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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 REPLY BRIEF OF APPELLEE
ON REMAND FROM THE UNITED STATES SUPREME COURT

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

Oral argument will not aid the decisional process in this case. The issue presented herein is very narrow: Appellant contends that Hall v. Florida, 134 S. Ct. 1986 (2014), requires courts to assess intellectual disability using current clinical practices rather than Florida law, while Appellee maintains that Hall only invalidated this Court's interpretation of Florida's legal definition as requiring a bright-line cutoff IQ score of 70. As this is a purely legal dispute to be resolved by a thorough reading of Hall, oral argument is not necessary.

STATEMENT OF THE CASE AND FACTS

Hall's brief discusses Dr. Prichard's testimony regarding prior reports by Drs. Krop, Bard, Lewis, Pincus, and Toomer, then asserts that "[t]hese mental health professionals all visited Mr. Hall on death row and conducted a professional assessment of his adaptive functioning" (Supplemental Answer Brief, p. 25). There is no record cite offered and this statement is not supported by any evidence presented at the 2009 evidentiary hearing or in any prior proceeding. The next statement in the brief, "[t]hese 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," is inaccurate since Drs. Krop and Pincus did not testify at the 1990 resentencing proceeding.

Hall's brief also asserts, without record citation, that "[t]he lower court's finding that Dr. Prichard did not assess Mr. Hall's adaptive functioning since his incarceration in 1978 is flat out wrong" (Supplemental Answer Brief, p. 26). Apparently, this is disputing the finding in the order denying relief which observed, "Dr. Prichard testified that he made no attempt to determine Hall's level of *present* adaptive functioning at the time he administered the WAIS-III in August of 2002. (emphasis added) (R. 260, 284)." However, Dr. Prichard indeed offered that testimony, and it is reflected at the page numbers cited in the court order.

Hall also claims that "[n]o mental health expert who has evaluated Mr. Hall for intellectual disability has ever reached a contrary conclusion" (Supplemental Answer Brief, p. 31). However, Dr. Harry McClaren testified in deposition below that he was asked to determine the issue and that he concluded Hall was not mentally retarded (based on the definition found in Florida law post-Cherry v. State, 959 So. 2d 702 (Fla. 2007) (V8/7, 36). In addition, at the 1990 resentencing proceeding, Dr. Carrera (who was court appointed to evaluate Hall for

competency in 1978) testified that he thought Hall's intelligence was in the average range, and that Hall was able to perform abstract thinking that people who are retarded or have very little schooling cannot do (See Hall v. State, Florida Supreme Court Case No. 77,563 [Resentencing Appeal] at V12/1945-46, 1959, 1962).

SUMMARY OF THE ARGUMENT

Hall's claim that the definition of intellectual disability found in Florida's statute and rule of procedure has been rendered irrelevant by the United States Supreme Court is not supported by any reasonable reading of the opinion returning this case to this Court. To the contrary, the High Court upheld the facial validity of Florida's definition, and only took issue with this Court's interpretation of a bright-line cutoff IQ score of 70. Even if the United States Supreme Court had held that the Constitution required replacing Florida's codified definition with accepted clinical practices of the profession, the record presented here fails to establish that Hall has intellectual disability which bars his execution. At the 2009 evidentiary hearing, Hall's primary expert acknowledged that the clinical definition of intellectual disability requires a finding that the necessary adaptive deficits exist concurrently with the significantly subaverage intellectual functioning, and also admitted that no assessment of Hall's current adaptive functioning had been conducted. Accordingly, when given the opportunity to present the evidence required by the United States Supreme Court's opinion, Hall failed to demonstrate that he cannot be executed because he is intellectually disabled, even if a clinical definition is applied.

ARGUMENT

ISSUE

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

Hall's Supplemental Answer Brief asserts that Hall satisfies the *clinical definition* of intellectual disability, and therefore this Court should reverse the ruling of the trial court, which found that Hall is not disabled *pursuant to Florida law*. Hall contends that the definition of intellectual disability found in Florida law was rejected in favor of clinical practice in Hall v. Florida, 134 S. Ct. 1986 (2014). However, Hall expressly upheld the facial validity of Florida's definition, noting that "[o]n its face," Florida's definition could be consistent with the views of the medical community noted and discussed in Atkins v. Virginia, 536 U.S. 304 (2002), and that "[o]n its face" the statute could be interpreted consistently with Atkins and with the conclusion in Hall itself. Id., at 1994. Therefore, without regard to any clinical diagnosis, he is still subject to execution if he fails to establish that he is intellectually disabled under properly interpreted Florida law.

The Hall decision as remanded to this Court only finds constitutional error under the Eighth Amendment due to this Court's holding in Cherry v. State, 959 So. 2d 702 (Fla. 2007),

to apply a bright-line cutoff using an IQ of 70. The opinion outlines the treatment of the IQ score in other jurisdictions, concluding society has reached a consensus against any bright-line cutoff that does not recognize a standard error of measurement in determining significantly subaverage intellectual functioning. Hall, 134 S. Ct. at 1996-98. Notably, Florida's statutory requirement of concurrent adaptive deficits is consistent with the definition of intellectual disability found in most states, removing any specter of constitutional error as to that element. Id., at 1993, 2008.

Hall does not even allege that he is intellectually disabled under Florida's statutory definition; he claims only that he qualifies for a clinical diagnosis of intellectual disability. However, even that allegation fails since Hall did not offer any evidence at all that he *currently* suffers deficits in adaptive functioning at the 2009 hearing.

Hall actually confirms that any reasonable definition of intellectual disability requires a finding that the individual possess adaptive functioning deficits that exist concurrently with significantly 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, including Hall's expert, Dr. Prichard. Hall, 134 S. Ct. at 1994; Phillips v. State, 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). On this point, Hall quotes the amicus brief filed by the American Psychological Association, one of the many professional authorities which Hall finds "properly informs" on the issue: "In the context of a formal assessment, '[t]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability.'" Hall, 134 S. Ct. at 1994.

Although Hall repeatedly asserts that the court below "refused" to consider the evidence of adaptive functioning presented at the hearing "because no prison guards were interviewed by Dr. Prichard," he does not provide any record cite to support his assertion (Supplemental Answer Brief, pp. 26, 29). In fact, what the court ruled below was simply that Hall's evidence was insufficient because there was no showing of current adaptive deficits (V4/602-04; V11/247-256). It was actually Hall's expert, Dr. Prichard, who opined that the typical way to properly 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).

Moreover, Hall's observation that none of the experts to have found Hall disabled "ever felt the need to talk to any prison guards" (Supplemental Brief, p. 26), demonstrates why all of those expert diagnoses are dubious. The following excerpts reflect Prichard's testimony with regard to Hall's current adaptive functioning:

Q [by Ms. Rodriguez]: And there is nothing about your evaluation in this particular case that is different or unique in any way from others you have taken, in your history?

A: Well, no, in the sense that I always talk to family, if family is available, that knew about the person prior to the age of 18. I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't really know why I didn't do it. It's been seven years. I'm not sure if Mr. Pinkard said no, or what. But I did not interview a Department of Corrections person.

(V11/260).

. . .

Q [by Mr. Tatti]: Would you agree that both the rule and the DSM require that to diagnose under the DSM as mentally retarded, deficits in adaptive functioning must be established concurrently with the I.Q. portion of the test?

A: Yeah, that word is in there, "concurrent."

Q: And your testimony was you did not address his current level of adaptive functioning; is that right?

A: In 2002. That's correct, yes.

Q: Okay. So would you agree that to diagnose Mr. Hall under the DSM as mentally retarded at the time you evaluated him, based on what you did was,

perhaps, premature in the absence of any inquiry into his present, that is 2002, level of adaptive functioning?

A: "Premature"? I don't know if I would characterize it as premature. I understand what you are saying. The problem becomes, you know, trying to assess adaptive behavior in the context of DOC. I don't know why it wasn't done in 2002. I really don't recall all that went on in this case. And I did most of my work at the end of 2002 on this case. I just don't remember what went on. But . . .

Q: But you acknowledge it wasn't done?

A: It was not done in this case, and I'm not sure why.

(V11/284-85).

Accordingly, Dr. Prichard acknowledged that even Hall's diagnosis in the clinical practice context was problematic. His speculation that Hall's attorney may have instructed him to refrain from any current assessment suggests a strategic decision to avoid an assessment with potentially unfavorable results. Hall's implication (Supplemental Brief, pp. 18-19) that clinicians are free to disregard the element of current adaptive functioning deficits when assessing prison inmates is refuted by Prichard's acknowledgment that he typically conducts such assessments when evaluating a death row inmate for intellectual disability.

In addition, Dr. Prichard testified that satisfaction of this element requires a showing that a person is significantly deficient in at least three different domains of functioning (V10/117-18). The only specific examples of current deficits

cited in Hall's brief -- his scores on the Wide Range Achievement Test, 3rd, and his brothers' testimony about his inability to write letters - are both denoted as relating to one, the "conceptual" domain, and are therefore insufficient. Accordingly, the court's express finding that Hall failed to establish current adaptive deficits to support a diagnosis of intellectual disability should be affirmed.

Freddie Lee Hall has been *labeled* intellectually disabled for much of his life. He seeks that label now, without regard to the meaning behind the words. When his teachers observed that he was "mentally retarded" on school records in the 1950s, the definition of mental retardation included individuals with IQs of up to 85 (V10/59). The label was used repeatedly at the 1990 resentencing, but none of the experts at that time described the diagnostic criteria for the condition or offered any particular definition to support it, and they apparently felt "no need" to talk to prison guards about current adaptive functioning. When Dr. Prichard testified that Hall was "mentally retarded" at the 2009 hearing, he also did so without ever assessing Hall's current adaptive functioning (V11/260, 284-85). And although his resentencing judge found in 1991 that the label was supported by "substantial" evidence, he also suspected "the defense experts are guilty of some professional overkill," and stated "[t]his

Court does not believe that the defendant is as mentally, emotionally, or cognitively disabled as the defense would have us believe. Here, the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant" (See Hall v. State, Florida Supreme Court Case No. 77,563 [Resentencing Appeal] at V4/649, 653, 662).

The record in this case fully supports the trial court's finding that Hall failed to demonstrate either concurrent deficits in adaptive functioning or onset prior to age 18 at the 2009 hearing. As the court below properly denied his claim of intellectual disability, this Court must 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 7th day of October, 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`**.

/s/ Carol M. Dittmar

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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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