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IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Appellant,

v.

Case No. SC10-1335

Lower Tribunal No. 1978-CF-0052

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLEE
ON REMAND FROM THE UNITED STATES SUPREME COURT

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STATEMENT OF THE CASE AND FACTS

On May 27, 2014, the United States Supreme Court reversed this Court's ruling to affirm the trial court's denial of Freddie Lee Hall's claim of intellectual disability (formerly known as mental retardation). Hall v. Florida, 134 S. Ct. 1986 (2014). The Court held that applying a definition of intellectual disability which included a bright-line cutoff IQ score of 70 to establish the first element of significantly subaverage intellectual functioning was unconstitutional, and that Hall should have been given the opportunity to establish whether he could satisfy the other two elements of intellectual disability. The case was remanded to this Court "for further proceedings not inconsistent with this opinion." Hall, 134 S. Ct. at 2001.

This case originated with the filing of a successive motion for postconviction relief premised on Atkins v. Virginia, 536 U.S. 304 (2002), in November, 2004 (V1/1-18). Appellant Hall sought and received an evidentiary hearing on his claim of intellectual disability, which was conducted December 7-8, 2009 (V10-V11). Prior to the presentation of evidence, the court below considered the State's motion in limine, which asserted that the court should not permit testimony or evidence relating to Hall's adaptive functioning unless and until Hall established

that his intellectual functioning was significantly subaverage (V1/184-89). Although the court ultimately granted the State's motion, the result of that ruling was that Hall's evidence as to the other two prongs was proffered into the record (V10/32-44). The defense witnesses were already arranged, and the expert Hall intended to use to establish his intellectual functioning would not be available until the second day of the two-day hearing (V10/32-42). Because the court was concerned about running out of time, the ruling permitted the defense to present all of the evidence they wanted to present, but it would be considered a proffer rather than competent, substantial evidence (V10/42-44).

Dr. Valerie McClain, a licensed psychologist, testified about various definitions for intellectual disability and how children are evaluated in school settings (V10/44, 54-58). She observed that the IQ requirement was changed in 1977 when it went from one standard deviation to two standard deviations from the norm, so an IQ of 85 or below would be in the mentally retarded range prior to that time (V10/59). She had reviewed documents from Hall's history, including school records (V10/53, 59). She noted that Hall's school records did not include any information about intelligence testing or any indication that Hall had been placed in special classes (V10/59). However, they

suggested that Hall was slow and had difficulties with comprehension (V10/59).

Lugene Ellis, Hall's half-brother, and James Hall, Hall's brother, both provided testimony relating to Hall as a child, and describing the difficulties he had with adaptive functioning while he was growing up (V10/66-100). Ellis testified that Hall "couldn't read too good" when he was in school, and noted that Hall can't write still today; although he wasn't sure about Hall's current reading skills, he knew Hall can't write because he gets letters from Hall that Ellis can't read (V10/70, 75). Ellis also noted that when he visited Hall in prison, Ellis did not care for the way Hall ate; he would take an entire loaf of bread and ball it up and refuse to share it (V10/75).

James Hall agreed that Hall still can't write, noting he gets letters from Hall that he doesn't even try to read because no one could understand them (V10/86). James noted that Hall had difficulty speaking as a child, and would pound in frustration instead of talking (V10/85). The speaking problem lasted until Hall was in his teens, and he had a stutter when he was in his teens (V10/85). When James visits Hall in prison, Hall talks to them, but his conversation is different and he can't keep up with his visitors' level, so they mostly sit and listen as Hall talks (V10/86). Hall tries to quote scripture from the Bible to

them, but he doesn't make sense and he doesn't know what the scriptures mean (V10/91, 96-97).

Licensed psychologist Dr. Harry Krop evaluated Hall in 1990 and testified at Hall's postconviction evidentiary hearing in 1997 (V10/101-02, 108, 126). Krop had administered the WAIS-R in March, 1990, and obtained a full scale score of 73 (V10/120). Based on the information he compiled in 1990, including information relating to Hall's adaptive functioning, Krop described Hall as functionally retarded at that time (V10/122).

Dr. Greg Prichard, a licensed psychologist, was initially contacted by CCRC in 2002 to evaluate Hall (V10/160, 163). Prichard reviewed the intelligence tests that had been given to Hall over the years, including his own WAIS-III administered in 2002 (V10/179; V11/215, 268-82). In addition to the testing, Prichard reviewed a number of documents, interviewed Hall for his history, and spoke to Hall's sister, Deana Rigsby, and his brother, James Hall, regarding Hall's adaptive behavior as a child and around 18 years of age (V11/215-17). Prichard agreed that Hall's records did not reflect any intelligence testing prior to age 18 (V11/219). The school records characterize Hall as mentally retarded, but there is never an indication as to what compelled that designation (V11/220).

Dr. Prichard assessed Hall's adaptive functioning by completing the Vineland Adaptive Behavior Scale, using Hall's sister and brother as the respondents (V11/215, 230, 236-46). Prichard "had" to do the assessment retrospectively, interviewing family members to determine Hall's level of functioning prior to age 18 (V11/230-31, 236-46). Prichard acknowledged that he had not undertaken any analysis of Hall's current adaptive functioning while on death row (V11/260, 284-85). He had completed such assessments with other death row inmates, by questioning the corrections officers about current adaptive behavior (V11/260). He could not recall why he had not undertaken any assessment of Hall's adaptive functioning when he administered the intelligence tests in 2002, and he acknowledged that the clinical definition of intellectual disability requires that adaptive deficits be concurrent with the intellectual subaverage functioning, just as Florida's legal definition for intellectual disability as a bar to execution requires (V11/260, 284-85).

At the conclusion of the hearing, the trial court denied the motion, finding that Hall had failed to establish *any* of the three prongs necessary to prove that he was intellectually disabled so as to preclude execution under Atkins (V4/596-606). After finding that Hall failed to demonstrate that he suffers

significantly subaverage general intellectual functioning, the trial court considered the evidence proffered as to the other two prongs of an intellectual disability diagnosis "in an abundance of caution" (V4/602). The court found that Hall failed to demonstrate that he has the necessary deficits in adaptive functioning to qualify as intellectually disabled, since he did not present or proffer any evidence of current adaptive deficiencies (V4/602-04). Moreover, the court found that Hall failed to demonstrate any onset of intellectual disability prior to age 18 (V4/604-05).

SUMMARY OF THE ARGUMENT

The trial court's finding that Hall is not intellectually disabled should be affirmed. At the evidentiary hearing below, Hall was permitted to proffer evidence as to his adaptive functioning and the timing of the onset of any potential intellectual disability. The trial court's express findings that Hall failed to establish either the second or third element of the definition of intellectual disability are supported by the record, and accordingly Hall's motion was properly denied.

ISSUE I

WHETHER THE TRIAL COURT PROPERLY REJECTED HALL'S CLAIM OF INTELLECTUAL DISABILITY.

The United States Supreme Court held that this Court should have rejected the trial court's finding that Hall failed to establish the first prong of intellectual disability, significantly subaverage intellectual functioning. Specifically, the Court found that this Court's interpretation of the definition of intellectual disability in Section 921.137, Florida Statutes, should not have excluded consideration of a standard error of measurement which might permit an individual with significantly subaverage intellectual functioning from scoring above a 70 on a standard IQ test. Hall v. Florida, 134 S. Ct. 1986, 2000 (2014).

Although the Court found that Hall should not have been precluded from offering evidence regarding the other two elements of intellectual disability, the record in this case reflects that Hall was permitted to proffer this evidence at his 2009 evidentiary hearing. Moreover, the trial court, "in an abundance of caution," made express findings and concluded that Hall failed to demonstrate either the second or third prong of intellectual disability (V4/602-05). Because the United States Supreme Court has reversed this Court's ruling as to the first prong, intellectual functioning, this Court must now consider

whether the remaining trial court findings - that Hall failed to demonstrate any concurrent adaptive deficits and onset prior to age 18 - are adequate to defeat Hall's claim of disability. The standard of review is whether the trial court's ruling is supported by competent, substantial evidence. Phillips v. State, 984 So. 2d 503, 509 (Fla. 2008).

In Hall's initial brief filed in this appeal, he presented four issues. The first issue challenged the trial court's finding that Hall was not intellectually disabled, asserting primarily that this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), was contrary to the Atkins decision. As part of that issue, Hall claimed that he had satisfied the adaptive functioning element of intellectual disability because his brothers had testified that, even today, Hall writes them letters which they can't understand because he writes so poorly (V10/70, 75, 86).

Hall's initial brief also states that his "serious speech impediments and impaired social skills are examples of his adaptive functioning deficits," citing to Dr. Krop's testimony at the evidentiary hearing (Appellant's Initial Brief, p. 10). However, Dr. Krop testified only that speech impediments, limited social skills, and impaired self-concepts can be examples of deficits in adaptive functioning; he did not

indicate that Hall currently had any speech impediments, limited social skills, or impaired self-concepts. Hall's brother, James, was asked specifically how long Hall had "this sort of problem in his kind of speaking," and responded "way up until I imagine in his teens," because he still had "kind of" a stutter when he was in his teens (V10/85). Although James still hears Hall talk when they visit at the prison, there was no indication that Hall still stutters today.

A full review of the record confirms that the court below did not err in finding that Hall failed to demonstrate that he currently has deficits in adaptive functioning to satisfy this element of intellectual disability. None of the experts that testified to Hall's alleged disability had conducted any type of assessment of current adaptive functioning. Dr. Prichard even acknowledged that such an assessment was necessary, that he had conducted assessments in the past with individuals on death row by talking to corrections officers, and that he could not remember why he did not undertake the analysis when he tested Hall's intelligence back in 2002 (V11/260, 284-85).

The testimony about Hall's current inability to write letters, accurately explain Biblical scripture, and demonstrate good table manners was plainly insufficient to satisfy Hall's burden on this point. According to the defense experts at the

hearing, the proper way to evaluate current adaptive functioning for an inmate on death row is to talk to the corrections officers about the inmate's specific abilities (V11/260). Satisfaction of this element requires a showing that a person is significantly deficient in at least three different domains of functioning (V10/117-18). No one offered any testimony that the shortcomings identified by Lugene Ellis and James Hall demonstrated significant deficits, and the particular domains where Hall is seeking to be found deficient have not been identified or discussed in any manner. Accordingly, the court's express finding that Hall failed to establish current adaptive deficits to support a diagnosis of intellectual disability should be affirmed.

There is no dispute, factual or legal, that any reasonable definition of intellectual disability requires a finding that the individual possess adaptive functioning deficits that exist *concurrently* with significant subaverage intellectual functioning. This element is specifically codified in Florida's definition of intellectual disability as a bar to execution, and is expressly required for a clinical definition as recognized by mental health professionals. Hall, 134 S. Ct. at 1994; Phillips, 984 So. 2d 503, 509, 511-12 (Fla. 2008); § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); American Psychiatric

Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013); (V11/284). In the trial court below, Hall offered no argument that Florida law on this point was contrary to Atkins or that the element of current adaptive deficits had been improperly interpreted or applied, but simply claimed that he had met his burden based on his brothers' testimony at the evidentiary hearing (V4/542-43, 578-80). Because the trial court rejected that claim factually and that finding is supported by the record, the ruling below should be affirmed.

The trial court's finding that Hall failed to demonstrate any onset of intellectual disability before age 18 is also proper. In Hall's initial brief, he does not identify any possible error in this finding below. The record reflects that there were no intelligence test results available to establish Hall's intellectual functioning below age 18 (V10/59; V11/219). While the school records indicate Hall was considered "slow" and even classified him as mentally retarded, that classification is not reliable because there is no information to explain or support the label in the school records. There is no indication of the particular definition of retardation, or who may have been applying it to Hall. Moreover, because Hall's school records were generated before 1977, when the definition of

mental retardation was changed to require an IQ of approximately 70 rather than 85, even a particular showing that Hall's intellect was at the mental retardation level at that time would not satisfy his burden of establishing onset before age 18.

Should this Court find the record insufficient to support the trial court findings on these two elements, the proper remedy would be a remand for reconsideration of the ruling on Hall's intellectual functioning. Because the evidence on that point was conflicting, establishing that Hall has obtained IQ scores ranging from 71 to 80 over a period of many years, the trial court would be the proper forum for resolution of this factual dispute. On the record available, however, Hall's failure to establish intellectual disability is evident. Since Hall failed to demonstrate either concurrent deficits in adaptive functioning or onset prior to age 18, the court below properly denied his claim of intellectual disability, and this Court should affirm that ruling.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the order entered below finding that Hall is not intellectually disabled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2014, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal which will send a notice of electronic filing to the following: Eric Pinkard, Assistant CCRC-M, Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, **`pinkard@ccmr.state.fl.us`** [and] **`support@ccmr.state.fl.us`**.

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CERTIFICATE OF FONT COMPLIANCE

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

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