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**IN THE SUPREME COURT OF FLORIDA**  
**Case No. SC10-1335**  
**Circuit Case No. 1978-CF-0052**

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**FREDDIE LEE HALL,**  
**Appellant,**  
**v.**  
**STATE OF FLORIDA,**  
**Appellee.**

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

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**SUPPLEMENTAL ANSWER BRIEF OF APPELLANT**

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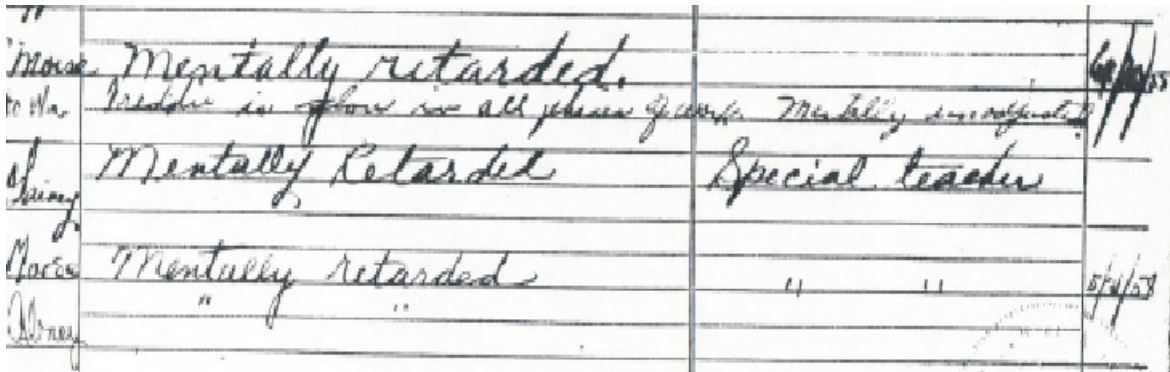
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## **REQUEST FOR ORAL ARGUMENT**

The Appellant respectfully requests the opportunity to present oral argument.

## STATEMENT OF THE CASE AND FACTS



Appendix 1, hereto (Hall's school records).

### A. Hall's Intellectual Disability Before *Atkins* was Decided<sup>1</sup>

1. **1989:** "Teachers immediately recognized him to be mentally retarded."

Mr. Hall first presented evidence of his intellectual disability in 1988 when counsel filed a 3.850 motion challenging his sentencing proceeding under

*Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), on the

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<sup>1</sup>The Court in *Atkins* used the term "mental retardation." In *Hall*, both the majority opinion and the dissent chose to adopt the term now used by most professionals in the field, "intellectual disability." *Id.* at 1990 ("This opinion uses the term 'intellectual disability' to describe the identical phenomenon."); *See also id.* at 2002 (Alito, J., dissenting); AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (11th ed. 2010) [hereinafter AAIDD, DEFINITION MANUAL]; AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 72 (11th ed. 2012) [hereinafter AAIDD, USER'S GUIDE] ("The term *intellectual disability* covers the same population of individuals who were diagnosed previously with mental retardation . . . ."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter APA, DSM-5]. The terms mentally retarded and mental retardation that appear in this brief are from direct quotes from prior proceedings and records.



claim that non-statutory mitigating evidence had not been allowed. *See Hall v. State*, 541 So.2d 1125 (Fla. 1989). Hall proffered evidence of such non-statutory mitigating circumstances including evidence of Mr. Hall's intellectual disability which the trial court found proven by a preponderance of the evidence. However, the trial court found the *Hitchcock* violation harmless. This Court reversed:

. . . Hall's childhood was marked by an existence which can only be described as pitiful. Teachers and siblings alike **immediately recognized him to be significantly mentally retarded**. This retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him. Constantly beaten because he was slow or because he made simple mistakes, Hall felt the wrath of his father, his mother and his neighbors, who had permission to beat Hall whenever they deemed it proper. Hall's mother would strap him to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or chord.

541 So.2d at 1127. This Court also referenced reports from several mental health professionals which referred to Hall's very low intellectual level. *Id.*

2. **1990:** Hall "has been mentally retarded all his life"

In 1990, the trial court conducted the resentencing proceeding ordered by this Court due to the *Hitchcock* error. Mr. Hall offered the testimony of four qualified mental health expert witnesses, Doctors Lewis, Bard, Toomer, and Heide, who all opined that Mr. Hall had intellectual disability. The trial court found substantial evidence Mr. Hall had been intellectually disabled his entire life,

but would not quantify that finding as a mitigating factor. *Hall v. State*, 614 So.2d 473 (Fla. 1993).

On appeal to this Court, the majority upheld Mr. Hall's death sentence.

However, Justices Barkett and Kogan issued a prophetic dissent:

The testimony reflects that Hall has an IQ of 60: he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie lee Hall was "raised under the most horrible family circumstances imaginable."

Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that Hall may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, **has been mentally retarded all his life**, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development.

Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a croaker sack, swung it over a fire, and beat him: buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked: locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed famine was

imminent, and she allowed neighbors to punish Hall by forcing him to stay under a bed for an entire day.

Hall's school records reflect his mental deficiencies. His teachers in the fourth, fifth, seventh and Eighth grades described him as mentally retarded.<sup>[2]</sup> His fifth grade teacher stated he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

The United States Supreme Court has expressed the view that the Eighth Amendment does not prohibit the execution of the mentally retarded. Nonetheless, the Court noted in *Penry* that "evolving standards of decency that mark the progress of a maturing society" may ultimately lead to a national consensus against executing the mentally retarded.

*Id.* at 479-482. <sup>3</sup>

**B. 2013: Mr. Hall's Non-Intellectual Disability Under Florida's Application of *Atkins***

In 2001, Florida enacted Florida Statute 921.141 which prohibits the execution of the intellectually disabled. In 2002, the United States Supreme Court, in *Atkins* held that the execution of persons with intellectual disability violated the Eighth Amendment. Even though this Court had twice upheld the trial court's finding that Mr. Hall was intellectually disabled, Mr. Hall was required to go

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<sup>2</sup>See Appendix 1, hereto.

<sup>3</sup>After this Court affirmed the death sentence following the resentencing, Mr. Hall filed a 3.850 motion alleging that he was incompetent. Doctor's Krop, Toomer, and Zimmerman also testified that Mr. Hall was mentally retarded. In the postconviction order the trial court found, again, that Mr. Hall "**is probably somewhat retarded**" and this Court, again, affirmed that finding. *Hall v. State*, 742 So.2d 225, 229 (Fla. 1999).

forward with another evidentiary hearing *to prove, again*, that he is intellectually disabled.

In 2004 Mr. Hall filed a “Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation.” Attached to the motion was a confidential evaluation of Mr. Hall conducted by Dr. Gregory A. Prichard.

1. Hall’s *Atkins* Hearing: Under Medical and Professional Clinical Criteria, But Not the Florida Statute, Hall is Intellectually Disabled

a. The lower court hearing was constrained by *Cherry*

Prior to the hearing, the state filed a Motion in Limine to prohibit Mr. Hall from submitting any evidence on the 2<sup>nd</sup> and 3<sup>rd</sup> prong of establishing intellectual disability based upon *Cherry v. State*, 959 So.2d 702 (Fla. 2007)(claim must be denied if the defendant fails to prove an IQ score of 70 or below).<sup>4</sup> The trial court granted the State’s motion and required Hall to establish, by clear and convincing evidence, that his IQ had been tested and he had scored a 70 or below before age 18 before he could present any evidence regarding his adaptive functioning. PCR Vol. V at 32. Several IQ scores were presented, the valid ones of which were in the range of approximately 70, given the standard error of measurement.<sup>5</sup>

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<sup>4</sup>A fuller discussion of the definition of intellectual disability is set out *infra*.

<sup>5</sup>Every psychologist or psychiatrist who conducted intelligence testing on Hall has diagnosed him as mentally retarded, beginning long before *Atkins*. That

However, none of the scores considered by the lower court were 70 or below.

Thus, the lower court only allowed a proffer of evidence on prongs two and three.

b. Under Standard Clinical Practice, Mr. Hall is  
Intellectually Disabled

Hall presented testimony from Dr. Krop and from Dr. Greg Prichard. Dr. Krop, relying on his 1990 evaluation of Hall, testified that Hall was “functionally retarded,” with a “mental age of around 13.” PCR Vol. V at 122-123; Krop Report 1, 4. Dr. Krop noted that all of Hall’s reliable IQ scores fell “within the range of mental retardation.” PCR Vol. V at 126. Dr. Prichard testified that he had evaluated Hall and administered an IQ test, the WAIS-III, on which Hall scored 71. PCR Vol. V at 230. He explained that “when a person has an I.Q. of between 65 and 75,” a clinician has to determine whether “those cognitive limitations create deficits in the person’s ability to adapt” before determining whether the person is mentally retarded. PCR Vol. V at 233.

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is not surprising: all but one of Hall’s IQ scores on the “gold standard” testing instruments—the Wechsler tests—are consistent in clustering in the high 60s to low 70s: 69 on the WAIS-III (not considered by the lower court), 71 on the WAIS-III, 72 on the WAIS-IV, 73 on the WAIS-R, and 74 on the WAIS-R. All of those scores are within the 95% confidence interval for a “true” score of 70, or two standard deviations below the mean. One outlier score of 80 resulted from a test given “by a student” likely with “no supervision on site.” Nevertheless, the expert who evaluated Hall at that time concluded he was “significantly retarded” and would have “great difficulty taking care of himself.” PCR 614.

Dr. Prichard assessed Hall's adaptive limitations, in part by interviewing family members. Dr. Prichard concluded that Hall had "significant adaptive deficits" in "virtually every domain measured." PCR Vol. V at 239. Based on his own assessment and an extensive review of Hall's records and previous testing results, Dr. Prichard concluded that, as a clinical matter, "Hall [met] the three prongs required for a diagnosis of mild mental retardation." PCR Vol. V at 258.

c. The lower court refused to address Clinical Standards: "I'm **certainly not going to go anywhere near the DSM** [the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*]. **That's way beyond my field**, and I won't even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for." PCR Vol. V at 253<sup>6</sup>

The prosecutor made no attempt to rebut Dr. Krop's and Dr. Prichard's diagnoses of mental retardation. Instead, he contended that their diagnoses were irrelevant because *Cherry* required a score of 70 or under.

As the prosecutor put it: "*Dr. Prichard is reciting a **clinician's approach** to mental retardation, which I submit **is not relevant** to this proceeding.* Because under the law, if an I.Q. is above 70, a person is not mentally retarded." PCR Vol. V at 172 (emphases added); *see also, e.g.*, PCR Vol. V at 234 ("[M]y position is that once the witness testified that his I.Q. test of Mr. Hall revealed a full-scale IQ

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<sup>6</sup>As discussed *infra*, it is the obligation of decision-makers in *Atkins* cases "to go anywhere near the DSM."

of 71, that the inquiry under Florida law is over.”). The court agreed, at one point commenting: “I’m certainly not going to go anywhere near the DSM [the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*]. That’s way beyond my field, and I won’t even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for.” PCR Vol. V at 253.<sup>7</sup>

d. The lower court denied relief by requiring an assessment of adaptive functioning in prison and requiring an IQ score of 70 or below before age 18

The trial court denied Hall’s motion. Pointing to Hall’s obtained IQ scores, the court found that Hall was unable to demonstrate “an I.Q. score of 70 or lower.” Trial Ct. Op. ¶ 20. Hall’s “mental retardation claim fails as a matter of law.” *Id.* ¶ 22.

The court went on to find that Hall could not show deficits in adaptive behavior “existing concurrently” with sub-average intellectual functioning. *Id.* ¶¶ 23-26. The court interpreted “concurrently” to mean that Hall had to present evidence of deficits in adaptive behavior *in prison*.<sup>8</sup> Since Hall failed to present

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<sup>7</sup>As discussed *infra*, a “clinician’s approach” is exactly what *Atkins* requires.

<sup>8</sup>“Since the Defendant has been incarcerated in the Department of Corrections since 1978, the logical and necessary inquiry to determine ‘concurrent’ deficits in adaptive functioning would have been to interview correction officers or classification officers, or perhaps, to review records documenting the Defendant’s existence and interactions while in the custody of

such evidence, he could not meet the adaptive behavior prong. *Id.* ¶ 26. The court also found that Hall could not satisfy the third prong—manifestation prior to age 18—because his IQ was not tested before age 18. *Id.* ¶¶ 28-29.

## 2. This Court’s Stare Decisis Required Affirmance

On appeal, a majority of this Court reaffirmed its holding in *Cherry* that the “plain language” of the statute requires a “firm IQ cutoff of 70,” rejecting Hall’s argument that accepted clinical practice requires consideration of the standard error of measurement. *Hall v. State*, 109 So.3d 704, 708-709 (2012). The Court also declined to address Hall’s argument that the trial court improperly limited his introduction of evidence regarding adaptive functioning, reasoning that “because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry.” *Id.* at 710.

In a concurring opinion, Justice Pariente found it “unquestionabl[e]” that “clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment.” 109 So. 3d at 714. But “unless this Court were to recede from *Cherry*,” “a plain-language interpretation of Florida’s bright-line cutoff score will remain the rule of law in this state.” *Id.* Justice Pariente predicted that “[a]t some point in the future, the United States Supreme Court may

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the Department of Corrections.” Order at 8.



determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137(1).” *Id.* at 715. The United States Supreme Court accepted Justice Pariente’s invitation.

## **SUMMARY OF ARGUMENT**

The trial courts finding that Hall is not intellectually disabled should be reversed. The findings that Mr. Hall did not establish the second or third elements of the definition of intellectual disability are not supported by the record and are in direct contravention of the United States Supreme Court's decision in *Hall v. Florida*, 134 S.Ct. 1986 (2014).

## ARGUMENT

### APPLYING CONTROLLING CLINICAL PRACTICE, MR. HALL HAS INTELLECTUAL DISABILITY

A. There Has Heretofore Been No Dispute That Under Clinical Practice Hall is Intellectually Disabled.

The State did not challenge below that, under clinical standards, Hall is intellectually disabled. Justices Labarga and Perry noted this in dissent. Justice Labarga “wr[ote] to express [his] deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though the evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *Atkins* under the definition of ‘mental retardation’ set forth in section 921.137(1).” 109 So. 3d at 715. He explained that, in his view:

[T]he imposition of an inflexible bright-line cutoff score of 70 ... is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded.... The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those **standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded**, without application of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

*Id.* at 717-718 (emphasis added). The Supreme Court agreed.

Justice Perry also dissented, urging that “[i]f the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed.” 109

So. 3d at 718. Recounting the voluminous evidence of Hall’s disability, Justice Perry stated that “Hall is a poster child for mental retardation claims.” *Id.* at 719. “[T]he record here clearly demonstrates that Hall is mentally retarded.” *Id.* Yet because Hall obtained IQ scores above 70, “[t]he current interpretation of the statutory scheme will lead to the execution of a retarded man in this case.” *Id.* at 720. “Hall had been found by the courts to be mentally retarded before the [Florida] statute was adopted. Once the statute is applied, Hall morphs from someone who has been ‘mentally retarded his entire life’ to someone who is statutorily barred from attempting to demonstrate ... deficits in adaptive functioning to establish retardation.... [T]his cannot be in the interest of justice. *Id.* The Supreme Court agreed.

B. *Hall v. Florida*: The Florida Rule of an IQ Score of 70 or Below Violated Accepted Clinical Practice With Respect to The Determination of Significant Impairment in Intellectual Functioning

In *Atkins*, the Supreme Court held the execution of persons with intellectual disability violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The Court explained that a national consensus against the execution of intellectually disabled persons had developed, and that the “diminished capacities” of persons with intellectual disability undermined the traditional penological justifications for the death penalty and increased the likelihood that such persons would be wrongfully executed. *Atkins*, 536 U.S. at 318-321. The

Court left to States the power to “develop appropriate ways to enforce th[is] constitutional restriction.” 536 U.S. at 317. But state were not free “to define intellectual disability as they wished.” *Hall*, 134 S.Ct at 1099.

The clinical definition of intellectual disability involves three, interrelated, prongs. The first prong—significant impairment in intellectual functioning—is generally evaluated via IQ test scores. Florida’s statute<sup>9</sup> defines this prong as “significantly sub-average general intellectual functioning” which this Court held, in *Cherry* and *Hall*, required an IQ score of 70 or below.

In reversing this Court, the Supreme Court reiterated the constitutional holding of *Atkins* and provided guidance to the States on its implementation. Specifically, the Court held that Florida could not impose an arbitrary IQ score limitation on the right of capital defendants to seek relief under *Atkins*. “Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test,” *id.* at 2001, which the Court found to “create an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” *Id.* at 1990.

This unacceptable risk arose because Florida’s rule was inconsistent with medical and clinical practice.<sup>10</sup> IQ tests generally, and arbitrarily, are designed so

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<sup>9</sup>Fla. Stat. § 921.137(1) (2013)

<sup>10</sup>134 S.Ct at 1993 (“Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.”)

that the mean score across the population is 100. Significant limitations in intellectual functioning is often determined from “an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement [SEM] for the specific instruments used and the instruments’ strengths and limitations.”<sup>11</sup> Given the universally recognized SEM, two standard deviations below the mean on many IQ tests is only ““*approximately 70*.”<sup>12</sup> Hence, standard clinical practice recognizes “an individual’s intellectual functioning cannot be reduced to a single numerical score.” *Id.* at 1995.

“By failing to take into account the SEM and setting a strict cutoff at 70, *Florida goes against the unanimous professional consensus*. Neither Florida nor its *amici* point to a single medical professional who supports this cutoff.” *Hall*, 134 S. Ct. at 2000 (internal citation and quotation marks omitted; emphasis added). Florida is not free to define mental retardation inconsistently with the consensus of professionals, and thus Florida’s rule violated *Atkins*’ prohibition on the execution of intellectually disabled individuals.

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<sup>11</sup> AAIDD, DEFINITION MANUAL, at 31. Citing medical, clinical, and scientific literature and manuals, *Hall* held that intelligence tests, based as they are on statistics, suffer “inherent imprecision.” 134 S. Ct. at 1995. Thus IQ scores “cannot be read as a single fixed number.” *Id.* at 1995.

<sup>12</sup>*Atkins*, 536 U.S. at 308 n. 9 (citing DSM IV at 42-43)(emphasis added).

C. To the Degree it is Now Disputed, Under Appropriate Clinical Practices—Which Were Applied in this Case Before *Cherry*—Mr. Hall is Intellectually Disabled

The diagnostic criteria for a finding of intellectual disability is set forth by the APA DSM-V:

Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life such as communication, social participation, and independent living, across multiple environments, such as home, school, work and community.

C. Onset of intellectual and adaptive deficits during the developmental years.

DSM-V at 33.

1. *Hall v. Florida* Established Mr. Hall’s IQ Scores Satisfy Prong 1 of an Intellectual Disability Diagnosis, Which the State Cannot Dispute

The Supreme Court in *Hall* held that the IQ scores submitted by Hall placed him in the intellectually disabled range and required assessment of the “condition” of intellectual disability:

This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [as here], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits

*Hall*, 134 S.Ct at 2001.

2. Under Controlling Clinical Practice, Prongs 2 & 3 Are Historically, and on this Record, Clearly Established

a. The Reason the Lower Court Did Not Find Prong 2—Adaptation to Prison-- is Rejected by Clinical Practice

*Hall* requires courts to examine and rely upon what “experts in the field would consider” when diagnosing intellectual disability. *Hall*, 134 S.Ct at 1995.

The trial court concluded that Hall could not demonstrate deficits in adaptive functioning because he did not present evidence regarding his functioning in prison. But, according to “experts in the field,” adaptive behavior is measured by a person’s ability to cope in a normal environment, not in prison.

The AAIDD has recognized that prison settings make difficult the assessment of adaptive functioning, reporting, “[l]egal restrictions significantly reduce opportunities to observe and assess the person in age-appropriate community environments. Examples include the person being in physical restraints, imprisoned, or highly medicated” AAIDD DEFINITION MANUAL, p. 99. AAIDD, USERS GUIDE at 20 (“The diagnosis of [mental retardation] is not based on the person’s ... behavior in jail or prison.”). Incarcerated individuals



simply lack the opportunity to demonstrate adaptive behaviors.<sup>13</sup> “The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior.” Tassé, *Adaptive Behavior and Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 *Applied Neuropsychology* 114, 119 (2009).<sup>14</sup>

b. Under *Hall*, life long evidence of deficits must be considered

The lower court violated the fundamental rule that for a diagnosis of prong 2 a fact-finder must consider substantial and weighty evidence of intellectual disability as measured and made manifest by... **medical histories, behavioral records, school tests, and reports, and the testimony regarding past behavior and family circumstances.** *Hall*, 134 S.Ct at 1996 (emphasis added). This is so because “the medical community accepts that all of this evidence can be probative of intellectual disability.” *Id.* Thus, “the law requires that [Hall] have an opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning **over his lifetime.**” *Id.* at 1999 (emphasis added.)

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<sup>13</sup>Widaman, K. F., & Siperstein, G. N. (2009). Assessing adaptive behavior of criminal defendants in capital cases: A reconsideration. *American Journal of Forensic Psychology*, 27(2), 5-32. Retrieved from <http://www.iapsych.com/iqmr/widaman2009.pdf>

<sup>14</sup>*See also United States v. Smith*, 790 F.Supp 482, 534 (E.D. La. 2011)(correctional officers provide neither “reliably based nor persuasive” evidence of, and “little insight” into, adaptive functioning.); *United States v. Davis*, 611 F. Supp. 2d 472, 494 (D.Md. 2009)

c. Hall established these life-long deficits

The Supreme Court listed many of Hall's life-long deficits:

Hall then presented substantial and unchallenged evidence of intellectual disability. School records indicated that his teachers identified him on numerous occasions as "[m]entally retarded." App. 482-483. Hall had been prosecuted for a different, earlier crime. His lawyer in that matter later testified that the lawyer "[c]ouldn't really understand anything [Hall] said." *Id.*, at 480. And, with respect to the murder trial given him in this 1991\*1991 case, Hall's counsel recalled that Hall could not assist in his own defense because he had "'a mental ... level much lower than his age,'" at best comparable to the lawyer's 4-year-old daughter. Brief for Petitioner 11. A number of medical clinicians testified that, in their professional opinion, Hall was "significantly retarded," App. 507; was "mentally retarded," *id.*, at 517; and had levels of understanding "typically [seen] with toddlers," *id.*, at 523.

As explained below in more detail, an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability. See DSM-5, at 37. Hall's siblings testified that there was something "very wrong" with him as a child. App. 466. Hall was "slow with speech and ... slow to learn." *Id.*, at 490. He "walked and talked long after his other brothers and sisters," *id.*, at 461, and had "great difficulty forming his words," *id.*, at 467.

Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe. Hall was raised — in the words of the sentencing judge — "under the most horrible family circumstances imaginable." *Id.*, at 53. Although "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded... [t]his retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him." *Id.*, at 20. Hall was "[c]onstantly beaten because he was 'slow' or because he made simple mistakes." *Ibid.* His mother "would strap [Hall] to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken

Hall by hoisting him up and whipping him with a belt, rope, or cord." *Ibid.* Hall was beaten "ten or fifteen times a week sometimes." *Id.*, at 477. His mother tied him "in a 'croaker' sack, swung it over a fire, and beat him," "buried him in the sand up to his neck to 'strengthen his legs,'" and "held a gun on Hall ... while she poked [him] with sticks." *Hall v. Florida*, 614 So.2d 473, 480 (Fla.1993) (Barkett, C.J., dissenting).

*Hall*, 134 S.Ct at 1990-1991.

1. The un-refuted expert testimony below

Dr. Gregory Prichard conducted comprehensive evaluation of the adaptive functioning prong. He testified at the 2009 evidentiary hearing that he is a clinical psychologist who had worked for the Agency for Persons with Disabilities since 1996 conducting assessments of whether a person is intellectually disabled. PCR Vol. V at 164. He is a member of AAIDD, and has evaluated approximately 1500-2000 persons to determine whether they have intellectual disability. PCR Vol. V at 165. He has administered the Vineland Adaptive Functioning test at least 1000 times. PCR Vol. V at 165. He reviewed records concerning Mr. Hall including mental health reports from Dr. Dorothy Otnow Lewis, Dr. Leslie Prichep, Barbara Bard, Dr. Harry Krop, Marylynn Feldman, Dr. George Barnard, Dr. Jonathan Pincus, Dr. Carrerra, Kathleen Heide, Dr. Jethro Toomer, and Dr. Bill Mosman. PCR Vol. V at 169-170. He also reviewed DOC records from 1968 and 1969 and from 1978 onward as well as transcripts of testimony from Dr. Barnard, Mr. Hall's sisters Deanna Mitchell-Rigsby and Katie Mae Glenn, and his brother James Hall.

PCR Vol. V at 169-170. He also reviewed the sentencing order from the trial court and Mr. Hall's school records. PCR Vol. V at 169-170.

In conducting his evaluation of Mr. Hall in 2002, Dr. Prichard interviewed him and obtained a history, administered the WAIS III - obtaining a Full Scale IQ of 71, administered the Wide Range Achievement Test, spoke to Hall's sister Deana Rigsby and to his brother James Hall, and conducted a Vineland Adaptive Behavior Scales analysis through information supplied to them about Mr. Hall. PCR Vol. V at 215, 218. He outlined the portions of the record he considered important in his adaptive functioning assessment as follows:

School record: In 1952, when he was about six or seven years old, there is a note in his school records that his mental maturity is far below his chronological age. In 1953, at age eight and nine, he is slow in all of his work. 1955, age nine and ten they said he is mentally retarded. 1956, age ten and eleven, Freddie is slow in all phases of his work. In 1957, age eleven and twelve, mentally retarded. 1958, age twelve and 13, described as mentally retarded, 1961 age 15 and 16 described as mentally retarded. So what was relevant to me is that throughout school, between 1952 and 1961, he was described in terms that certainly represent to me that he had some academic difficulties and appeared to the people who were trying to teach him to have cognitive limitations, because he was described as mentally retarded, several times.

PCR Vol. V at 219-220.

DOC records: Records from the DOC from 1968 to 1972 referenced his school functioning as being poor, and that he was socially promoted in school. A questionnaire filled out by his mother that year said it was hard for him to learn in school, that he couldn't learn, that he had head trouble and made no progress. A presentence

investigation in 1968 stated Mr. Hall appeared to be functioning below normal levels, and was classified as 4f because his score on the test for military screening was very low. The DOC stated his reading level was 2,6 and commentary of intellectual depravation, and that he seemed to lack the ability to adequately cope with more complex factors in his environment, and lacked the capacity to reason through to logical conclusions, problems of every day living. In 1978 the DOC records stated Mr. Hall showed little signs of self improvement.

PCR Vol. V at 223-226.

1990 report of Dr. Harry Krop: Dr. Prichard noted that Dr. Krop evaluated Mr. Hall in 1990 when he was 44 years of age, and his report reflected he talked to Mr. Hall's family, as Dr. Prichard did, and found he has always had difficulty adapting in a number of areas.

PCR Vol. V at 229.

Vineland testing: Dr. Prichard administered the Vineland test to two members of Mr. Halls family, his sister Deana Rigsby, and brother James Hall to obtain information about the adaptive functioning and onset before age 18 prongs. (PC-R 330). Dr. Prichard chose these two family members because they knew Mr. Hall the best as spent a lot of time with him. (PC-R 329 - 331). Dr. Prichard stated that the formal assessment of adaptive functioning through the Vineland test demonstrated consistent adaptive functioning deficits across all domains measured.

PCR Vol. V at 230-231, 236-239.

1986 report of Dr. Bard: Dr. Prichard noted in his testimony that Dr. Bard had evaluated Mr. Hall in 1986, and administered a Woodcock Johnson test, which is a psychoeducational evaluation, and the results were that Mr. Hall was an illiterate adult, with little mathematical capabilities, and probably incapable of even the most basic living skills which incorporate math and reading, such as check writing, and his communication skills were not good. (PC-R 333). Dr. Prichard found those results to be consistent with the standardized adaptive functioning test he administered. Language, reading, writing, and

math are part of the conceptual domain and this is direct evidence of deficiency in that domain. DSM-V, 37.

PCR Vol. V at 241-242.

1986 report of Dr. Dorothy Lewis: Dr. Prichard noted that Dr. Lewis found Mr. Hall to be chronically brain damaged individual with severe learning disabilities, difficulty with speech, receptive language was poor. Dr. Prichard found this information to be consistent with the information he obtained from Mr. Hall's relatives. Learning is part of the practical domain and language is part of the conceptual domain. DSM-V, 37.

1988 report of Dr. Jonathan Pincus: Dr. Prichard noted that Dr. Pincus conducted a neurological examination of Mr. Hall, which showed evidence of poor memory and probable mentally retarded and that he suspected Mr. Hall was mildly mentally retarded and brain damaged. Dr. Prichard found that report to be consistent with his findings concerning Mr. Hall and adaptive functioning deficits. Memory is part of the conceptual domain. DSM-V

PCR Vol. V at 241-242.

1988 report of Dr. Jethro Toomer: Dr. Prichard noted that Dr. Toomer found that Mr. Hall had life long severe impairment in cognitive functioning, and organic brain damage. (PC-R 336). He described Mr. Hall to be easily influenced, which Dr. Prichard found consistent with his deficits in adaptive behavior.

PCR Vol. V at 244-245.

Wide Range Achievement Test, 3<sup>rd</sup> Edition (WRAT-III): In his report, which was introduced into evidence at the evidentiary hearing, Dr. Prichard mentions administered the WRAT-III to Mr. Hall in 2002 which is a measurement of basic skills of reading, spelling, and arithmetic. His results suggested a 1st-2nd grade level of skill and, according to Dr. Prichard, are consistent with a finding of deficiency in the mentally retarded range.

PCR Vol. II at 259. These mental health professionals all visited Mr. Hall on death row and conducted a professional assessment of his adaptive functioning. These are the same mental health professionals upon whom the trial court relied in 1991 when finding that there was substantial evidence in the record that Mr. Hall has been retarded his entire life. Along with Dr. Prichard, these are also the same five mental health professionals who this Court relied upon in affirming that finding.

Ultimately, Dr. Prichard testified that, in his opinion, based on the records he reviewed, the testing he performed, and the test scores he reviewed, Mr. Hall did meet the three prongs required for a diagnosis of mild mental retardation.

In his report Dr. Prichard summarized his findings as follows:

Indeed, there is a plethora of evidence that Mr. Hall has been mentally retarded his entire life. He was slow reaching developmental milestones, could not learn to read or write, was gullible and easily led, communicated poorly, was considered mentally retarded throughout school. Failed the military exam because of cognitive difficulties, was considered inadequate and cognitively inferior in DOC, could not obtain a drivers license, demonstrated gross deficits in adaptive skills, and constantly has been characterized as brain damaged, dull, and retarded by the vast majority of professionals who have evaluated him. There is little historical information that would contradict the presence of mental retardation. His intellectual level as measured by the WAIS is significantly subaverage. Adaptive skills as a child and an adult has been impaired 9below 70 based on interview with those who knew him best), and the presence of cognitive difficulties obviously manifested prior to the age of 18.(school reports, anecdotal data from relatives). Mental retardation is a static condition that generally shows little change over the course of an

individuals life. Freddie Lee Hall is mentally retarded, has always been mentally retarded, and will be mentally retarded for the remainder of his life.

PCR Vol. II at 260.

The DSM-V states that the proper method for assessing the adaptive functioning prong is through a combination of psychometrically sound measures with knowledgeable informants such as family members, and review of educational, developmental, medical and mental evaluations. DSM-V at 37. Dr. Prichard did just that in this case by administering the Vineland Adaptive Behavioral Scale with knowledgeable informants, and reviewing educational, developmental, and mental health evaluations. The lower court's finding that Dr. Prichard did not assess Mr. Hall's adaptive functioning since his incarceration in 1978 is flat out wrong.

All of this information was provided to the trial court via Dr. Prichard's testimony and through judicial notice of the 1991 resentencing. The lower court refused to consider it because no prison guards were interviewed by Dr. Prichard. Yet none of the many mental health professionals who have opined that Mr. Hall is intellectually disabled has ever felt the need to talk to any prison guards in order to make that diagnosis.

In 2002 Dr. Prichard administered the Wide Range Achievement Test, 3<sup>rd</sup> Edition, to Mr. Hall. This measurement of basic skills of reading, spelling, and



arithmetic revealed Mr. Hall had a 2<sup>nd</sup> grade level of skill. PCR Vol. V at 259. Reading, spelling, and math are part of the conceptual domain. DSM-V at 37. Dr. Prichard testified that his test was consistent with findings of deficiency in the mentally retarded range. This test was administered when Mr. Hall was 57 years old and he had not learned to read, spell, or do arithmetic beyond the level of a 2<sup>nd</sup> grader.

Contrary to the finding of the lower court, Dr. Prichard did not limit his adaptive functioning assessment to the period when Mr. Hall was 18 years of age or less. The record establishes that Dr. Prichard relied upon standardized testing (the Vineland) and review of school records, DOC Records, Mental Health Records, standardized educational testing (the Woodcock Johnson and the WRAT), over the period of Mr. Hall's entire life and exercised his clinical judgment in finding that Mr. Hall met the adaptive functioning deficits prong for a finding of intellectual disability. His assessment of Mr. Hall concerning adaptive functioning was consistent with the requirements of the DSM-V and the principals enunciated in *Hall v. Florida*.

The State called no mental health expert to refute Dr. Prichard's findings. The state has called no mental health expert at any of the proceedings in Mr. Hall's case which dispute that he is intellectually disabled. The lower court's finding that the only way to determine the adaptive functioning prong is to

interview prison guards is merely the court substituting its judgment for that of a duly licensed and highly skilled mental health professional. This is completely at odds with the DSM-V and *Hall v. Florida*.

## 2. Family members

In addition to Dr. Prichard, two of Mr. Hall's siblings testified at the evidentiary hearing concerning their observations of and experiences with their brother. Lugene Ellis testified that he is approximately 20 years older than Mr. Hall and one of 11 siblings. He stated that Mr. Hall was unlike any of the other children and never acted normal. PCR Vol. V at 67-68. He described Mr. Hall as having a severe speech impediment and that he could be easily misled. Mr. Hall was not able to read very well, and could not write. PCR Vol. V at 69. Mr. Hall writes him letters but he cannot read them because they are so poorly written. PCR Vol. V at 70. Mr. Hall was not able to hold a job so he worked for him as a fruit picker, but performed poorly. PCR Vol. V at 71-72. Mr. Hall could not handle money, cook for himself, or take care of himself, and never had a drivers license. PCR Vol. V at 72.

Bishop Hall testified that he has been visiting his brother throughout the prior 31 years, approximately 3-4 times per year. PCR Vol. V at 94. When he visits, Freddie Hall talks in manner that doesn't make sense and cannot be understood. PCR Vol. V at 86. The letters currently sent by Freddie Hall cannot be

read or understood as the letters are all over the page. PCR Vol. V at 86, 98-99. He does not believe Freddie can read. PCR Vol. V at 96. Freddie Hall does not understand them when they speak during visitation so he just listens as Freddie talks during the visits. PCR Vol. V at 86.

The above testimony from two siblings of Mr. Hall show that he cannot read, speak, or write properly both before and after his incarceration, and these conditions were present up to one month prior to the 2009 evidentiary hearing. Reading, speaking, and writing are part of the conceptual domain. DSM-V at 37. These two siblings provided information similar to what Deanne Rigsby and James Hall provided to Dr. Prichard. They are knowledgeable informants who have known Mr. Hall his entire life. Their testimony was not considered by the trial court because Dr. Prichard did not talk to prison guards. That ruling restricted the ability of Mr. Hall to present evidence of his adaptive functioning deficits over his entire life and, therefore, violates *Hall v. Florida*.

### 3. The Lower Court's Requirement of IQ Testing and/or Diagnosis Before the Age of 18 Violates all Clinical Standards.

The State notes that the lower court correctly found that “there were no intelligence test results available to establish Hall’s intellectual functioning below age 8 (V10; V11/210).” Brief at 12. This is not relevant.

Diagnostic standards do not require actual IQ testing during the developmental period. *See* AAIDD, Definition Manual, at 27 (“This disability does not necessarily have to have formally identified, but it must have originated during the developmental period.”).<sup>15</sup> The lower court’s reasoning would prevent anyone who did not take an IQ test in childhood from receiving *Atkins*’ protection when there is no requirement that Mr. Hall show he had scored 70 or below on a test given prior to the age of eighteen. *See e.g. Walker v. True*, 399 F.3d 315, 323 n. 7 (4th Cir.2005); *Cole v. Branker*, 2007 WL 2782327 (E.D.N.C.2007). Best practices for retrospective diagnoses require compiling a “thorough history” including but not limited to considering past testing data “if possible.” AAIDD DEFINITION MANUAL at 95-96.

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<sup>15</sup> This is what clinicians know. The *Hall* opinion uses the word “clinical” eight times, relying on “clinical definitions,” “clinical judgment,” and “clinical standards.” It uses the word “medical” 15 relevant times, including phrases like: the views of “the medical community” are important; what does “the medical community recognize?”; practice must be “consistent with the views of the medical community;” and its decision is “informed by the medical community’s diagnostic framework.” “In determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.” *Hall*, 132 S.Ct at 1993.

## **CONCLUSION**

Mr. Hall was intellectually disabled before *Atkins*. He still is.

Intellectual disability is “a clinical judgment, not an actuarial determination.” *Hall*, 132 S.Ct. at 2000 (quoting AAID DEFINITION MANUAL at 40). Dr. Prichard conducted a thorough and clinically correct assessment. His assessment of all three prongs utilized proper and accepted techniques outlined in the APA DSM-V and referred to by the Court in *Hall v. Florida*. His findings were uncontroverted. The courts got it right the first time(s) when they found that Mr. Hall has been intellectually disabled his entire life. No mental health expert who has evaluated Mr. Hall for intellectual disability has ever reached a contrary conclusion.

Enough is enough. Overwhelming evidence of Mr. Hall's intellectual disability exists in the record, over several decades. This Court should now uphold the constitutional barrier to his execution imposed in *Atkins* and *Hall*. Accordingly, Mr. Hall requests that this Court reverse the findings of the lower court and order the imposition of a life sentence.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing for Supplemental Answer Brief of Appellant was generated in a Times New Roman proportional, 14 point font, pursuant to Fla. R. App. P. 9.210 this September 23, 2014.

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Answer Brief of Appellant has been furnished by electronic mail to Carol M. Dittmar, capapp@myfloridalegal.com and [carol.dittmar@myfloridalegal.com](mailto:carol.dittmar@myfloridalegal.com), and by U.S. mail to capapp@myfloridalegal.com and by U.S. mail to Freddie Lee Hall, DOC# 022762, UCI, 7819 NW 228th Street, Raiford, FL 32026 this September 23, 2014.

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**IN THE SUPREME COURT OF FLORIDA**  
**Case No. SC10-1335**  
**Circuit Case No. 1978-CF-0052**

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**FREDDIE LEE HALL,**  
**Appellant,**  
**v.**  
**STATE OF FLORIDA,**  
**Appellee.**

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

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**APPENDIX 1 TO**  
**SUPPLEMENTAL ANSWER BRIEF OF APPELLANT**

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1. Freddie Lee Hall School Records, PCR 494

