptive functioning deficits. (T. 3:90-91)

Finally, Dr. Suarez refuted Dr. Toomer's claim that there must be organic brain damage due to Franqui's performance on the verbal and nonverbal sections on the WAIS, where he scored a 92 on the nonverbal section and a 79 on the verbal section and based on the discrepancy on the Beta test. (T. 2:203-04; 3:153-54) Instead, Dr. Suarez dispelled the idea that it would be organic brain damage if the scores were reviewed in a cultural context, since it would be clear that because English was not Franqui's first language that he would yield a much lower verbal score than what he scored on the performance section. (T. 3:154-55) Additionally, Dr. Suarez noted that none of the other doctors who previously performed evaluations for intellectual disability on Franqui, including Dr. Mutter, Dr. Fischer, or Franqui's own doctor, Dr. Block-Garfield, found Franqui to be intellectually disabled. (T. 3:165)

The post-conviction court determined that Franqui did not show, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100. (PCR4. 924-28) The court based that on the expert's report of Franqui's IQ test scores of 75, 76, 75, and 83; the court noted that Franqui had repeatedly demonstrated malingering. The post-conviction court rejected the Flynn effect based on the reasoning in *Quince v. State*, 241 So. 3d 58 (Fla. 2018), *cert. denied sub nom. Quince v. Florida*, 139 S. Ct. 202 (2018), and found that even when applying the SEM to various IQ exams administered to Petitioner, the lowest score Petitioner could have is a 71. PCR4. 927-28.

The post-conviction court analyzed each of the three domains for determining adaptive functioning. PCR4. 929. It noted that Franqui had been an average student before the seventh grade, but his grades deteriorated as he stopped going to school. "The [Petitioner's] own explanation for his failing grades and eventual expulsion from school as a result of his absences, belie a claim of an adaptive deficit." The court noted that a teacher had also reported the same thing. PCR4. 931. The court found that Franqui did not suffer from conceptual difficulties such as "abstract thinking, executive functions, such as planning and priority setting, short term memory and function use of academic skills" based on the evidence during the trial. PCR4. 931-32. Citing the evidence of Franqui's family and work life, the post-conviction court found he did not suffer from social deficits. PCR4. 933-35. Finally, the post-conviction court found Petitioner did not suffer from deficits under the practical domain, noting

Franqui's collective job skills and employment history, his ability to handle money, supporting his family, car ownership, driver's license, medication management, and so forth. PCR4. 936-38.

Finally, the post-conviction court found "[t]he evidence presented is overwhelming that, prior to his incarceration, the [Petitioner] functioned normally in society and, while incarcerated, the [Petitioner] has shown no adaptive deficits. [Petitioner] has failed to prove, by clear and convincing evidence, any concurrent deficits that would satisfy the third prong of the intellectual disability test." PCR4. 941.

The Florida Supreme Court affirmed the post-conviction court's determination that Franqui had failed to prove intellectual disability, noting that there was competent, substantial evidence in the record supporting its findings on each of the three prongs. *Franqui v. State*, 301 So. 3d 152, 153-54 (Fla. 2020), *reh'g denied*, No. SC19-203, 2020 WL 5562317 (Fla. Sept. 17, 2020). The Florida Supreme Court also denied relief under *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

REASONS FOR DENYING THE WRIT

I

The Florida Supreme Court correctly applied *Hall v. Florida* in its analysis and fact specific rejection of petitioner's intellectual disability claim.

Petitioner requests that this Court review the Florida Supreme Court's

decision denying relief for his *Atkins v. Virginia*, 536 U.S. 304 (2002), claim, arguing that the state court's decision "contravenes the letter and spirit of *Hall* and the Eighth Amendment." (Pet. 32) He contends that the state courts failed to conduct a holistic evaluation of his intellectual disability claim, taking into consideration all the factors to be considered together. He argues that the Florida Supreme Court is reverting to a pre-*Hall* reliance solely on an IQ score.

Petitioner's claim that the state courts violated either the 'letter' or the 'spirit of *Hall* is incorrect. The state courts followed this Court's precedent and Petitioner was allowed to present evidence on all three prongs. That the state courts rejected his claims factually provides no basis for certiorari.

The Florida Supreme Court directed that an evidentiary hearing be held on the intellectual disability claim and the lower state court heard and weighed the evidence presented, not only on the test scores but on Petitioner's life history and functioning within society. Based on that evidence, it determined that Franqui failed to prove intellectual disability. Petitioner is simply dissatisfied with the outcome. Petitioner does not provide any "compelling" reason for this Court to review his case. U.S. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's decision in this case. Certiorari should be denied.

In *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986 (2014), this Court recognized "the inherent error in IQ tests" and concluded that the State could not seek "to

execute a man because he scored a 71 instead of a 70 on an IQ test." *Id.* at 722, 724. Rather, the Court concluded, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. *Hall* requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724. In other words, Florida's IQ cutoff was defective because it "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted). The Florida courts followed *Hall* exactly in this case.

The court which conducted the evidentiary hearing cited to *Hall* and properly conducted a holistic evaluation of the evidence for all the pertinent factors in reaching its determination that Franqui had failed to prove by clear and convincing evidence his claim of intellectual disability. Florida Statutes § 921.137(1) and § 921.137(4) explicitly state that for a defendant to establish a claim of intellectual disability, he must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive

behavior and manifested during the period from conception to age eighteen. *See* § 921.137(1), (4), Fla. Stat. (2018) ("If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death...."). The state court properly followed that burden of proof in determining that Appellant was not intellectually disabled under the law.

As to the first prong, the post-conviction court found that, taking into account the SEM, Petitioner's IQ test scores on the WAIS and Stanford-Binet test range from 71-80, using the testimony of the defense experts. PCR4. 927-28. The post-conviction court found that the Flynn effect "is not wholly accepted among all psychologists and the Flynn Effect adjustments are mostly sought after in the criminal forensic arena." PCR4. 927. Additionally, Petitioner's own defense expert Dr. Taub conceded that "the Flynn Effect would not be applied in all cases where IQ is being tested." PCR4. 925. Consequently, the court determined that Petitioner had not shown by clear and convincing evidence that he satisfied the first prong on intellectual disability. PCR4. 928.

That court then went on to examine whether there were any adaptive deficits. Addressing the second prong of "how well a person meets community standards of personal independence and social responsibility," the post-conviction court referenced the DSM-5 which describes deficits in adaptive functioning:

> Adaptive functioning (Criterion B) involves three domains: conceptual, social, and practical. The conceptual (academic) domain

> involves competence in memory, language, reading, writing, math reasoning, and acquisition of practical knowledge, problem solving, and judgement in novel situations among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy, interpersonal communication skills, friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among other. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning....
>
> ....
>
> Criterion B is met when at least one domain of adaptive functioning conceptual, social, or practical- is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Criterion during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

PCR4. 928-29. Referencing Dr. Toomer's and Dr. Suarez's examinations, the post-conviction court analyzed each of the three domains. PCR4. 929.

The post-conviction court referenced Dr. Toomer's findings that Petitioner did not know his father, his mother was absent, and he had "difficulties in learning academic skills involving reading, writing, arithmetic, time and money, with support needed in one or more areas to meet age-related expectations." PCR4. 929-30. While the post-conviction court found that Petitioner's home life "impacted his adjustment to and functioning in school," the court referenced the DSM-5 which indicated that

"the inquiry does not stop there" and that "[t]o meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to an intellectual impairment." PCR4. 930.

Referring to Petitioner's school grades, Dr. Toomer admitted that Petitioner was a "C" student when he went to school during the fifth and sixth grades. As to his failure to attend most of seventh grade, forcing him to repeat it, Dr. Toomer "had no way of knowing whether the absences were a result of [Petitioner]'s decompensation or because he simply decided to skip school." PCR4. 930.

As to Dr. Suarez's testimony regarding the conceptual skills category, the post-conviction court found:

> ... Dr. Suarez failed to find that the [Petitioner] had deficits relative to his adaptive behavior. Dr. Suarez testified that the [Petitioner] indicated that he was in special classes when he was in school in Cuba, but after arriving to the United States, was placed in the sixth grade and later promoted to the seventh grade. The [Petitioner] repeated the seventh grade two or three times and stated that he eventually was expelled from school because of poor grades and excessive absences. According to Dr. Suarez, the [Petitioner] admitted that he missed a considerable amount of time at school and left school because he "wanted to be with [the] other guys." (H. Vol. 3, p. 26) The [Petitioner's] own explanation for his failing grades and eventual expulsion from school as a result of his absences, belie a claim of an adaptive deficit. While Franqui contends his poor school grades are indicative of this disability, school records presented include a report by a teacher indicating that his failing grades were due to absences and lack of participation when he was in school. His absences from school, not intellectual disability, were the cause of his academic difficulties.

PCR4. 930-31.

The post-conviction court also determined that Petitioner did not suffer from

conceptual difficulties such as "abstract thinking, executive functions, such as planning and priority setting, short term memory and function use of academic skills" based on the evidence during the trial. PCR4. 931. The court was not persuaded by Dr. Toomer's testimony that Petitioner was "merely responding to the officers' questions during his confession" as Petitioner "went into great detail in explaining why he took the actions he did when planning the crimes." PCR4. 931. The post-conviction court also stated that based on the testimony from both experts, Petitioner did not suffer from any short-term memory problems. PCR4. 932.

In considering the social domain, the post-conviction court cited the DSM-5 in explaining that the domain "involves awareness of others' thoughts, feelings, and experiences, empathy, interpersonal communication skills, friendship abilities and social judgment." PCR4. 933. Further, "[t]here was no testimony that the [Petitioner] was immature, has difficulty perceiving social cues, has more concrete language than others of his age, or has problems regulating his emotions or behavior. In fact, much of what was presented regarding [Petitioner's] life before prison would suggest the opposite."[4] PCR4. 933. Petitioner's home life and the relationships he was able to

[4] "An examination of the language used by the [Petitioner] during his statements to the police demonstrates that it was no more concrete than normal, and he responded to open ended questions appropriately. Moreover, the [Petitioner] communicates effectively with staff and other inmates at the Florida State Prison. [Petitioner] has engaged in written correspondence with family members and an internet pen pal and has engaged in telephone conversations with his attorneys. He also has the ability to follow instructions, play chess and card games between cell walls with other inmates, all of which requires the ability to count and remember numbers. [Petitioner] takes advantage of recreational activities, uses the mail for correspondence and uses resources in prison, including the law library to acquire legal materials and shares them with other inmates. Further, while in prison, the [Petitioner] has requested specific books including 'The Art of Thinking,' 'The Biology of Belief,' 'The Virus of the Mind,' a French-English dictionary, a Spanish-English dictionary, and grammar books all indicative

make, despite his mother's abandonment and his father's use of drugs, suggest he does not suffer from social deficits. PCR4. 935.

Finally, the post-conviction court found Petitioner did not suffer from deficits under the practical domain, which "analyzes learning and self-management across life settings, including, but not limited to: personal care, job responsibilities, money management, and self-management." PCR4. 935-36. The court noted that Petitioner's collective job skills and employment history at the sanitation department, golf course, and security guard at a marina did not "support a deficit in the practical domain." PCR4. 936. Additionally, his ability to handle money did not illustrate a "level of deficiency required in this area, in order to support a claim of intellectual disability" given the fact that he was the owner of nine cars, possessed a driver's license, and could adapt his mode of transportation for "his family's needs." PCR4. 936. He also managed his money in his canteen account, was able to request specific medications, and communicated with a pen pal in a foreign country who would send him money. PCR4. 937. Additionally:

> [Petitioner's] crimes also belie a claim of a deficit in the practical domain. [Petitioner] helped plan and carry out both robberies. He knew how to hot wire an automobile, box in the victims' vehicles, and use walkie-talkies to communicate with his accomplices. [Petitioner] described his intention to receive $26,000 from the North Miami robbery, clearly reflecting a financially driven motive for the crime. While Dr. Toomer opined that the thought process for committing these crimes is reflective of maladaptive behavior, and therefore not indicative

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of a functional use of academic skills." PCR4. 934. "The [Petitioner's] ability to recall and request very specific medications also indicates no conceptual deficits. [Petitioner] is capable of dealing with perceived problems and injustices by filing grievance requests and paperwork." PCR4. 934.

> of adaptive functioning, each of the skills necessary to commit the crimes [Petitioner] committed reflect his ability to coordinate and collaborate — skills that exceed the routine and regimented.

PCR4 at 937. The post-conviction court also noted that Dr. Block-Garfield's report was indicative that Petitioner was able not only to care for himself but could care for his wife and children; thus, his scores "reflect considerable difficulties, but it does not appear that [Petitioner] functions in the [intellectually disabled] range." PCR4. 937-38.

The post-conviction court then evaluated whether there was proof of adaptive deficits prior to the age of eighteen.

> None of the experts could say, with any degree of certainty, the reason why [Petitioner] dropped out of school in the 7th grade after receiving acceptable grades during the 6th grade. Dr. Toomer reluctantly admitted that [Petitioner's] poor grades could be explained because he failed to attend classes and wanted to hang with friends instead of going to school.
>
> There is a dearth of evidence that [Petitioner] suffered from any adaptive deficits as an adult. The testimony and records provide that [Petitioner] was able to cope with life's common demands. He was able to communicate, care for himself, and live normally in his home and with others. Prior to committing the crimes for which he was imprisoned, [Petitioner] was able to function in the community, maintain employment, handle money, as well as drive and hot-wire a car. Franqui lived on his own, maintained a romantic relationship and took care of his girlfriend/wife and children. His ability to plan and carry out his crimes further support the conclusion that he possesses the ability to adapt to his surroundings.

PCR4. 940-41. Thus, "[t]he evidence presented is overwhelming that, prior to his incarceration, the [Petitioner] functioned normally in society and, while incarcerated, the [Petitioner] has shown no adaptive deficits. [Petitioner] has failed to prove, by

clear and convincing evidence, any concurrent deficits that would satisfy the third prong of the intellectual disability test." PCR4. 941.

Accordingly, the post-conviction court concluded that under a "holistic inquiry required by *Hall*," Petitioner had failed to prove, by clear and convincing evidence, that he is intellectually disabled under § 921.137(1), Fla. Stat. (2017), and denied Petitioner's motion. PCR4. 942. The Florida Supreme Court affirmed that finding saying that competent substantial evidence supported the post-conviction court's conclusion. *Franqui v. State*, 301 So. 3d 152, 155 (Fla. 2020). Contrary to Petitioner's assertions, the Florida courts' evaluation and analysis of the evidence presented was thorough and considered all the different aspects of an intellectual disability claim as mandated in *Hall*. This claim does not present any unsettled question of law; nor does it conflict with any of this Court's precedent. Accordingly, certiorari should be denied.

II-III

Petitioner's claim that *Hurst II* should apply to him does not warrant review.

Petitioner next claims that the Florida Supreme Court's denial of a new penalty phase trial, under *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*), violates the due process clause of the U.S. Constitution. He contends that in *Hurst II* the Florida Supreme Court conducted a statutory interpretation of Florida's death penalty statutes which resulted in the

necessity of the State to prove new "elements" of the offense of capital murder, a higher degree of murder than first-degree murder. In his estimation, that was a substantive change in the law which, under *Fiore v. White*, 531 U.S. 225 (2001), must reflect back to the enactment of the statute; since no such findings or "elements" were found in his trial, he is entitled to a new penalty phase. He argues that the Florida Supreme Court's reliance on *State v. Poole*, 297 So. 3d 487 (Fla. 2020), is essentially an ex post facto violation.

Petitioner's entire analysis of *Hurst II* is incorrect and his claim is without merit. This Court has consistently rejected certiorari review based upon the Florida Supreme Court's application of *Hurst* in Florida.[5] Petitioner presents no persuasive or compelling reasons to accept review of his case.

This Court does not review claims that are based on independent state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). The reason is jurisdictional and fundamental: "Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Herb v. Pitcairn*,

[5] *See Lamarca v. Florida*, No. 18-5648 (Oct. 29, 2018) (denying petition that argued that *Hurst II* imposed new substantive elements); *Geralds v. Florida*, No. 18-5376 (Oct. 9, 2018) (same).

324 U.S. 117, 125-26 (1945)). Since the decision below was based on independent and adequate state-law grounds, this Court should decline certiorari review.

Petitioner's theory for relief necessarily raises a state-law issue about what *Hurst II*, a state court decision, purportedly found to be the "elements" in a state statute. "States possess primary authority for defining . . . criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Therefore, defining the elements of a crime is "essentially a question of state law." *Hankerson v. North Carolina*, 432 U.S. 233, 244-45 (1977). However, the Florida Supreme Court has stated that *Hurst II* did not create new substantive elements to a higher degree of murder, contrary to Petitioner's stance.

> [W]e explained in *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018), the *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-degree murder has occurred.

Rogers v. State, 285 So. 3d 872, 885 (Fla. 2019) (emphasis omitted), *cert. denied sub nom. Rogers v. Florida*, 141 S. Ct. 284, 208 L. Ed. 2d 43 (2020). *Hurst II* did not say anything new about the substantive requirements needed to impose a capital sentence.

Petitioner cannot argue that he ultimately brings a due process claim and, therefore, raises a federal issue. After all, the determination that *Hurst II* made no alteration to Florida's capital-sentencing statute conclusively resolves Petitioner's due process claim absent any federal analysis. *Cf. Graves v. Ault*, 614 F.3d 501, 512

(8th Cir. 2010) ("[W]e are bound by the Supreme Court of Iowa's holding that a change, rather than a mere clarification, occurred."). Indeed, when this Court has confronted claims that a prisoner's due process rights were violated because a subsequent state court decision clarified that the conduct the prisoner was convicted of was simply not criminal, this Court has certified questions about the content of state law to the relevant state supreme court. *E.g.*, *Fiore*, 531 U.S. at 228; *see also Bunkley v. Florida*, 538 U.S. 835, 840-41 (2003) (remanding to state court to determine when change in law occurred). Implicit in that certification is the view that whether a state law has been altered is itself a state-law question. And here, when that state-law answer fully resolves the case, there is no federal jurisdiction. *E.g.*, *Gladney v. Pollard*, 799 F.3d 889, 898 (7th Cir. 2015) (finding "no federal constitutional issue" and only "perceived error of state law" when habeas petitioner argued that a new state-law statutory interpretation had to be applied to him, but the state courts found that the petitioner had been convicted under the proper law at the time of his trial). In short, the opinion below rests on state law all the way down and, thus, this Court lacks jurisdiction.

Further, Petitioner does not even try to identify any traditional basis for certiorari under Supreme Court Rule 10. He points to no split among the lower courts, no conflicts with this Court's decisions, and no issues of great federal importance. Petitioner's claim turns on how Florida interprets its own death-penalty statute. No other state would have reason to interpret Florida's statute, which explains why no

split among state courts of last resort exists. Nor is there a split with this Court's decisions or with a lower federal court because "[s]tate courts . . . alone can define and interpret state law," and thus, the Florida Supreme Court's interpretation of its own capital-sentencing statute is the last word. *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975). Finally, no split on any constitutional question exists because, to avoid adverse retroactivity rulings, Petitioner abandons any direct constitutional theory. In short, Petitioner advances no split because the legal issue he presents cannot give rise to one.

The Florida Supreme Court's decision denying the *Hurst* claim was correct. Petitioner wants *Hurst II* requirements to benefit him even though his sentence was final well before that case was decided. Petitioner avoids arguing that either *Hurst I* or *Hurst II* is retroactive as a matter of federal or state law. Instead, he addresses his claim as a due process one, arguing incorrectly that *Hurst II* established new elements required for a death sentence and was thus a substantive ruling on what Florida's death-penalty statute had always meant. However, *Hurst II* did not change Florida substantive law, it simply changed procedure, and Petitioner presents no due process argument for why a procedural change should apply retroactively to his case. Also, Petitioner's sentence is undeniably proper under current Florida law (as announced in *State v. Poole*, 297 So. 3d 487 (Fla. 2020)). In the Hialeah case, Petitioner was convicted of one count of first-degree murder, two counts of attempted first-degree murder with a firearm, one count of attempted robbery with a firearm,

two counts of grand theft, and one count of unlawful possession of a firearm while engaged in a criminal offense. Consequently, there was a unanimous jury finding for the aggravators of prior violent felony convictions and the murder was committed during the course of an attempted robbery. In the North Miami case, Petitioner was unanimously convicted of first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft third degree, and burglary. Again, there was a unanimous jury finding for the aggravators of a prior conviction for a capital or violent felony (Hialeah case and contemporaneous robbery and assault convictions) and the murder was committed during the course of a robbery.

Hurst II did not change the substantive law in Florida death penalty's scheme. The Florida Supreme Court in *Foster* specifically stated that there was no new capital-murder offense with additional elements; rather, *Hurst II* established necessary jury findings for sentencing. *Foster*, 258 So. 3d at 1251-52; *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019); *Rogers*, 285 So. 3d at 885; *Duckett v. State*, 260 So. 3d 230, 231 (Fla. 2018); *Finney v. State*, 260 So. 3d 231 (Fla. 2018). For example, in *Rivera v. State*, 260 So. 3d 920 (Fla. 2018), the defendant argued, as Petitioner does here, that under *Fiore* and *Winship*, *Hurst II* should have applied to his case because it announced a substantive clarification of Florida law. The Florida Supreme Court rejected the claim because *Hurst* did not announce new elements needed to establish a capital crime. *Id.* at 928. That determination is entitled to conclusive weight

because "state courts are the final arbiters of state law." *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997).

Hurst II itself makes clear that it neither clarified nor changed the substance of Florida law. It only transferred the necessary findings from the judge to the jury. *Hurst II*, 202 So. 3d at 53. *Hurst II* involved no new statutory requirements; the decision's focus was on "the mandate of [*Hurst I*] and on Florida's constitutional right to jury trial, considered in conjunction with [Florida's] precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." *Id.* at 44. The decision was grounded in federal and state constitutional law, not the statutory text. *Id.* at 59 (requiring jury unanimity under the Sixth and Eighth Amendments and the Florida right to a jury trial); *id.* at 69 (finding a "Sixth Amendment right to a jury determination of every critical finding necessary for imposition of the death sentence"). *Hurst II* did not purport to reach a new interpretation of Florida's capital-sentencing law.

Further, every finding required by *Hurst II* was also found in Petitioner's pre-*Hurst II* case; the findings were just made by a judge, not a jury. The trial judges found four aggravators in the Hialeah case and three in the North Miami case. Those aggravators were sufficient because longstanding Florida law had held that a single aggravator provides a sufficient ground for death eligibility. *E.g.*, *Poole*, 297 So. 3d at 502-03; *Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Thus, as a matter of substance, every finding required after *Hurst II* was

found in Petitioner's case. In short, Petitioner's view that *Hurst II* found new substantive elements finds no support in the opinion itself, subsequent Florida law, or this Court's cases. Instead, *Hurst II* procedurally changed *who* was required to make certain findings, not the content of those findings. With only a procedural change, Petitioner cannot even get to the first step of a due process analysis (whether *Hurst II* changed or clarified Florida substantive law) and, therefore, cannot state a viable due process claim.

Even if Petitioner could have benefitted from *Hurst II*, he would still not be entitled to relief since the Florida Supreme Court has receded from *Hurst II*, "to the extent its holding requires anything more than the jury to find an aggravating circumstance." *Poole*, 297 So. 3d at 501. In Petitioner's cases, however, juries did find aggravating circumstances beyond a reasonable doubt when he was convicted of the robberies, kidnapping, and attempted murder that occurred at the same time as his murders. And for that reason, under current Florida law, Petitioner would not be entitled to resentencing even if his interpretation of *Hurst II* were correct. *See id.* (finding that Petitioner was not entitled to relief under *Poole*).

Faced with this problem, Petitioner argues that due process precludes the application of *Poole* and requires that his already-final sentence be vacated based on an erroneous state-law ruling that occurred after his sentence became final and has since been rejected by the Florida Supreme Court. That theory lacks merit.

Petitioner relies on *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), and *Rogers v. Tennessee*, 532 U.S. 451 (2001), to argue that *Poole* was an unexpected and indefensible change to substantive law that cannot be applied retroactively. As a threshold matter, the *Rogers* line of cases has no application here because *Rogers* is based in the "basic . . . principle of fair warning." 532 U.S. at 459. Thus, the *Rogers* line concerns "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.'" *Id.* at 461 (quoting *Bouie*, 378 U.S. at 354). That is, *Rogers* applies when a change in law leads to a new judicial interpretation being applied to criminal conduct that occurred before the new interpretation was announced.

Here, *Poole*'s decision to recede from *Hurst II* could not have affected Petitioner's decision to commit his crimes, which were committed long before *Hurst II* was decided. When Petitioner committed his murders, the law was clear that the death penalty in Florida could be imposed if a judge found a statutory aggravator and found that the aggravator outweighed any mitigators. *E.g.*, *Hildwin v. Florida*, 490 U.S. 638, 640 (1989). Petitioner can therefore hardly be said to have been unfairly surprised that *Poole* receded from *Hurst II* to restore the trial judge to some role in capital sentencing long after Petitioner's sentences became final on direct review; after all, when Petitioner's primary conduct occurred, the trial judge had the dispositive role in capital sentencing. This case, then, unlike the *Rogers* line, involves

a change in law after the defendant's conduct and after his sentence became final on direct review, and then a second change back towards what the law was when the defendant acted. That second type of change does not deprive a defendant of fair warning and cannot have impacted the defendant's conduct. Thus, it does not violate due process under any conceivable interpretation of *Rogers* and its progeny. *E.g.*, *United States v. Barton*, 455 F.3d 649, 655 (6th Cir. 2006) ("If, however, the change in question would not have had an effect on anyone's behavior, notice concerns are minimized.").

Even beyond that, applying the *Rogers* line (which is less restrictive than the Ex Post Facto Clause) here would be inconsistent with this Court's decision in *Dobbert v. Florida*, which held that procedural changes to how capital sentences are imposed are not subject to the Ex Post Facto Clause. 432 U.S. 282 (1977). In *Dobbert*, the defendant committed a capital crime. *Id.* at 284. In between the crime being committed and trial, Florida changed its death penalty scheme to align with *Furman*. *Id.* at 288. Namely, at the time Dobbert committed his crime, a person convicted of a capital felony would be sentenced to death unless a majority of the jury recommended mercy, but by the time of trial, a person could only be sentenced to death if, after weighing aggravators and mitigators, the trial judge imposed the sentence. *Id.* at 289. Dobbert argued that the statutory "change in the role of the judge and jury" was an ex post facto violation. *Id.* at 292. This Court disagreed, explaining that the change was not an ex post facto violation because the change was procedural. *Id.* And by

procedural, the Court meant that the change "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94. The same is true here, the change from *Hurst II* to *Poole* changed the method for "determining whether the death penalty [would] be imposed," not "the quantum of punishment attached to the crime." And given that, it would not make sense to find a due process violation here, when *Rogers* found that due process requirements were less stringent than ex post facto ones. *Rogers*, 532 U.S. at 458-60.

Even if *Rogers* applies, Petitioner would still not state a due process claim based on application of *Poole*. *Rogers* bars only retroactive application of "unexpected and indefensible" changes in law. 532 U.S. at 461. *Poole* was neither (much less both, as Petitioner must show). Petitioner spends exactly four words arguing that *Poole* was unexpected. (Pet. 37) ("Certainly, *Poole* was unexpected."). In truth, *Poole* was hardly groundbreaking. Indeed, *Poole*'s holding that, under the Sixth Amendment, a jury had to find one aggravator beyond a reasonable doubt (but nothing more) was predicted in 2005 when the Florida Supreme Court explained that "if *Ring* did apply in Florida . . . we read it as requiring only that the jury make the finding . . . that at least one aggravator exists — not that a specific one does." *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005).

Regardless, *Poole* was not indefensible. Notably, this Court has recently confirmed *Poole*'s holding by explaining that "in a capital sentencing proceeding just

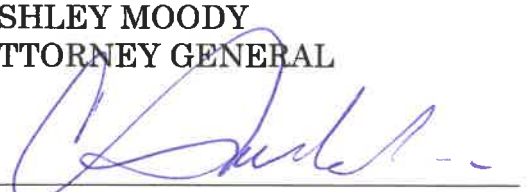
as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *McKinney v. Arizona,* 140 S. Ct. 702, 707 (2020). And this Court denied certiorari in *Poole* itself. *Poole v. Florida,* 141 S. Ct. 1051 (2021).

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL



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