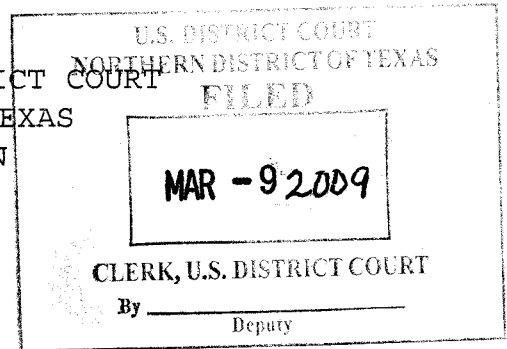


IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



MICHAEL WAYNE HALL,

Petitioner,

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VS.

NO. 4:06-CV-436-A

NATHANIEL QUARTERMAN,
DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS
DIVISION,

Respondent.

MEMORANDUM OPINION
and
ORDER

This case is back before the court by reason of an order of reversal and remand by the United States Court of Appeals for the Fifth Circuit with the direction that the court conduct a hearing on the claim of petitioner, Michael Wayne Hall, ("Hall"), who is now subject to the penalty of death arising from a planned thrill killing of Amy Robinson by Hall and his friend, Robert Neville,¹ ("Neville") on February 15, 1998, that he is mentally retarded.² The impetus for the remand was the decision of the Supreme Court

¹On December 18, 1998, Neville was sentenced to death for Amy Robinson's murder and his sentence was carried out on February 8, 2006.

²Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008).

in Atkins v. Virginia that the execution of a mentally retarded defendant violates the Eighth Amendment to the Federal Constitution. 536 U.S. 304, 321 (2002). The Supreme Court concluded that a national consensus had developed that mentally retarded offenders should not be subjected to the death penalty. Id. at 316.

After a thorough review of the record and full consideration of the applicable authorities and briefs of the parties, the court has concluded that the relief sought by Hall's application under 28 U.S.C. § 2254 should be denied.

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I.

History of Hall's Criminal Case

The facts of Hall's crime and the history of his criminal case, commencing with his indictment, going through his appeals and habeas proceedings, and ending up here again, are found in three published opinions: first, the May 5, 2004, opinion of the Court of Criminal Appeals of Texas, Hall v. State, 160 S.W.3d 24 (Tex. Crim. App. 2004) (en banc) (in which the court concluded that the evidence adduced at Hall's trial and in his state habeas action supported findings that Hall's mental retardation claim was without merit, and, therefore, he was eligible for the death penalty); next, the August 3, 2006, memorandum opinion and order of this court, Hall v. Quarterman, 443 F. Supp. 2d 815 (N.D. Tex. 2006) (in which this court concluded that Hall did not overcome the deference owed under 28 U.S.C. § 2254 to the state court's

adjudication that Hall's mental retardation claim was without merit, and denied Hall's § 2254 application); and, finally, the June 30, 2008, opinion of the Fifth Circuit, Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008) (in which the Fifth Circuit concluded that this court erred in failing to conduct a hearing on Hall's claim of mental retardation, reversed this court's August 3, 2006, denial of Hall's habeas application, and remanded the case to this court for a hearing). The court refers the reader to those opinions.

II.

Issues Now Before the Court

Although the court conducted an evidentiary hearing on December 10, 2008, on the issue of Hall's claim of mental retardation, as the Fifth Circuit ordered, the court continues to owe deference to the state court's adjudication that Hall's mental retardation claim was without merit and the state court's determinations of factual issues related to that claim. The pertinent parts of 28 U.S.C. § 2254 direct that:

(d) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State

court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In Valdez v. Cockrell, 274 F.3d 941, 950-51, 959 (5th Cir. 2001), the Fifth Circuit explained that "a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme." Id. at 959. Thus, even though the state court did not provide a full and fair hearing on the mental retardation issue and this court had a hearing on that issue, this court is obligated to give § 2254 deference to the state court's adjudication and the determinations of factual issues made by the state court.³

³A concern Judge Higginbotham had with the decision of the majority of the panel in Hall v.
(continued...)

As reflected by the discussion between court and attorneys at pages 10-12 of the transcript of the December 10, 2008, hearing in this court, the parties agreed that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. Stated another way, the parties agreed that § 2254 deference is required and that the court need concern itself only with the deference requirement of § 2254(e)(1).

To the end of further defining the issues before the court, the parties stipulated to a definition of mental retardation which, as modified verbally at the hearing, is as follows:

Mental retardation is a disability characterized by:
 (1) significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below];
 (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

J. Stipulation to Hr'g Exs. filed Dec. 9, 2008, at 2; Tr. of Dec. 10, 2008, Hr'g at 12-13.

³(...continued)

Quarterman to order this court to have a hearing rather than to direct the state court to have a hearing was that this court could not hold "a hearing free of the deference the federal district court must give to the state adjudication of retardation" 534 F.3d 365, 398 (5th Cir. 2008) (Higginbotham, J., dissenting).

III.

State Court Proceedings Specific
to Whether Hall is Mentally Retarded, and
the State Court's Adjudication and Determinations
of Factual Issues Related to that Subject

A. General Remarks

Because the court is required by 28 U.S.C. § 2254 to give deference to the state court's adjudication and determinations of factual issues pertinent to the mental retardation issue, the court must consider the state court proceedings, including the evidence received at Hall's trial, the evidence received as a part of his state habeas action, and the state court's adjudication and determinations of factual issues.⁴ Therefore, the court discusses those things in some detail⁵ before proceeding to a discussion of the evidence received at the December 10, 2008, hearing and the impact, if any, that evidence has on the state court's adjudication and determinations.

⁴The state court's adjudication and determinations of factual issues related to Hall's mental retardation claim were based on evidence received during Hall's criminal trial, particularly the punishment phase, as well as additional evidence presented to the state court as part of Hall's state habeas action. Hall v. State, 160 S.W.3d 24, 27-35, 38 (Tex. Crim. App. 2004).

⁵Necessarily the court has omitted some of the details given in the state court evidence. Nevertheless, all the evidence is being considered by the court in its analysis, findings, and conclusions.

B. State Court Trial Proceedings

1. Evidence Received at Hall's February 2000 Criminal Trial

a. General

Even though the jury in Hall's criminal trial was not asked to decide whether Hall was mentally retarded, significant time was devoted at the trial, primarily at the punishment phase, to the development of evidence bearing on Hall's mental retardation contention.

The issue of mental retardation was touched on during the guilt phase of the trial. Hall's supervisor when he was employed at a Kroger store responded to a question asking if Hall appeared to be mentally challenged by saying, "No. He was lazy, but he wasn't mentally challenged, in my opinion." Hall, 160 S.W.3d at 27. The facts of and planning for the offense and the post-offense conduct of Hall and Neville, which tended to demonstrate that Hall had the ability to make reasoned, albeit extremely undesirable, decisions, were before the fact finder for consideration. The videotape of Hall's interview by news media personnel following his arrest provided the fact finder a chance to observe Hall carrying on a normal conversation, during which he displayed a rational understanding of what he had done and

that the consequence of his conduct probably would be the death penalty.

b. The Expert Witnesses Dr. Cunningham
and Dr. Price

At the punishment phase, Mark Douglas Cunningham, Ph.D., and J. Randall Price, Ph.D. (the same two expert witnesses who testified at the December 10, 2008, hearing) testified at length, and were subjected to extensive cross-examination. Dr. Cunningham's testimony for the defense occupies 260 pages of the transcript of the evidence received at Hall's trial. One hundred sixty-three of those pages were devoted to direct examination, 68 to cross-examination, 26 to redirect, and 3 to re-cross. Most of Dr. Cunningham's testimony at each stage of the questioning was on the subject of mental retardation and his qualifications to speak to that subject. Dr. Price's testimony for the State is spread over 82 pages of the trial transcript, 37 pages of which were devoted to direct examination by the prosecutor, 40 to cross-examination, 4 to redirect, and 1 to re-cross. Dr. Price's testimony was devoted in its entirety to the subject of mental retardation and his qualifications to give opinions on that subject.

Dr. Cunningham said that his occupation was as a clinical and forensic psychologist. His testimony established that he was an experienced expert witness in death penalty cases, apparently earning hundreds of thousands of dollars per year from that activity. Dr. Price described his business, occupation, or profession as a clinical and forensic psychologist and a neuropsychologist. He had testified between seventy-five and one hundred times in capital sentencing cases. About seventy percent of the time Dr. Price testified for the defense, and about thirty percent of the time he testified at the request of the prosecution.

Dr. Cunningham's description of the standard he used to determine whether Hall was mentally retarded was similar to the standard to which the parties stipulated in this action. The difference between the two is that the standard Dr. Cunningham used at trial was more favorable to Hall than the stipulated standard because of the higher IQ score incorporated into Dr. Cunningham's trial standard. Dr. Cunningham explained during his trial testimony that:

Now, a diagnosis of mental retardation requires really three elements. The first one is an IQ score below 75. The second one is significant deficits in at least two areas of adaptive functioning.

Adaptive functioning means kind of practical intelligence, not on a test, but day-to-day life. What can the person do or not do, and how does that interfere with their functioning.

And so you need two areas, two arenas, of functioning that show significant deficits in order to call somebody mentally retarded. And then you have to have an onset of these things before the age of 18. . . .

R. of Crim. Trial, Vol. 34 at 195.

The focus of Dr. Cunningham's testimony was on the first two elements--Hall's IQ score and his perceived deficits in the area of adaptive functioning.⁶ Dr. Cunningham expressed the opinion that Hall is mildly mentally retarded. Hall's full-scale IQ score was 67 on a WAIS-III test conducted by Dr. Cunningham in 2000. Because the ultimate score has a plus or minus three range of error, the score was in the range of 64 to 70. Dr. Cunningham noted that Hall was subjected to an intelligence test at school in 1991, when his score on a WISC-R test was 71, with a plus or minus five margin of error, meaning that the score ranged between 66 and 76. In addition to the IQ tests, Dr. Cunningham based his opinion on extensive information provided to him concerning the environment into which Hall was born and raised and the way Hall

⁶The parties seem to take as a given that whatever mental disability Hall might have had when he and Neville murdered Amy Robinson existed before the age of eighteen. When he and Neville committed the murder, he was eighteen years of age, having a birth date of April 6, 1979.

conducted himself from a very young age up to his trial. Dr. Cunningham's evaluation of Hall's adaptive functioning caused him to conclude that Hall had adaptive functioning deficits in several respects.

Dr. Price did not speak with as much certainty as Dr. Cunningham. When asked by the prosecutor if Dr. Price was able to determine whether Hall was mentally retarded, he responded:

Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's -- it's sort of a judgment call.

R. of Crim. Trial, Vol. 35 at 196. Dr. Price said that Hall was able to understand the difference between right and wrong, the significance of committing a crime like murder, and what it means to take another person's life, and had the intellectual capacity to make choices.

When Dr. Price interviewed Hall for two hours on February 2, 2000, for a little over three hours on February 3, and for approximately two hours on February 9, Hall was oriented in that he knew who he was, where he was, and the time. Hall was appropriately dressed and had an appropriate appearance. Hall's thought processes were on the topic, logical, and goal-centered. He followed the line of questions Dr. Price was asking, and he

answered the questions. Hall's thought processes flowed pretty normally. When Hall would think of something to add to the conversation he did so. The conversation Dr. Price had with Hall was a normal conversation. He saw no evidence that Hall suffered from any kind of delusion or any form of hallucination. Hall's emotions seemed normal, though a little on the flat side, but the emotions changed depending on the topic. He found Hall very cooperative, with a good attitude about talking to Dr. Price and the testing Dr. Price conducted.

Dr. Price gave Hall a test that he considered to be an assessment of Hall's adaptive behavior, which resulted in a finding that Hall was in the low-average area in terms of his knowledge of adaptive skills and behaviors. The overall impression Dr. Price conveyed by his testimony is that, while Hall is intellectually challenged, there is doubt that he qualifies as mentally retarded.

* * * * *

The identities of the other witnesses who testified at the punishment phase of the trial, and a synopsis of the testimony of

each, are set forth below:

c. Other Witnesses Called by the State

(1) Richard L. Moon, Jr.

Mr. Moon is a staff photographer for the local daily newspaper. In early March 1998, he went to Eagle Pass, Texas, to cover the news story of the arrest of Hall and Neville at Eagle Pass. He identified an exhibit as a photograph he took of Hall and Neville while there.

(2) Rodrigo Rodriguez

Mr. Rodriguez is a police officer for the City of Arlington, Texas. On February 17, 1998, he was dispatched to a location in Arlington, Texas, to investigate a suspicious vehicle and two suspicious persons. When he arrived, he saw two persons who he later learned were Hall and Neville. They told him they were returning a vehicle that they had purchased because they were having problems with it, and they were removing property from the vehicle. He observed that the items included a crossbow, BB guns, .22 shells, CO₂ cartridges, and two knives. In the beginning, Neville did most of the talking. Hall and Neville indicated to Officer Rodriguez that the items he saw belonged to both of them.

(3) Thaddeus Corley

Mr. Corley is a Special Agent with the United States Department of Treasury, U.S. Customs Services. On March 3, 1998, he was dispatched to the port of entry at Eagle Pass, Texas, in reference to Hall and Neville, who had been stopped there pursuant to an outstanding murder arrest warrant. When he arrived, he arranged for a fellow special agent to interview Neville while he, in a separate room, interviewed Hall. He identified himself and informed Hall of his Miranda rights. Hall agreed to discuss the events leading, and related, to the murder of Amy Robinson, and gave the following description:

He said that he and Neville wanted to become serial killers. They wanted to kill one to five people a week. He said that they wanted to become White Supremacists and only kill blacks. He said that they didn't want to have to beat up, knock out, or drag anybody, so they decided to kill Amy. He said that they went to her house to pick her up, but she was already on her bike on her way to work and they convinced her to go with them to a secluded area. She told them that she would go, but she didn't want to be late for work. So they took her to a secluded area.

He said that Robert Neville got out of the vehicle, went to the bushes. He was in the car with Amy. He told Amy that her father would be upset if he knew that she was out there with him and that she should go to the bushes with Neville. He said that as she approached the bushes, Neville fired, shot at her

with a crossbow, but he missed her. He said that Neville sent her back to the vehicle. He said that he shot at her with a .22, but missed her. He then sent her back to the bushes.

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Neville shot at her first with his crossbow. When she went back to the vehicle, Hall shot at her with his .22. Then she went back to the bushes, and then Neville shot at her again with his .22.

Q. And did Mr. Hall also tell you that he shot at her with a pellet gun?

A. He said that after she returned to the car, she was on her way back to the bushes and he shot at her, but he missed. He said that Neville missed, but he got -- Hall got upset and grabbed his pellet gun, went after her, and shot her in the leg and in the chest. He said that she fell to the ground, started crying, and they --

Q. What did they do? What did he tell you that they did then?

A. He said they stood over her and laughed and she was crying and screaming. He said that Neville got tired of listening to her scream, so he took the .22 and shot her in the chest and then he shot her in the head.

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A. A couple of days after he killed her, he said that he and Robert Neville returned to the body. He said that he took four or five dollars from her.

Q. Did he say where he took the money from on her body?

A. He said he took it out of her pocket.

Q. Did he say he did anything else?

A. He said that they shot at her some more with the pellet gun and with the .22.

Q. I want to back up just a minute. The day that they killed her, did he say specifically anything about her keys?

A. Yes. He took the keys and threw them in the bushes. She also had a bike -- excuse me. She also had a bike, and he took the bike and placed it on the side of the hill.

R. of Crim. Trial, Vol. 33 at 48-52. Hall told Special Agent Corley that he expected to receive the death penalty for his crime.

As Special Agent Corley and Hall started to talk, and Hall started to reminisce about killing Amy, "he kind of went into like a zone"; "[y]ou could see his eyes get a little bit wider"; and, "[h]e became very excited, almost aroused." R. of Crim. Trial, Vol. 33 at 50. When asked if he raped Amy, Hall said that he did not because the body was nasty. Hall described in a general way where the body was located. Special Agent Corley was with Hall approximately one hour.

(4) Caroline Massey Barker

Ms. Barker was Amy Robinson's grandmother. She related information about Amy and Amy's disappearance. None of her

testimony would have a significant bearing on Hall's mental retardation claim.

d. Other Witnesses Called by Hall

(1) Karen Hall (Gray)

Ms. Hall is Hall's mother. She related information about her education and background and the educations and backgrounds of her children, Hall, Damon, and Rebecca. Hall was born April 6, 1979. Ms. Hall testified about her marital relationship with Hall's father and her relationships with other men who lived in the home with her and her children from time to time over the years. She described Hall's interaction and relationships with his father and the other men. Ms. Hall described the home environment as Hall was growing up, including unusual sexual activities between her, Hall's father, and other persons who came into the house, which occurred while Hall was present in the house, violence in the home, and alcohol and drug usage by her and others in the house. She told of suffering physical abuse from one of her male friends in front of Hall.

She met Larry Gray in 1994, at a time when Hall was living with his father. In December 1994 Hall returned to live in the home with her and Mr. Gray. Ms. Hall described the home environment after Hall returned to live with her and Mr. Gray,

including suicide attempts by Mr. Gray that Hall witnessed. She said that Hall lived twelve different places during the first eighteen years of his life. Ms. Hall said that as a result of the problems in their home, the family received counseling in 1996. She discontinued the counseling in June 1997 because they were "going into [her] childhood and trying to blame everything that's been going on [as her] fault." Id. at 114.

Ms. Hall described how in the summer of 1997 Hall withdrew to his room, and was not smiling anymore. He played video games and listened to the stereo, and would be by himself for long periods of time. Hall passed the written part of a driving test, but did not try to take the driving part.

She told of difficulties she had during her pregnancy with Hall. Ms. Hall discussed different times when Hall had an accident of one kind or another that could have resulted in a head injury. She described Hall's history in school. He was in special education classes up through the ninth grade, when Hall's father had him put in regular classes. Hall was unable to handle the regular classes. He was required to have the services of a speech therapist, and took Ritalin from the time he was in the first grade until he was in the fifth grade. Hall went to the tenth grade in public school. She described things that Hall was

unable to do, such as reading the hands on a clock, though he could tell time from a digital watch; using a menu; negotiating public transportation; and using a dinner knife, though he could use a fork and spoon. He sometimes chewed with his mouth open.

She described Hall's mental challenges. He could not count change. Hall had difficulty with directions, and would "get lost real easy." R. of Crim. Trial, Vol. 33 at 125. He was hired as a stocker at Kroger, but they moved him to a sacker position because his hands were so big he could not stack small boxes of JELL-O the way they should be stacked.

Hall did not fit in with people his age. He played as if he were eight years of age, and attracted kids eight, nine, or ten years of age. Children his own age would call him stupid or retarded, which would cause Hall to cry. Younger children accepted him.

Hall became a friend of Neville when they were working together at Kroger in the fall of 1997. She met Neville twice, once at Kroger and once when Neville came to the door with a car, and asked if Hall could come out. At that time, Neville was twenty-three years of age and Hall was eighteen. She did not approve of Hall's friendship with Neville because Neville was older than Hall. Neville would do things with Hall that Hall's

father once did, such as taking him to play bingo and shoot pool, and buying a pellet gun for him. Hall was excited about the things Neville did for him.

She taught all of her children how to use pellet guns when Hall was ten years old. Hall did not shoot a pellet gun well. He was not really interested in doing that. Hall enjoyed playing different video games, some of which involved violence. He read and wrote at about a fourth-grade level. Hall read children's books, and had been reading the Bible since he had been in jail.

She would not agree that Hall could express himself, though he could relate an event he experienced. There was a period of time when Hall was not able to distinguish fantasy from reality. That was after a situation with Mr. Gray, his sister, and his father. She was aware of two girlfriends Hall had, but did not know their ages. She met one of them, who was near his age. Hall could use a telephone, and he was involved in church.

Ms. Hall discussed the household chores that Hall performed, including taking care of his room, taking out the trash, cleaning up after the dogs in the back yard, helping her in the kitchen (such as loading the dishwasher), and cleaning up the bathroom. Hall could brush his teeth, shave, change his clothes, and button his shirt. After he quit working at Kroger, he got a job at

Winn-Dixie. Hall quit Winn-Dixie because Neville told him that he could get a better job at a place where the two of them could work together.

For about two weeks after Amy Robinson disappeared, Hall stayed at night with Neville at Neville's grandmother's apartment. During that time Hall came home every day, bringing his dirty clothes, picking up clean clothes, and sometimes picking up video games, magazines, and a VCR. Hall never mentioned to her that the police had contacted him while they were searching for Amy, though he did tell her that Neville had talked to the police.

Her last contact with Hall before he was arrested was when she took him to the Kroger store, where he was to meet Neville. When she dropped him off he told her "I love you," and then went into the store. R. of Crim. Trial, Vol. 33 at 135. When Hall did not return or call her that night, she called the police about Hall being missing. After she reported Hall missing, and the police came to her house to discuss the situation, Mr. Gray's thirteen-year-old son, Alleron, told her about a conversation he had with Hall concerning Amy Robinson. She then called the Arlington police and reported that she thought she knew who killed Amy. At that time she had concern about Hall, thinking

that Neville might have killed him. However, Hall did not seem to be afraid of Neville.

(2) Damon Hall

Damon was Hall's older brother. His date of birth was March 27, 1975. He discussed his employment and educational background and problems he had with misuse of drugs and alcohol. Damon was asked about things that happened to Hall when he was a child that could have resulted in a head injury. He believed that Hall had problems with respect to how smart he was. Damon was standing behind Hall when Hall had his Kroger check cashed, and Hall was \$10.00 short but did not realize it. Hall's writing was poor, and his drawings seemed childish. He had a difficult time explaining a question. As they were growing up, Damon from time to time would take advantage of Hall by talking him into doing things that were not to Hall's advantage.

Damon described the environment at the house where he and Hall were raised. His father and mother had a fight while Hall was in the house. Hall was a loner, an outcast, and an oddball; and, there were times when he would rescue Hall from younger kids who were picking on him. Hall did not have many friends his own age. Damon had difficulty causing Hall to interact with Damon's friends. His understanding is that Hall had a girlfriend once.

When Hall was seventeen he told Damon that he wanted to die, and Damon noticed that he had slash and burn marks on his arm. He discussed how Hall acted when he was on Ritalin.

Damon and Hall had difficulties with their father. They heard their father yelling more than talking. When he and Hall were growing up, he smelled marijuana in the house, and he fussed at his mother because of the odor coming from her bedroom. A son of one of his mother's boyfriends, who apparently stayed with them awhile, antagonized Hall, and Hall would get upset, but would have to be pushed really far before he would retaliate. He discussed a drinking problem that his mother had, which was so bad that he left to go live with his father.

Hall had trouble telling the time, but he could read a digital watch. Hall had a hard time following directions, but he pretty much could follow them if they were given to him slowly.

Damon met Neville once, and it was shortly before he heard that Hall had been arrested. He believed that Neville had significant influence over Hall. He mentioned to his mother that Hall should not be hanging around Neville. Damon noticed that after Hall started being with Neville, Hall did things differently from what he did before. His music changed, his

attitude changed, and the video games he played were a lot more detailed and gory.

Damon lived in an apartment with friends for a period of time before Hall left home the final time. When he visited Hall, he noticed that Hall was acquiring more hard-core video games, involving more blood and violence, and Hall seemed to enjoy those games. Also, he saw that Hall was taking an interest in hard-core music, including music containing satanic lyrics. He noticed those things about two or three months before Amy Robinson's murder.

Hall had the telephone number at Damon's apartment, and would call him from time to time, and on occasion Hall would visit with one or the other of Damon's roommates over the telephone. One of Hall's calls to a roommate was on the subject of whether the roommate could get him a gun.

After Amy Robinson disappeared, and before Hall left with Neville and was later arrested, Damon and several of his friends were at his apartment while Hall was there. Hall was on the couch crying. Damon assumed that the problem was depression from what was going on in Hall's household. His mother's boyfriend, Larry Gray, was having an affair with Rebecca, Hall's sister, and Hall was upset about that. Damon tried to bolster Hall's morale.

The night before Hall and Neville left, Hall spent the night at Damon's apartment, and Damon had a long conversation, about two hours, with Hall. Hall broke down emotionally, and Damon tried to offer encouragement to Hall. Nothing was said about Amy Robinson, who by then had been reported missing. The following morning Hall got up, gathered up his games and everything, and said he was going fishing with Neville, who showed up at the house. That was the last time he saw Hall and the only time he met Neville.

(3) Ken Trainer⁷

Mr. Trainer is a school teacher who taught a wood shop class in which Hall participated during the 1995-96 school year at North Garland High School. Hall was a ninth grader in the fall session and a sophomore in the spring session of that school year. Because of the nature of the course he taught, Mr. Trainer often had special-education ("special-ed") students in his class, and has had such students throughout the fourteen years of his tenure as a teacher. He had two or three special-ed students in Hall's classroom. He viewed Hall to be "pretty much as mentally

⁷Mr. Trainer's name is spelled "Traynor" in the Record of Criminal Trial. The court is of the belief that the correct spelling is "Trainer."

disturbed coming into the class." R. of Crim. Trial, Vol. 33 at 274.

Mr. Trainer had difficulty at the outset teaching Hall some of the simplest tasks, and Hall was frustrated that it took him longer to get things accomplished. Hall wanted to be like any other high school student-- "[h]e wanted to get things done, just get it over with and do it now." Id. at 275. Even though Hall was frustrated, Hall kept things to himself. He did not see any kind of anger, violence, or anything like that in Hall. Notwithstanding his frustration, Hall would come back to it and get back to work. The students would pick on each other from time to time. If anybody picked on Hall, he would draw back and kind of hide in a shell. He did not consider Hall to be a danger.

Their first class project was to make a baseball bat holder. Normally it took the students two or three weeks to complete the project. It took Hall about eight weeks to complete it. Often Hall simply did not work, instead he just sat at his desk. It took Mr. Trainer a long time to motivate Hall to get him busy and to get him started working on the project. He had to show Hall every step what to do. Sometimes Hall would not remember what he

did at a certain step and would have to learn it over again. Hall could not do even the simplest math.

The second class project was to make a flower cart, which involved spokes on wheels. Hall had difficulty making the preparation for drilling the holes. Hall finished the flower cart project in normal time. Mr. Trainer attributed that to the fact that they were going into the second semester of school, and Hall was seeing other kids working on their own projects that they had designed and were building themselves, and Hall wanted to get on to another project.

Hall was further behind than the other special-ed students he had in that class. As time went by, he understood more about Hall. Every task Hall did was simpler to him than the ones before. However, Hall continued throughout to have difficulty in his wood shop work. Hall's final project was a motivation to Hall, and he worked extra time, sometimes after school, in order to do it. At the end, Mr. Trainer saw in Hall a sense of completion with that project--Hall had finally completed something. Mr. Trainer thought that the final project probably gave Hall more motivation than anything--just to be able to complete it and get it built. Hall had pride in his project, and he wanted to get it home and get it working. During the time

Hall was working on his final project, Mr. Trainer never had to motivate him because the project was something Hall wanted to build.

Often when Hall came to class, he would seem to be "way outside the classroom altogether." Id. at 287. He would come in, stare for a long time, and then put his head down and go to sleep. When he gave Hall instructions, Hall would say that he understood, but he really did not. Oftentimes his students paired up to get projects done, but Hall stayed pretty much to himself.

Hall did not have many absences from his class, and he normally arrived on time. Hall was appropriately dressed each day, and complied with the rules of conduct for the most part, except on occasions Hall had the idea that he wanted to do it his own way. Hall knew the difference between right and wrong and could follow the basic rules that are necessary to follow in a school society. Hall worked on the wood shop machines like other students. He thought Hall's motor skills were quite adequate. He was pleased, and surprised, with Hall's progress through the school year. Hall had a lot of determination to complete a project, and that is what motivated him. He has had students with backgrounds similar to Hall's who did not reach that point

of completion. He was very proud of what Hall did. By the end of the school year he saw that Hall was feeling better about himself and feeling a little bit of pride at the outcome. When Hall responded to Mr. Trainer's inquiries, it would be an appropriate response he could understand.

(4) Cheryl Kay Conner

When she testified, Ms. Conner was a self-employed school psychologist, acting as a consultant. Before that she had been a school teacher for twenty-one years. During the 1994-95 and 1995-96 school years she was employed at North Garland High School as a resource teacher and contact-mastery teacher. She was not acting as a school psychologist at that time. During those two years she was involved in Hall's education as his English, reading, and math teacher for a period of time, and also served as his monitor teacher with the responsibility to monitor his behavior outside classes and to keep up with his attendance and grades. Because of the nature of her relationship with Hall, she probably knew more about him than any other school employee. Hall was a special-ed student.

In Hall's reading class, Hall rarely kept his head up and rarely gave any eye contact; he had a sense of humor, but it was slightly bizarre; he never initiated any communication; and he

fell asleep frequently. His reading comprehension probably was on the first-grade level, though he could figure out what the words were in the sense that he could call the words. At the end of Hall's second year he had earned enough credits to be considered a sophomore.

He probably, by use of a pencil and paper, could do math up to a third-grade level, but he could not do multiplication from memory, nor could he do addition or subtraction in his head. She checked his progress every five minutes to keep him on task; otherwise, he would drift off, either begin to sleep or just sit there, do nothing, and stare. He could not write a complete sentence unless he had very frequent prompts from her. When he was instructed to do something, he was not always successful even if there was only one instruction at a time. If he was given two steps in sequence, he could not remember the second step.

Hall attempted to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously, and sometimes he would say things that were not appropriate. Because of that conduct, the others in the class ostracized Hall further. He did not even fit in with the other children in the special-ed class. Most of the time when he would try to interact, the things he would say were so bizarre that the

other students became upset, and perhaps even angry, but after awhile they just ignored him. Hall very much wanted to fit in, he wanted to please, and he wanted the other students to like him. She observed that Hall was susceptible to being manipulated by other students. Other students teased and antagonized him.

During Hall's freshman year, he had a close friend he did things with. The friend was a boy who was learning-disabled in the sense that he had normal intelligence and just had a learning problem. The friend was the leader between the two.

Hall did not have disruptive behavior. He was always very compliant and tried to please, had no discipline problems, and was always polite and respectful. The only thing noncompliant about his conduct was that consistently in the classroom he slept and did not do his assignments. Reports from Hall's other teachers were that Hall was lazy.

She was concerned that Hall was severely depressed. She wanted to have him tested for depression, but Hall's mother would not permit the testing. Hall's mother did not want him in a special-ed class; she wanted him put in the mainstream classes. She had several conversations with Hall's father. He probably was one of the most disinterested and negative parents she ever encountered. The last two times she called the father to make a

report on Hall's progress, the father told her not to call him any more, that he was not interested and did not care, and that he had washed his hands of Hall and did not want to know anything else.

There was a gap of about six weeks in the spring of 1996 when Hall did not come to school. He told her that the problem was that he had had a fight with his mother because she was drinking too much and that his father was drinking a lot and ignoring Hall. When he returned, his hair was rarely washed, he rarely washed his hands, his clothes were always rumpled and never seemed to be clean, and Hall was very, very depressed. Hall almost looked drugged--he could barely keep his head up and his eyes focused when he was spoken to. Hall told her at that time that his father had kicked him out of the house.

Hall always shuffled--he never picked up his feet. She had to ask him to have eye contact--he always kept his head down and mumbled. Teachers commented that he would talk to himself. He would keep his mouth open, and there were comments from teachers that he drooled. She considered Hall to be a concrete thinker, meaning that if he could not see it, touch it, smell it, taste it, then he had a hard time understanding it. He had a very difficult time with abstract ideas, such as understanding that a

day is part of a year or even that the months went in an order or how many months there were.

She said that if Hall was interested in a task, he would begin it on his own; but, she added, the subjects she had him in, math, English, and reading, were not fun subjects, so he was not interested in starting them. She had the impression that Hall did not ask for help because he did not know how to formulate a question asking for it. He had difficulty with sequential order, such as the sequence of steps necessary to make a peanut butter and jelly sandwich. He could not come up with a plan, such as a plan for working on his assignments. Her impression was that he was very good at playing video games, and enjoyed it a lot. When he would come to school he seemed to be living in a fantasy world like the video games.

He was required to wear glasses, and was subject to punishment if he failed to do so, but he refused to wear them.

Hall did well in a very concrete, structured environment where he knew what the schedule was, what the rules were, and that the rules were consistent. He did not do well in a looser environment where there were options. He rarely stayed on task or made productive use of his time.

On cross-examination by the prosecutor, Ms. Conner disclosed facts that were not developed during the direct examination. As part of an individual assessment done by the Garland school, Hall was given a TONI, a nonverbal intelligence test, and had an IQ score of 84; and, he tested on the WISC-R with an IQ score of 71. He was classified as learning-disabled, but was not classified as mentally retarded.

Hall would attempt to socialize with females, but they would rebuff him. The fantasies he had were violent, involving injuries to other people. She attributed the fantasies to the video games he played. When he returned from being absent for a period of time, he seemed to have fewer fantasies, but was very, very depressed and more withdrawn than ever--he almost was catatonic.

Reports she received from Mr. Trainer and another teacher, Mr. Bays, who was in the industrial arts area, were very complimentary of Hall, even in Hall's vocational assessment, which showed that Hall's high skills were in the manipulative tasks. Part of the reason for Hall's classification as learning-disabled was that he failed to live up to his potential abilities. She disagreed with an assessment that was made as a result of measures made of Hall's adaptive behavior that his

"level of intellectual functioning is consistent with his or her adaptive behavior, with no significant deficits in either area."

R. of Crim. Trial, Vol. 34 at 56. That assessment was made by an employee of the school district.

On redirect she explained that the TONI intelligence test usually tests about ten points higher than a WISC, and with some students even higher than that. The WISC is a fairly verbal intelligence measure and the TONI requires no verbal intelligence. The 71 on Hall's WISC is one point above the dividing line for mental retardation. There is a margin of error in the test results. Depression can affect the outcome of an intelligence test--it will lower an IQ score. She felt that during the two-year period when she was working with Hall, his IQ was declining.

(5) Chris Bybee

Mr. Bybee was Hall's math teacher at North Garland High School during the 1995-96 school year. He described Hall as being very quiet, someone who kept pretty much to himself, slow, hard to motivate, not a troublemaker, not tending to be in class discussions, not interacting with other students, and not initiating conversations. He was able to cause Hall to accomplish things when he had a one-on-one discussion with Hall.

Hall could not do multiplication or division, but he could do double-digit addition and subtraction, using what Mr. Bybee referred to as stick fingers on paper. Hall never created discipline problems. Mr. Bybee did not witness harassment or taunting of Hall by other students.

He and Hall had some discussions regarding Hall's home conditions. Hall told him that he and his father had a bad relationship, and Hall thought that his father hated him. It was difficult for Hall to follow instructions on academic matters. He guessed, from the work he got out of Hall, that Hall's IQ score would be in the upper sixties. Most of the time Hall seemed to be unmotivated in class. Sometimes he thought that Hall was not giving it enough effort, that he was giving up too quickly, and that he was lazy. Occasionally Hall slept in his class. Otherwise, Hall's behavior in his class was appropriate, except when on occasion Hall would say something inappropriate to the conversation.

(6) Tom Mueller

Mr. Mueller became acquainted with Hall on January 5, 1999, while he was doing jail ministry at the jail where Hall was confined. When Mr. Mueller arrived at the jail on January 5 the jail chaplain gave Mr. Mueller a Bible to take to Hall,

explaining that Hall's mother had brought the Bible for him. He took the Bible to Hall, and then ministered to Hall that night. Hall's attitude toward him and the ministry was very positive. He could tell that Hall was very sincere about wanting to learn more about the Lord. Hall told him that he had accepted Jesus Christ as his Lord and Savior, and that he knew that Jesus had forgiven him for his sins and that some day he would be with Jesus in heaven. Mr. Mueller could tell that Hall was very sincere and honest, and he was very open with Mueller.

When Mr. Mueller was preparing to leave Hall on that first visit, after having been there more than an hour, Hall asked him if he could pray for Mueller, and when Mueller consented, Hall did so. For a period of three or four months he saw Hall every Tuesday night. There were three or four different inmates with Hall during the time he was seeing Hall, and each of the other inmates told him what a blessing it was to have Hall with them because they would pray and study the Bible together, and Hall would help them work through their problems. Hall was ministering to the other prisoners.

His reaction to Hall was that Hall was not the brightest person, and had a hard time reading and sometimes had a hard time putting things together, but Hall did put together that he knew

who Jesus Christ was, he knew he was forgiven, and he knew that someday he would be in heaven.

He sometimes helped Hall find verses in the Bible. Hall told him on numerous occasions that he hoped someday he would have a chance to meet Amy Robinson's parents and ask for their forgiveness. Hall was very sorry for what he had done.

e. Witnesses (in Addition to Dr.
Price) Called by State on Rebuttal

(1) Alan Boles

Mr. Boles, who was eighteen years of age, worked with mentally challenged children for City of Arlington, Texas, where he had been employed for six months. From August 11, 1997, until sometime in September 1999 he was employed at a Kroger store, where he became acquainted with Hall. He worked with Hall three or four days each week. Hall trained Mr. Boles to do his job as a courtesy clerk, bagging groceries and taking them out to the customer's vehicle. Hall explained to him the proper way to sack groceries, such as not putting chemicals and cleaning samples in with the food products, to double-bag the heavy items, and that sort of thing. Hall was able to give him those instructions and to demonstrate to him how to sack the groceries.

He worked with Hall for six or seven months. Mr. Boles did not notice anything slow about Hall while he was working with him. He also worked with Amy Robinson. She was not as quick mentally or physically as Hall. He liked Amy, and is angry toward Hall for what he did to her.

(2) Monica Zepeta

Ms. Zepeta was employed at a restaurant in Castroville, Texas, in February 1998. In late February or early March 1998 Hall and Neville came into the restaurant between 8:45 and 8:50 p.m. to have dinner. She gave them menus, and both appeared to read their menus. Neville ordered for himself, and Hall separately ordered for himself. Hall's order was different from Neville's.

She served with their meals a steak knife and two forks. She did not see Hall picking up his food with his hands. He was using proper eating etiquette. While they were in the restaurant they were laughing and having a good time. They flirted with her and tried to encourage her to go to their room to have drinks and then to show them the town.

As they were leaving, Hall asked her for a date the following morning. She agreed, but she did not actually plan to be there. Later that evening, Hall called her on the house

phone, and encouraged her to come to the room and have drinks with him. She declined. The next time she saw Hall and Neville was when she saw them on TV following their arrest.

(3) Richard Daniel Nutt

Mr. Nutt is an officer with the City of Arlington Police Department. He was involved in the investigation of Amy Robinson's death. After Hall and Neville were arrested in Eagle Pass trying to cross the border into Mexico, he went to Eagle Pass with his partner for the purpose of interviewing Hall and Neville.

When Hall was given his Miranda warning, he looked Officer Nutt in the eye and told him he understood. Hall agreed to be interviewed. As Hall gave his statement another Arlington Police Department employee who was present typed what Hall related. The interview lasted one hour and fifty-one minutes. After the interview, Officer Nutt read the statement to Hall and made needed typographical corrections. Hall appeared to understand what was being said. He initialed each page at the top and bottom. The typewritten statement was read to the jury. It relates basically the same facts, but with more detail, that Hall related to Special Agent Corley. Supra at 18-20.

2. Pertinent Parts of the Court's Charge to the Jury at the Punishment Phase of Hall's Trial

Hall's case at the punishment phase was submitted to the jury on three special issues. The one pertinent to Hall's mental disability claim was Special Issue Number 3, which was worded as follows:

Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Clerk's R., Crim. Trial, Vol. 3 at 238. The jury was instructed that they could not answer Special Issue Number 3 "Yes" unless ten or more jurors agreed, and that they could not answer it "No" unless they were in unanimous agreement. Id. at 234. The jury was further instructed that it need not agree on what particular evidence supported an affirmative finding on Special Issue Number 3, and that in deliberating on that issue the jury should consider mitigating evidence to be evidence that a juror might regard as reducing Hall's moral blameworthiness. Id.

3. Arguments by Counsel at Hall's Trial Directed to the Issue of Mental Retardation

After the conclusion of the evidence and after the court's charge was read to the jury, counsel for each side presented a

jury argument pertinent to Hall's mental retardation contention. The focus of the argument pertaining to Hall's mental capabilities was Special Issue Number 3. Defense counsel strongly urged the jury that they should answer Special Issue Number 3 in favor of Hall based on the evidence of his mental disability, particularly the evidence that he is mentally retarded. R. of Crim. Trial, Vol. 36 at 39-47.

4. The Jury's Verdict

The jury answered Special Issue Number 3 "No." Clerk's R., Crim. Trial, Vol. 3 at 238. Put another way, each of the twelve members of the jury concluded that none of the evidence that Hall was mentally retarded, or otherwise mentally challenged, established a sufficient mitigating circumstance to warrant imposition of a sentence of life rather than death. However, the jury was not asked to decide whether Hall was mentally retarded, nor was it given in the court's charge a definition of mental retardation.

C. State Court Habeas Proceedings

1. General

On January 17, 2002, Hall filed an application for writ of habeas corpus in the state court, asserting as his first claim for relief that he is mentally retarded and that the Eighth

Amendment to the United States Constitution would be violated if he were to be subjected to the penalty of death. Clerk's R., St. Habeas, Vol. 1 at 8. The definition of mental retardation Hall suggested in his application is basically the same as the one to which Hall and respondent stipulated at the commencement of the December 10, 2008, hearing. Id. at 11.

2. Evidence Made a Part of the Record of Hall's State Habeas Proceedings

a. Affidavits Filed with Application

Hall's application was supported by six affidavits, which were summarized in his application as follows:

(1) Sally Church, Ph.D.

Dr. Church is a Ph.D. psychologist with extensive training and experience in matters concerning mental health and mental retardation. She has performed numerous psychodiagnostic evaluations and assessments.

With regard to this case, Dr. Church has reviewed Applicant's family history; Applicant's school, medical, employment, jail, and prison records; previous psychological evaluations performed on Applicant; investigation reports; the testimony from Applicant's trial and witness affidavits. She has also conducted a psychodiagnostic evaluation of Applicant at the Polunsky Unit of the Texas Department of Corrections.

Based upon her review of documentary evidence and her psychodiagnostic evaluation of Applicant, Dr. Church's professional opinion is that Applicant is mentally retarded. The most recent testing places Applicant's I.Q. at 67, and this score is consistent with previous intellectual testing. Dr. Church is able

to state that, based on this I.Q., ninety-eight percent (98%) of the population operates at a higher level of intellectual functioning. Thus, Applicant is significantly subaverage.

Further, in Dr. Church's professional opinion, Applicant has critical deficits in his adaptive skills and behavior. In fact, Dr. Church believes that it is "highly doubtful that he alone could meet the needs of his da[y] to day life."

Finally, based on the reported history and documentation, Applicant has suffered from mental retardation since a very early age, if not from birth. Thus, his condition originated during the developmental period.

In addition to her diagnosis that Applicant is mentally retarded, Dr. Church notes that Applicant's physical appearance is typical of a person who suffers from Fetal Alcohol Syndrome or Fetal Alcohol Effect. It is entirely possible that Applicant suffers from one of these conditions as there is evidence that Applicant's mother was an alcoholic. Either of these conditions would be a correlate of Applicant's mental retardation.

Also, Applicant exhibits characteristics consistent with genetic disorders such as XXY, Klinefelter Syndrome, YYX, Extra Y Chromosome, or Fragile X Syndrome. All of these disorders are usually related to mental retardation and are present at the time of birth.

By way of explaining the fact that Applicant will appear, at first blush, to be much more intelligent than he actually is, Dr. Church states that,

[Applicant]'s main motivation is not to [appear] to be a 'dummy' in order to mask his deficits. He tends to say what he has heard others say and/or to say what he thinks others want or expect him to

say. This is not at all unusual as a coping mechanism for the Mentally Retarded person.

Clerk's R., St. Habeas, Vol. 1 at 11-13.

(2) Bill Coble

Mr. Coble resides in the cell immediately adjacent to Applicant's cell on death row at the Polunsky Unit. Mr. Coble has known Applicant since Applicant arrived on death row. Mr. Coble has never read anything about Applicant's case and has not been made privy to the findings of the experts who have evaluated Applicant to determine if he is mentally retarded or the standards for determining if Applicant is mentally retarded.

According to Mr. Coble, Applicant is referred to as "half-deck" by the guards and other inmates on death row. The reason for this nickname is Applicant's obvious lack of intellectual functioning. Indeed, Mr. Coble has had the opportunity to know both Applicant and Johnny Penry, and believes that Applicant is "worse off" than Penry.

Mr. Coble has to supervise all of Applicant's correspondence for him. In other words, Mr. Coble writes answers to letters for Applicant, and then Applicant copies the letters in his own handwriting. It takes "weeks" for Applicant to copy a letter that Mr. Coble gives him. Further, Mr. Coble tries to teach Applicant new words, but he has to tell Applicant the meaning of those words over and over, and Applicant "never really seems to get it."

As an example of Applicant's inability to grasp simple concepts, Mr. Coble once told Applicant that he was "putting the cart before the horse." Applicant did not understand that saying at all. Mr. Coble explained the saying to Applicant a couple of times, but when Mr. Coble inquired if Applicant understood it two or three days later, Applicant did not know.

Mr. Coble's observation is also that Applicant is wholly lacking in "street smarts." As an example, Applicant does not understand how to buy items from the commissary, i.e., he does not understand what items cost and how much money he would have to have to purchase them. As another example, Mr. Coble has to constantly remind Applicant to wash himself, to shave, to clean his food container, and to clean his cell.

Mr. Coble also believes that Applicant has other mental problems that exacerbate his retardation. Applicant often appears "depressed" or "spaced out." Also, Applicant "watches" television by tuning his radio to the television band. During these times, Applicant will listen to the cartoons and "laugh just like a little kid would." Sometimes, Applicant talks back to the cartoons. Applicant describes this activity to Mr. Coble as "watching t.v." and says that he "can see the cartoons in his head."

Mr. Coble has also had the opportunity to observe that Applicant does not understand his case. For example, Applicant received notice that he was being sued civilly by the injured party's family. Applicant became very upset because he was afraid they were going to take him back to Fort Worth and that he would "get another death penalty." Mr. Coble does not try to explain the legal proceedings to Applicant as Mr. Coble sees that as the job of Applicant's attorneys.

Id. at 13-15.

(3) William S. Harris

Mr. Harris was one of Applicant's appointed attorneys at trial. Even prior to his appointment to represent Applicant, Mr. Harris was aware of Applicant's mental limitations. Based upon his meetings and conferences with Applicant, Mr. Harris "concluded that his [Applicant's] mental limitations were very severe." Mr. Harris obtained a professional opinion from Mark Cunningham, Ph.D., a forensic psychologist, who diagnosed Applicant as mentally

retarded. Based upon his observations of Applicant, Mr. Harris believes that Dr. Cunningham's diagnosis is accurate.

According to Mr. Harris, Applicant was unable to grasp the legal concepts applicable to his case (such as the law of parties or eligibility for probation) no matter how many times or how simply and clearly Mr. Harris explained them to him. However, demonstrating his desire to mask his mental retardation, Applicant would tell Mr. Harris that he understood and then immediately call and ask the same questions over and over again. Mr. Harris would again explain the situation to Applicant, who could never truly grasp what he was being told.

Mr. Harris also observed Mr. Hall's lack of functioning in regard to understanding how the world works. Mr. Hall would sincerely request that his case be moved to Hawaii, because he thought the food would be better. In another incident, Mr. Harris was having difficulty getting Applicant a new pair of glasses. Applicant asked if, since he could not get the glasses, he could have lasik surgery. It was obvious to Mr. Harris that Applicant neither understood the expense of such a surgery or that it would be more difficult to get the surgery than getting a new pair of glasses.

During jury selection, Applicant objected to being present, stating that he did not understand what the participants in the court room were saying and that he was "like a blind man in a room full of people who could see." Mr. Harris interprets this statement as follows: "Just as a blind person need never have had sight to understand that he is missing a sense most people have, so a retarded person does not have to have high intellect to know he does not understand what everybody else grasps."

While he does not remember every example of Applicant's obvious lack of intellectual ability and functioning, Mr. Harris knows that he "frequently made the comment to others during my dealings with

[Applicant] that the average person does not realize how breathtakingly profound the mental limitations of one who is, as [Applicant's] I.Q. test showed him to be, in the bottom 2 percentile of the population"

Further, representing Applicant made Mr. Harris "profoundly aware of how limited his mental capacity is and how unjust it is to indulge in the fiction that he has an adult capacity to understand his actions or their consequences."

Id. at 15-17.

(4) Paul A. Conner

Mr. Conner was Applicant's other appointed attorney at trial. Upon his first meeting with Applicant, Mr. Conner was "struck by the low level of mental capability he exhibited." Mr. Conner's subsequent dealings with Applicant, "only enhanced [his] belief in [Applicant's] low I.Q."

During their first meeting, Applicant explained things to Mr. Conner in a manner that reminded Mr. Conner of a child. In response to Mr. Conner's questions, Applicant used his fingers to represent people and "walked" them to describe their actions.

Although Applicant would consistently accept explanations and instructions from Mr. Harris and Mr. Conner, the extent of his lack of understanding would be profoundly demonstrated by asking the same question within days, or sometimes within hours or minutes, of the explanation.

Mr. Conner noticed that Applicant would attempt to "mask" his retardation by not asking questions. Mr. Conner states that Applicant "bitterly did not want people to think him 'dumb.'" Applicant would sometimes appear to be surprisingly well informed on a topic, but as the discussion would continue, it would become apparent to Mr. Conner that Applicant was "parroting" words and phrases that he had heard. In these situations, further inquiry would normally reveal that

Applicant had a complete lack of understanding of the words he was using or, at best, only a rudimentary grasp.

Mr. Conner describes Applicant as "child-like" in his understanding of his arrest and the ramifications of the charges against him. He continually asked why he could not go home, and did not appear to understand his attorneys' explanations of bail. Mr. Conner also remembers Applicant requesting to have the venue of his case changed to Hawaii so that "he could see it, since he had never been there."

Id. at 17-18.

(5) Joseph D. Ward

Mr. Ward is a private investigator who has been appointed to assist in the preparation of this Application. He has met with Applicant at the Polunsky Unit. Based on his conversations with Applicant, it is clear to Mr. Ward that Applicant did not understand anything about his appeal. Mr. Ward noticed that Applicant will "agree with or go along with whatever" Mr. Ward wanted Applicant to say. Further, Mr. Ward states that Applicant's ability to understand their discussions is significantly diminished from other people his age. Mr. Ward describes Applicant's demeanor as "childlike."

During one interview, for which another investigator, John Ladd, was present, Applicant was asked about the circumstances surrounding his arrest and the videotaped statement that he gave in Eagle Pass, Texas. Applicant was "completely unable to recall or relate those events in any meaningful way." Despite the fact that they had just identified themselves, Applicant could not remember Mr. Ladd's name or Mr. Ward's name.

Based on his discussions with Applicant, Mr. Ward notes that Applicant often uses words inappropriately and pronounces them incorrectly. Mr. Ward believes

that Applicant does this in an attempt to mask his mental retardation.

In conclusion, Mr. Ward does not feel that Applicant has the ability to assist with his defense in any meaningful way and does not see any evidence indicating that Applicant is able to take care of himself without the continual help of those around him. Accordingly, Mr. Ward questions whether Applicant fully understands the consequences of his actions or what it means to be executed.

Id. at 18-19.

(6) John Ladd

Mr. Ladd is a private investigator who has been appointed to assist in the preparation of this Application. He has conducted one interview of Applicant at the Polunsky Unit. During that interview, it became apparent to Mr. Ladd that Applicant "was not fully capable of understand[ing] what has happened to him or why." Applicant was unable to remember very much about the details of his arrest or the video taped statement that he gave in Eagle Pass, Texas. At one point during the conversation, Applicant believed that Mr. Ladd was one of the detectives who questioned him in Eagle Pass.

It was very clear to Mr. Ladd that Applicant has a very short attention span. Mr. Ladd describes talking to Applicant as "almost like talking to a 6 or 7 year old child." Further, Applicant "clearly did not understand most of the questions I asked him."

Applicant also showed his limited adaptive functioning when he described that he gets "extra food" by saving portions of his meals to eat late at night. According to Mr. Ladd, Applicant felt that he was very clever in getting this "extra" food, but failed to recognize that it was his own food that he was saving.

In conclusion, Mr. Ladd does not believe that Applicant was able to assist in his own defense or understand the nature of the charges against him.

Id. at 19-20.

As part of the evidence in support of his application, Hall incorporated by reference all of the testimony from his trial, during both the guilt/innocence phase and the punishment phase.

Id. at 20.

b. Affidavits Filed by State in Reply

Before the State replied to Hall's state habeas application, the Supreme Court handed down its June 20, 2002, decision in Atkins v. Virginia, 536 U.S. 304 (2002). The reply filed by the State on July 16, 2002, took into account the Atkins decision. The State submitted with its reply affidavits of Dr. Price, Brandon Daniel, Julie Perego, Suzanne Prosperie, Todd Raymond Tatum, and Darrell J. White. A summary of pertinent information provided by those affiants follows:

(1) Dr. Price

Dr. Price repeated information he provided in his trial testimony. The definition he gave for mental retardation basically is the same as the one to which the parties stipulated in this action. Clerk's R., St. Habeas, Vol. 1 at 121, ¶ 3. He opined that "[w]hile there is no question that Michael Hall has

had learning problems throughout his life, his intelligence test results do not clearly place him in the range of mild mental retardation" and that "[i]t is very important to know that Michael Hall was placed in special education due to having been classified as having a learning disability--not mental retardation." Id. ¶ 4. He reiterated that his "review of this case does not clearly indicate that Michael Hall is mentally retarded." Id. Dr. Price added that based on his review of the records and the administration of tests related to Hall's knowledge of adaptive behavior, his opinion was that "Hall was a poor student but that he does not have significant adaptive deficits." Id. at 122, ¶ 6. Finally, Dr. Price explained that "the use of mental age to describe the functioning of an adult is not an accepted practice in psychology." Id. ¶ 7.

(2) Brandon Daniel

Mr. Daniel was employed as a prison guard at the prison unit where Hall had been confined since he was given the death penalty. He said that Hall acted as normal as anyone in his pod; he saw Hall talking to the other inmates and joking or having conversations with them; he had been around people who are slow mentally, but he had not seen that in Hall; he had not seen any unusual behavior on the part of Hall; he had observed Hall

playing basketball and talking with other inmates; he had heard Hall play rock and roll or heavy metal music on his radio; he had not had any indication that Hall did not understand how to obey orders and follow the rules; based on his observations, Hall was just a normal inmate. Id. at 123-24.

(3) Julie Perego

Ms. Perego was another prison guard at the prison facility at which Hall has been confined. She said that Hall became angry at times if they woke him too early; she had seen nothing unusual in Hall's conduct, different from the other inmates; Hall's behavior was normal, and he did what he was supposed to do; she never had to tell Hall what to do more than once; she had been in the unit where Hall is confined since June 2001, and had been around Hall at different times. She never saw anything that would make her think Hall was mentally retarded, and he seemed pretty normal to her. Id. at 125-26.

(4) Suzanne Prosperie

Ms. Prosperie was another guard employed at the prison facility where Hall has been confined. She said that she had been employed there a total of about four years; she saw Hall on the average of about two days a week; Hall was just a normal inmate to her; when Hall was angry he would complain about things

he did not like, and threatened to write grievances; Hall socialized with other inmates, and there was nothing unusual about Hall's conduct or attitude; based on her dealings with Hall, he clearly and definitely knew the difference between right and wrong; Hall complained and argued, but he obeyed the orders of the guards; Hall complained about being subjected to strip searches, and threatened to write a grievance; his cell was filthy, but by his choice; she did not see any sign of mental retardation or illness in Hall; Hall appeared at times to be depressed, as would be expected from a person on death row; she had experience with mental retardation because one of her neighbors has a mentally retarded daughter; Hall learned the system and understood the rules; Hall functioned and coped as well as the other inmates; she caught Hall trading property with another inmate, which was a violation of the rules, and Hall knew that it was wrong and stopped when ordered to stop; she never heard Hall referred to as "Half-Deck" by anyone; and, Hall managed very well in prison. Id. at 127-29.

(5) Todd Raymond Tatum

Mr. Tatum was another employee at the prison unit where Hall is confined. He was around Hall about three months, and saw him on a regular basis. He had the usual contacts and conversations

with Hall and observed nothing unusual; Hall was never belligerent, and was always obedient with him; Hall's hygiene was not the best; Hall understood what was right and wrong and should be held accountable for his conduct like any other inmate; Hall was kind of a loner, but he was not crazy or unusual as an inmate; Hall learned the system and understood what he was doing; Hall was very capable of functioning and coping like any inmate; he knew kids in school with Down's Syndrome, but he had not seen anything at all that indicated Hall was mentally retarded. Id. at 130, 188.

(6) Darrell J. White

Mr. White was another employee in the prison unit where Hall is confined. He said that he had worked around Hall for about three months; in a normal workday, he checked the inmates every thirty minutes, and Hall would be doing normal things that inmates do in their cell; he did not observe any unusual conduct on the part of Hall; Hall obeyed orders and followed rules; Hall was just a normal inmate; he did not have problems with Hall failing to understand anything that he told him to do; Hall showered, brushed his teeth, and did the normal things; Hall played basketball and got along with other inmates at recreation. Id. at 132. He had experience with an uncle who was mentally

retarded, and Hall was nothing like his uncle, who he repeatedly would have to tell what to do; he had seen nothing about Hall to cause him to think that Hall was mentally retarded. Other than being very quiet, Hall was like any other inmate. Id. at 193.

c. The Report of Dr. Cannon

The record of the habeas proceeding contains a December 20, 1999, letter from Mary L. Cannon, M.D., a forensic psychiatrist, to the judge presiding over Hall's criminal trial advising that on December 17, 1999, she completed a psychiatric evaluation of Hall to determine his competency to stand trial. Clerk's R., St. Habeas, Vol. 2 at 322-23. Based on her review of Hall's past history, his medical history, and a mental status examination, her opinion was that Hall has a factual as well as a rational understanding of the charge against him and sufficient mental ability to consult with his attorney with a reasonable degree of rational understanding.

She described Hall as neat, clean, and dressed in jail clothes when she saw him on December 20, 1999, and said that he was pleasant and cooperative, made good eye contact, and appeared to be alert. Hall was able to tell her his charge, details of the event related to his charge, and the circumstances of his arrest. His mood was slightly depressed, and his affect was

appropriate to his mood. While his thought productions were slow at times, they were simple but logical and goal-oriented. She found no evidence of delusions or auditory hallucinations.

Hall did very well on the Proverbs and Similarities tests. His memory appeared to be only fair. He could perform only two of the four basic elementary mathematical functions. On theoretical questions, Hall's judgments were good, and his general fund of information was fairly good. He was oriented as to time, place, person, and circumstances.

Dr. Cannon concluded her letter by saying "[w]hile there is no doubt that Mr. Hall may have a learning disability, he did surprisingly well on the mental status examination and presented his case regarding his charge very well." Id.

d. Affidavits Filed by Hall on September 20, 2002

On September 20, 2002, Hall filed more affidavits in his habeas action responding to the State's reply affidavits. The following is a brief description of the contents of Hall's newly filed affidavits:

(1) George Carl Denkowski, Ph.D.

Dr. Denkowski is a psychologist who practices his profession in Fort Worth. He has been working with the mentally retarded

since 1975. He often conducted evaluations of adults thought to be mentally retarded. Hall's case was Dr. Denkowski's second case involving an appeal of a death penalty on the basis of mental retardation. He found in the other case that the defendant was not mentally retarded. He was retained by Hall's counsel to determine if Hall is mentally retarded under applicable standards. His opinions were based on a review of records provided to him by Hall's counsel.

His opinion was that Hall is a mentally retarded person. He explained the bases of his opinion in a general way as follows:

His Wechsler Full Scale IQ has consistently fallen below 75, and his adaptive behavior has been significantly deficient across his life-span. It is therefore apparent that this disabling syndrome originated in the developmental period of life. Within the context of the standards of professional practice applicable in Texas, it is therefore clear that Mr. Hall meets diagnostic criteria for mental retardation.

Clerk's R., St. Habeas, Vol. 3 at 605.

Dr. Denkowski's affidavit is nineteen pages long. In much the same way that a lawyer would present a case in a brief, Dr. Denkowski presented, based on the contents of the records he had reviewed, his arguments as to why his conclusions were correct. He expressed his understanding of the standard to be applied in

Texas for determining whether a person is mentally retarded to be the following:

1. The WAIS-III full scale IQ must be below 75;
2. Significant adaptive behavior deficits must exist in three skills areas and the measurement error adjusted standard score for the overall instrument must be below 71; and
3. These impairments must have originated prior to the 18-22 age range.

Id. at 610.

Dr. Denkowski took issue with virtually all of the evidence that had been presented by the State in support of its contention that Hall was not mentally retarded. He concluded his affidavit with the following explanations:

Analysis of the intellectual and adaptive behavior functioning data available on Mr. Hall, including proper accounting for measurement error and for the measurement quality of applied instruments, compels the conclusion that he is a mildly mentally retarded person. His Wechsler IQ has been under 75 from at least early adolescence, and he has manifested serious deficits in adaptive behavior since at least late adolescence. Relatedly, there exists no realistic basis for believing that these serious functional impairments do not persist to this day -- they may not be evident to the casual observer since Mr. Hall is being maintained in an extremely structured environment. And finally, it seems plain that this cumulative disability originated in the developmental period of life. Accordingly, it is clear that Mr. Hall meets the diagnostic criteria for mental retardation in

accord with applicable standards of practice that apply in Texas.

Id. at 621.

(2) William S. Harris

Mr. Harris, one of Hall's trial counsel, became convinced during his representation of Hall that Hall was mentally retarded. He supplemented his January 2002 affidavit with discussions of events during Hall's trial related to the defense efforts to establish that Hall was mentally retarded and of the difficulty he had working with Hall because of Hall's mental limitations. The affidavit is in the nature of legal arguments by counsel. Id. at 635-37.

(3) Stephen Dollar

Mr. Dollar was an attorney practicing with a law firm in Dallas. Before he became a lawyer he was a school teacher. He taught Hall world history in the 1995-96 school year at North Garland High School. Hall was enrolled in the special education program, and was authorized to go to an alternative classroom setting for his testing and assignments; however, Hall chose not to take advantage of that opportunity. He rarely left Mr. Dollar's classroom. Hall was unable to follow Mr. Dollar's daily instructions or complete the assignments. Mr. Dollar said that

Hall displayed no cognitive ability in his classroom, and, in Mr. Dollar's opinion, demonstrated behaviors similar to those of a child with a diagnosis of mental retardation. He gave examples of conduct of Hall that caused him to have that opinion.

Hall would not respond to his own name when called upon, he would sit in the back of the classroom, stare out the window, and drool from his mouth for most of the class hour; he could not read; he could not accomplish even the most menial of tasks, even when they were simplified to accommodate his special education needs; he could not spell his own name; he demonstrated extreme difficulty speaking complete sentences; he had to be woken frequently due to his tendency to fall asleep at his desk during the classroom hour; he was unable to identify his history book from his math book.

Hall had minimal family support. Mr. Dollar spoke to Hall's female caregiver on one occasion. When he told her of his concerns regarding Hall's lack of cognitive skills, her response was to "just hit him a few times as that was how she controlled his behavior." Id. at 638. Hall seemed to have no friends and often was the object of ridicule by his fellow students. He believed that Hall was absent of emotion and definitely was a follower. When other children in the class would act out, Hall

would mimic them. Nevertheless, Hall was neither disruptive to his classroom, nor did he exhibit any physical or verbally aggressive behavior. Mr. Dollar said that he did not feel that Hall was capable of improving or learning at a normal level due to his obvious mental impairment.

(4) Lilli C. Hallam

Ms. Hallam was a Project Coordinator for the ARC of Dallas's Mental Retardation and Justice Information Initiative. She has a master's degree in counseling. She discussed mental retardation in a general way. According to her, it would be difficult, if not impossible, to fake mental retardation. Eighty-seven percent of the persons considered to be mentally retarded have mild mental retardation. Their IQ scores fall in the range of 50-70. Persons with mild mental retardation often live in the community and attend school, and, with support, are able to hold jobs and manage their finances. Ms. Hallam described the challenges experienced by persons with mild mental retardation. They are not always easily recognized because they have learned to "blend" or "pass" as non-disabled. She provided with her affidavit the American Association of Mental Retardation's tenth edition of Mental Retardation Definition, Classification, and Systems of Support. Clerk's R., St. Habeas, Vol. 3 at 640-42.

- (5) Judith Bristow (Custodian of Records of Baylor Medical Center at Garland)

Ms. Bristow authenticated with her affidavit twenty-six pages of records of Memorial Hospital of Garland pertaining to Hall's birth there in April 1979 and treatment he received there in September 1995 as a result of an abrasion to his mouth and lip when he fell on the sidewalk from his bike. Clerk's R., St. Habeas, Vol. 4 at 883-909.

- (6) Alicia Richards (Custodian of Records of Benjamin Franklin Middle School, Dallas Independent School District)

Ms. Richards authenticated by her affidavit two pages of records pertaining to Hall's attendance at Benjamin Franklin Middle School of Dallas Independent School District during the 1993-94 school year. Id. at 910-12. They appear to show that he was withdrawn from the school on January 31, 1994, with a zero grade-point average and no credits.

- (7) Betty Pratt (Custodian of Records for Arlington Independent School District)

Ms. Pratt authenticated six pages of records of Nichols Junior High School of Arlington Independent School District. Id. at 913-18. They show that Hall attended school there for a period of time starting in December 1994. He received three credits for

his studies. Apparently he was withdrawn from the school on February 21, 1995, while he was in the ninth grade.

- (8) Annette Ervin (Custodian of Records for Mental Health Mental Retardation of Tarrant County)

Ms. Ervin authenticated records of Mental Health Mental Retardation of Tarrant County, Texas, pertaining to Hall. Id. at 920-37. The records show services rendered to Hall while he was an inmate in Tarrant County Jail prior to his criminal trial. The final entry in the record, dated February 17, 2000, indicates that Hall's problems were related more to being in administrative segregation than issues of chronic severe mental illness.

- (9) Sally Church, Bill Coble, Paul A. Conner, William S. Harris, John Ladd, and Joseph Ward

The affidavits of Dr. Church, Mr. Coble, Mr. Conner, Mr. Ladd, and Mr. Ward and one of the affidavits of Mr. Harris that were filed on September 20, 2002, are copies of affidavits that accompanied Hall's January 17, 2002, habeas application.

- (10) Miguel A. Omana, Jr. (Custodian of Records for Maverick County Sheriff Department)

Mr. Omana authenticated the records of the Maverick County Sheriff Department pertaining to Hall's stay there commencing March 4, 1998, following his arrest. Id. at 954-82.

(11) James R. Zeller

Mr. Zeller, the senior warden in the prison unit where Hall has been confined, authenticated records of that unit pertaining to Hall. Clerk's R., St. Habeas, Vol. 4 at 983-1075.

(12) Joyce Parmenter (Custodian of Records of Health Records Maintained at the Prison Unit Where Hall is Confined)

Ms. Parmenter authenticated by her affidavit the health records of the prison unit where Hall has been confined. Id. at 1075-113. A Mental Health Assessment form dated July 29, 2002, did not indicate that the evaluator observed anything inappropriate about Hall's conduct. Id. at 1081. Hall's personal hygiene was observed to be neat and clean; his cell hygiene was observed to be neat and orderly; he was shown to be oriented as to date, time, and place; his thought process was shown to be coherent; his thought content, speech rate, speech volume, and mood were shown to be normal; his attitude was shown to be cooperative; and, his behavior and attention span were shown to be normal. Basically the same findings were noted in a Mental Health Assessment form completed on May 2, 2002. Id. at 1082.

Hall was given a TONI-III test of nonverbal intelligence in March 2000, which resulted in a score of 77. Id. at 1086.

(13) Jerry W. Halpin (Custodian of Records for Garland Independent School District)

Mr. Halpin authenticated by his affidavit Garland Independent School District's records pertaining to Hall. Id. Vol. 5 at 1114-1479.

The records show that a WISC-R intelligence test performed on Hall in October 1991 determined that his intellectual functioning was in the borderline range of ability, with a full sale IQ score of 71. Id. at 1436. An individual assessment dated October 29, 1991, said that Hall's "performance on the WISC-R [performed 10/8/91] indicates that his/her assessed intellectual ability is above the mentally retarded range." Id. at 1440. As a result of an evaluation of Hall made in 1994, his TONI-2 Quotient was 84 and his adaptive behavior was described as follows:

The student's adaptive behavior was assessed using informal measures. Results showed that the student's level of intellectual functioning is consistent with his/her adaptive behavior, with no significant deficits in either area.

Id. at 1332. A form dated November 30, 1994, states that "[Hall's] performance on the standardized intelligence test indicates that [his] assessed intellectual ability is above the mentally retarded range." Id. at 1463.

An observation record dated November 30, 1994, when Hall was in the ninth grade, noted that Hall is poorly motivated, did not complete tasks, was easily distracted, and attempted but failed tasks; that frequently Hall was easily frustrated, slow to start assignments, could not remember directions or facts, had difficulty making friends, had difficulty in understanding spoken language, and that occasionally he was excessively shy. Id. at 1239. Similar observations are noted throughout the school records. As examples, a report dated May 5, 1994, indicated that Hall's failing grades in English resulted from tutorial non-attendance, non-completion of assignments, inattentiveness, student apathy, and low test grades; a December 7, 1995, report showed that Hall's failing grades in Spanish appeared to be the result of non-completion of assignments, inattentiveness, student apathy, and low test scores; the report of Hall's 1994 evaluation said that based on assessment data, Hall "demonstrates significant academic or developmental deficits in the area(s) of: reading, spelling, and math," id. at 1333, and stated that Hall appears to meet specific eligibility criteria for a learning disability, id., and that Hall "can be expected to meet the district's regular criteria for receiving passing grades and maintaining extracurricular activities," id. at 1336.

Interspersed throughout the school records are comments from teachers suggesting that lack of attention, sleeping in class, and simply refusing to do his work were significant parts of Hall's problem. An exception is a report by Ms. Conner, made at the tenth-grade level, which she concluded with the statement that "[f]or some reason (unknown to me) [Hall] is working well this semester and is doing good work on equal level with the other students in class." Id. at 1427.

(14) S. Buentello

Mr. Buentello was the chairman of the State Classification Committee of the Texas Department of Criminal Justice-Operations Division. In that capacity, he gave an affidavit stating that Hall's records at the prison indicated that Hall had not had disciplinary problems and had maintained a clear conduct record while confined in the prison. Mr. Buentello also served as record clerk of the Texas prison system. In that capacity, he authenticated copies of Hall's photograph, fingerprints, and commitment documents. Clerk's R., St. Habeas, Vol. 6 at 1481-92.

e. Dr. Price's Affidavit Filed by State in Reply

The State responded to the affidavits Hall filed on September 20, 2002, by the filing of another affidavit of Dr.

Price, with supporting documents. Id. at 1496-568. The affidavit was signed October 5, 2002, and filed October 7, 2002.

Dr. Price again provided, and elaborated on, his qualifications to speak on the subject of mental disorders. He provided more detail concerning his examination and evaluation of Hall's mental capabilities. His affidavit listed the sources of information upon which he relied in giving the affidavit, which included a review of the affidavits Hall had filed in support of his habeas application.

In Dr. Price's affidavit he focused on Dr. Denkowski's affidavit, pointing out the inappropriateness of Dr. Denkowski rendering an opinion concerning Hall's mental status without having conducted any kind of examination of Hall. Dr. Price stated that "the issue of the diagnosis of mild mental retardation is controversial and determining whether or not someone receives that diagnosis can literally turn on a word or a number." Id. at 1501. He discussed the misleading nature of the tendency of the advocates in favor of persons claiming mental retardation to raise the dividing point IQ to 75, id. at 1501-02; and, he explained that "[t]here is no consensus in the scientific literature about the structure or the measurement of adaptive behaviors," id. at 1502. Dr. Price explained that none of the

specific adaptive skills that are to be considered can be reliably and validly measured with any existing instrument. Id. at 1503.

Dr. Price attached to his affidavit his initial report of his psychological evaluation of Hall over a period of three days in early February 2000. Id. at 1540-64. The information contained in that report supplemented information Dr. Price previously had provided concerning Hall's mental status. For example, Dr. Price reported that "[Hall's] thought processes were goal directed and logical," "[h]is thought content was generally focused on religion, jury selection, and the trial," and "[h]is effort was good, and he showed no signs of problems related to attention or concentration." Id. at 1540.

Included in Dr. Price's report was a detailed discussion, on a day-by-day basis, of his interviews with Hall in early February 2000. Id. at 1552-62. The question and answer format used by Dr. Price demonstrated the extent to which Hall had the ability to reason and to conduct an intelligent conversation. Hall's response to one of Dr. Price's questions indicated that he understood the "law of parties"--that he could be held accountable for Neville's conduct in firing the shots that killed Amy Robinson. Id. at 1554. However, he expressed disagreement

with the rule. Id. at 1562. Hall had a clear understanding of what was happening at his trial and the sequence of trial events. Id. at 1559. However, Hall obviously did not have a realistic view of his chances of success before the jury, though he had rational thoughts relative to factors that could lead to a successful trial outcome. Id. at 1560-61. Hall had enough presence of mind, and the verbal skills, to articulate positions he thought his lawyer should take in his defense, including focusing on his mental background and showing that he was "just not too bright in school." Id. at 1562.

f. Dr. Denkowski's Second Affidavit

On November 27, 2002, Hall filed a second affidavit of Dr. Denkowski. The court does not consider that it added anything helpful to the decisions to be made by the court. It was more of a memorandum of argument that would be presented by Hall's attorneys than an objective statement of facts and opinions by an expert witness. Clerk's R., St. Habeas, Vol. 6 at 1600-16.

3. The State Habeas Court's Adjudication and Determinations of Factual Issues

By order signed December 3, 2002, the state trial court adopted as its own the proposed findings of fact and conclusions of law the State filed in the habeas action on November 6, 2002.

Clerk's R., St. Habeas, Vol. 6 at 1678. The state trial judge who made the habeas findings of fact had presided over Hall's trial as well, with the consequence that she could, and presumably did, consider her firsthand evaluations of the credibility of the trial witnesses.

On February 26, 2003, the Court of Criminal Appeals of Texas denied Hall's application for writ of habeas corpus by an order saying that the court adopted the trial judge's findings and conclusions and that the denial was based on those findings and conclusions and the court's own review of the record. Ex parte Hall, No. 53,668-1, slip op. at 1-2 (Feb. 26, 2003).

The standard for determining whether Hall was mentally retarded that the state court used in its habeas adjudication and fact findings was basically the same as the standard to which the parties stipulated in the instant action. Clerk's R., St. Habeas, Vol. 6 at 1574-75, ¶¶ III, IV, & V.

After making determinations of evidentiary facts, each of which is supported by the state trial and habeas evidentiary

records,⁸ the state court made the following determinations of ultimate facts (which it characterized as conclusions):

- I. Applicant cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in Tex. Health & Safety Code Ann. § 591.003(13). See Stevenson, 73 S.W.3d at 914-17; Ex parte Tennard, 960 S.W.2d at 61. Therefore, Applicant does not fall within the classification of mentally retarded capital offenders who are exempt from the death penalty under Atkins, 122 S. Ct. at 2244-52.
- II. Alternatively, even if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty. See Atkins, 122 S. Ct. at 2550 (recognizing that not all people claiming mental retardation will be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus").

Id. at 1592.

⁸The Fifth Circuit thought significant what it perceived to be errors on the part of the state court, Dr. Price, and Dr. Denkowski in stating that the IQ test Dr. Church administered to Hall resulted in a score of 72. Hall v. Quarterman, 534 F.3d 365, 370 & n.20, 371 n.27 (5th Cir. 2008). Not only is there nothing in the state court record to indicate that Dr. Price, Dr. Denkowski, or the state court would have reached any different results if they had treated Dr. Church's test score as 67 rather than 72, the record now affirmatively establishes that when properly scored the test administered by Dr. Church shows an IQ score of 72 for Hall. Tr. of Dec. 10, 2008, Hr'g at 59, 126.

Also, the Fifth Circuit expressed concern with the state court's credibility determination related to Dr. Church based on her lack of a Texas license or certification. Hall, 534 F.3d at 370-71. The state court did question whether the affidavit of Dr. Church, as well as the affidavit of Dr. Denkowski, should be considered, but said that a consideration of the affidavits would not cause the court's findings or conclusions to change. Clerk's R., St. Habeas, Vol. 6 at 1574. The court has no reason to think that the state court was not being truthful when it made that statement.

The state court's determinations of evidentiary fact issues served to explain and support the main and alternative determinations of ultimate facts set forth above. Id. at 1571-92. Based on such determinations, the state court adjudicated that Hall's mental retardation claim was without merit.

D. The Adjudication and Determinations of Factual Issues Made by the State Court on Direct Appeal After Remand by the Supreme Court

Following the remand of Hall's criminal case to the state court by the Supreme Court based on Atkins, on May 5, 2004, the Court of Criminal Appeals of Texas adjudicated Hall's mental retardation claim in a continuation of Hall's direct appeal. Hall, 160 S.W.3d at 24. The state court considered the evidence received at Hall's trial, with emphasis on the punishment phase evidence, and the evidence received in Hall's state habeas action in making its adjudication of, and determinations of factual issues related to, Hall's mental retardation claim. Id. at 38, 39-40. By the time the state court adjudication and determinations were made, the state court had decided Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), in which the court adopted guidelines to be used for determining whether a defendant is mentally retarded. Hall, 160 S.W.3d at 36. Those guidelines

include a definition that is the same as the one the parties stipulated is applicable to the instant action. Supra at 9.

The state court likened Hall's mental retardation claim to an affirmative defense upon which the burden of proof is always upon the defendant, both at the trial stage and habeas stage. Id. at 38-39. To sustain his claim of mental retardation, Hall was required to prove mental retardation by a preponderance of the evidence. Id.

As the state court noted, it already had reached a conclusion adverse to Hall's claim in Hall's state habeas proceeding in which the mental retardation claim was directly presented in the context of Atkins. Id. at 39. However, the state court re-reviewed the evidence. Id. After having done so, the court's conclusion did not change. Id. Finally, the state court deferred to the adjudication and factual determinations made by the state trial court in Hall's state habeas action. Based thereon, the state court affirmed the state trial court's judgment imposing the sentence of death. Id. at 40.

Thus, the state court's adjudication and determinations of factual issues from which Hall is seeking relief here are those discussed in the immediately preceding subsection of this memorandum opinion.

IV.

Hearing Conducted December 10, 2008

A. General Remarks

Because of a concern that a proper hearing, at which witnesses testified from the stand and were subject to cross-examination before the judge, was not held on the issue of whether Hall was mentally retarded, the Fifth Circuit ordered that such a hearing be held in this federal habeas action. Hall, 534 F.3d at 371-72. When the court fixed the date for the hearing and defined prehearing procedures to be followed, the court ordered that "[w]itness testimony at the hearing will be limited to testimony taken in open court at the hearing," Oct. 6, 2008, Am. Scheduling Order at 2, ¶ 2, and directed that "no witness testimony will be received at the hearing by affidavit, declaration, or deposition," id. at 1.

As the prehearing procedures were being pursued, the court realized, and became concerned, that neither side was taking seriously the court's expectation that all witness testimony would be developed from the witness stand. The court raised this issue with counsel during a telephone conference conducted December 2, 2008. Tr. of Dec. 2, 2008, Conference at 31. Counsel responded that they were satisfied to present most of

their witness evidence by other than live testimony. Id. at 33. At the commencement of the December 10, 2008, hearing, both sides confirmed that they did not expect to cross-examine any witness whose testimony is received through affidavit, letter, or other hearsay-type document so long as they had an opportunity to cross-examine the experts, Dr. Cunningham and Dr. Price. Tr. of Dec. 10, 2008, Hr'g at 15.

To expedite the hearing, the parties agreed at the outset that the testimony given by the hearing witnesses at Hall's trial would be considered as part of the evidence at the hearing. Id. at 19-20.

B. Witnesses Who Testified at the December 10, 2008, Hearing⁹

1. Witnesses Called by Hall

a. Karen Hall (Gray)¹⁰

After having asked a few preliminary questions of Ms. Hall, counsel for Hall said that he did not have further questions, because her entire trial testimony was going to be considered by the court. On cross-examination, respondent's counsel developed

⁹The court has considered all the evidence received at the hearing even though much is omitted from the short summaries in this opinion.

¹⁰By the time she testified at the hearing, Hall's mother had changed her last name from Hall to Gray.

that in October 1991 Hall was living with his mother and Warren Wells, and that Mr. Wells was abusive to both of them. Hall was withdrawn, and she guessed that he was depressed.

b. Cheryl Conner

Ms. Conner's testimony added little significance to the testimony she gave at Hall's criminal trial. Supra at 33-39. But, at the hearing, Hall's counsel apparently expected her to be an expert witness in support of Hall's mental retardation claim, an expectation that was somewhat frustrated by Ms. Conner's evasive response to counsel's first question to Ms. Conner:

Q. Yes, Ms. Conner, I wanted to ask you whether or not you considered Michael Hall mentally retarded.

A. (Pause.) Originally his classification was learning disabled, but when I looked at his records, because I felt like there was more going on, I found that, yes, he did have a classification of mental retarded in the past.

Q. How did he --

THE COURT: I don't think you answered his question. Did you form your own judgment whether he was mentally retarded, or were you simply relying on what other people had classified him in the past?

THE WITNESS: I knew that there was more involvement with Michael than what the records showed, so I did some investigation and found that past test results had shown a substandard score.

Tr. of Dec. 10, 2008, Hr'g at 30-31.

She said that she was qualified to make an assessment of mental retardation, and was qualified to do so when she was working with Hall at school. According to the State of Texas, the IQ feature of a mental retardation diagnosis requires an IQ score of 75 and below. She did not give Hall an IQ test.

Her impression was that Hall was regressing while he was in her classroom, and she did not know whether the regression was the result of depression, a brain lesion, or drugs. Depression can be caused by a bad home life. Falling asleep in class and failing to engage can result from depression.

c. Stephen Dollar

After asking Mr. Dollar preliminary questions, Hall's attorney informed the court that, if the court is going to consider Mr. Dollar's habeas affidavit, Hall had no further questions. The cross-examination by respondent's counsel did not add anything of significance.

d. Paul Conner

After asking preliminary questions of Mr. Conner, Hall's attorney asked Mr. Conner if he stood by his state habeas affidavit. Mr. Conner responded that he did, and that everything in it is true. There was no cross-examination.

e. Dr. Cunningham

Dr. Cunningham's testimony repeated much of the testimony he gave at Hall's criminal trial. He interviewed and tested Hall for over ten hours in 2000. His diagnosis was that Hall had mild mental retardation. Mild mental retardation is an IQ score of between 55 and 70, up to 75 when the standard error of measurement is included; moderate mental retardation is an IQ score of 40 to 54; severe mental retardation is an IQ score of from 25 to 39; and profound mental retardation is an IQ score below 25.

In 1991 Hall scored 71 as his IQ on the WISC-R. The form on which the 1991 test score is recorded has a notation that: "[S]cores from last WISC-R were lower (mentally deficient range[]]. However Michael falls in the borderline average range in this testing." Hr'g Ex. 4 at 592. The IQ test Dr. Cunningham administered to Hall in 2000 resulted in a score of 67, with a true range of 64 to 71, bearing in mind "an inherent degree of inaccuracy that's associated with all IQ testing." Tr. of Dec. 10, 2008, Hr'g at 58. He said that there is a ninety-percent likelihood that the range of scores between 64 and 71 contain Hall's true IQ.

He said that Dr. Church reported that her testing of Hall resulted in a score she described variously as 69 and 67. Both of her reported results were erroneous. The test form that she filled out at the time she gave the test "reflects a full scale IQ score of 72." Id. at 59.

The next, and most recent, intelligence test taken by Hall was a WAIS-III taken in 2008, the same kind of test Dr. Cunningham gave Hall in 2000. The 2008 test resulted in a score of 85, which, when the expected margin of error is considered, means that there is a ninety-percent likelihood that the range of 82 to 89 contains Hall's true IQ.

In explaining the basis of his assessment of Hall, Dr. Cunningham said:

I assessed Michael Hall in 2000, and my entire assessment is based on his status at that time. I have not attempted to update my findings with more contemporaneous information beyond the test that was given to him in 2002 and some affidavits that were provided in 2002. But otherwise, I have not attempted to bring this up to date as of today.

Id. at 61.

Dr. Cunningham discussed techniques he used in evaluating Hall's adaptive behavior. He administered a WAIS-III test; he looked at the academic functional literacy test given to Hall in school as well as one given to Hall in 2002 by Dr. Church; and,

he assessed Hall's adaptive behavior by the interviews he did with third persons in the year 2000. The interviews he did, his WAIS-III testing, and his IQ testing all were done by him in 2000. All of his opinions were based on 2000 information, except when he sat on the witness stand he had also reviewed the affidavits of Mr. Coble, Mr. Harris, and Mr. Conner; the intellectual assessment and achievement testing done by Ms. Church in 2002; and his review of summaries of what other witnesses were going to testify to in this case.

The test he used for the measurement of adaptive behavior did not look at what causes adaptive deficits. The IQ score must be relied on to form a judgment as to the cause of the deficits in adaptive behavior. He can reach different scores on adaptive behavior, depending on whose informant's information he is relying on. His informants were consistent in enough areas of adaptive behavior that he did not need to create an average for his diagnosis. Hall's adaptive behavior deficits put him in the mild mental retardation range.

When asked what distinguishes the conduct of somebody who is mildly mentally retarded, say with an IQ score of 70, from a person who has a measured IQ score of 76, he explained:

THE WITNESS: There may be little discernible difference between somebody whose IQ score is only three or four or five points apart from each other. In other words, to sit down and talk to them, to interact with them, I might not identify a significant difference between them.

THE COURT: How would you discern that difference?

THE WITNESS: You would discern it by actually assessing them. In other words, you typically can't tell that somebody is mildly mentally retarded by simply having a conversation with them. They may be able to express themselves. They have reading ability through about sixth grade. They may be able to do many things.

THE COURT: If they were one or two scores above mild mentally retarded, I guess they would have the same characteristics.

THE WITNESS: They would have many of the same characteristics, and so it's sort of an artificial dividing line to say at this point mental retardation begins.

Id. at 67-68.

He discussed what he calls the Flynn Effect, giving the following explanation:

This means that the population as a whole is getting better at the task that these IQ scores test. An IQ score is never like an x-ray. It's never that we took out your brain and weighed it. It's always where do

you score in relation to the group. If the rest of the population is moving, then this test becomes more and more inaccurate in terms of reflecting your actual IQ every year that goes by from the date of standardization. . . .

. . . .

The Flynn Effect is the inflation of IQ scores that needs to be corrected if we're going to properly understand where is Michael actually scoring related to everybody else. The older the test norms are, the more inflation is present.

Id. at 80, 83.

Dr. Cunningham said that when the Flynn Effect is considered, the score on the WISC-R that Hall took in 1991 would be 66 or below. Standardization bias means that "the standardization of WAIS-III was over-represented in individuals who had very low IQs that resulted in the standardization distribution, not as accurately reflecting the actual population as would be appropriate," causing the WAIS-III to overestimate IQ scores by 2.34 points. Id. at 85. He discussed the effect that changes in standardization had on the results of Dr. Church's IQ testing on Hall.

He said that, other than the evaluation of Hall in November 2008, Hall meets the standard for an IQ score below 75, which means that Hall's IQ scores are "in the zone of eligibility for mental retardation"; and, when the standard error of measurement

with the Flynn Effect is considered, "they are all well into the 60s." Id. at 89.

The direct examination of Dr. Cunningham concluded with the answer that "[a]t the time of my evaluation in 2002 and incorporating data available in 2000 and incorporating data through 2002, it is my opinion that [Hall] was at that time a person with mental retardation." Id. at 94.

On cross-examination, Dr. Cunningham testified that he has never been employed by the State in a capital case, but has been employed approximately 135 times by inmates in capital cases.

Dr. Cunningham could not answer "yes" or "no" to the cross-examiner's question asking whether Hall's IQ score of 85 in the November 2008 testing is consistent or inconsistent with his opinion that Hall was mentally retarded at the time he committed his crime. He discussed confidence levels in IQ score results, saying that "the observed confidence interval range for an IQ score of 85, as Dr. Price administered . . . would be from 82 to 89." Id. at 108. He also discussed possible inaccuracies in IQ testing results, posing the hypothetical, "say somebody's true IQ score is actually a 65, and sometimes when you test them they get a 63 and sometimes a 67 and sometimes a 69." Id. at 108. He then explained that when that hypothetical person has a 69 score,

then "[t]he observed range on that 69 would be between 65 and 73." Id. at 109.

Dr. Cunningham gave the following possibilities as to why Hall had an IQ score of 85 in November 2008:

In 2008 we get this 85 that is broadly discrepant from these others. Now, one possibility is that Michael Hall has gotten much smarter in the last eight years since I tested him. That's one possibility. Another possibility is that there are some other factors that are at work that are causing us to get this higher result now than what we saw before. What could those be?

Well, one possibility is that there is a standard error of measurement that's operating that has resulted in this score being a little bit more of an outlier. Another possibility is the Flynn Effect, which is that this score has been inflated in terms of the rest of the group. Another possibility is that there were problems in the administration or scoring of this test that caused it to depart from standardization and that resulted in inflated scores.

There are several different hypotheses that we might look at about how come this score is fundamentally different than the scores that were obtained previously over a 13-year period of time.

Id. at 110-11. He added as a hypothesis as to why Hall's November 2008 IQ score of 85 was so much higher than earlier IQ scores that the earlier testing did not accurately measure Hall's intelligence at the time of the testing.

There is sound scientific research and recommendations for the correction of IQ scores for the Flynn Effect, but it is not

broadly practiced in the educational or professional community "because science takes a while to disseminate its way out into standard and into everyday practice." Id. at 112.

He described things the person administering an IQ test can do to cause the test result to be unreliable. There were significant problems with Dr. Church's expert report concerning Hall. She made errors in administering the WAIS-R, there were discrepancies in her scoring, and the scores she reported in her report and her affidavit were inconsistent with the scores she reported on the protocol of the test that she gave.

If the IQ score of 85 derived from the test Dr. Price performed in November 2008 were to be corrected for any perceived errors and reduced by the Flynn Effect, the range of the score, assuming a 95% confidence interval, would be at its lowest 72.

A person's score on an IQ test can be negatively affected by depression, sleep deprivation, anxiety, behavioral disorders, and attention deficit disorder. The relationship existing between the person performing the test and the subject can affect the score. He discussed why that is so. All of the adverse things happening in Hall's environment might or might not undermine the validity of his IQ test scores, though he considered Hall's IQ scores to be reliable.

2. Witnesses Called by Respondent

a. Stephen Hillman

Mr. Hillman was a commissary manager at the prison unit where Hall was confined. He identified as part of the records of the prison unit Commissary Order Slips used by Hall in 1998 to order items from the prison commissary. Hr'g Ex. 13. The order slips show that the person who completed them was able to specify the quantity desired, write out a description of the items desired, fill in the price of the individual items, and show the amount where more than one item was desired and a total of all of the amounts. Apparently the multiplication and addition on the order slips are correct. The handwriting is legible, and the spelling appears generally to be correct. Mr. Hillman noted that to complete the order slips an inmate needs to use math and be able to read and write. The inmates fill out the order slips themselves. Hall did not have a cell mate who could fill out the slips for him. There would not have been anyone outside Hall's cell who could have filled them out for Hall.

b. Melissa Byley

Ms. Byley was a librarian at the prison unit where Hall has been confined. She identified book request forms completed by Hall requesting books from the prison library. Hr'g Ex. 9. To

comply with the requirements for completing the forms, Hall had to list the authors and titles of the books he was requesting. She identified another exhibit as a record of the library that lists by author and title of book the books Hall ordered from the library. Hr'g Ex. 8. Each time Hall received a book from the library, he was obligated to keep it seven days. If he had not completed it within seven days, he was required to re-check it. Based on her experience, Hall's check-out list was greater than the average death row inmate. Hearing exhibit 10 is a notice that appears on the back of the book request forms that gives the inmates instructions about checking out books. Hearing exhibit 12 is a specimen page of a large book available to the inmates in which books are listed by author and title to assist the inmates in selecting books they wish to request.

c. Robert Woodrow

Reverend Woodrow was a minister for the Hillcrest Church of Christ in Arlington, Texas. He became acquainted with Hall when Hall started attending the church in March or April, 1997. He believed that Hall's stepbrother invited him. Rev. Woodrow did not interact often with Hall before Amy Robinson's murder. After the murder, he visited with Hall at least eleven times in 1998 and at least seven times in 1999. Hall was able appropriately to

respond to questions Rev. Woodrow asked him, and Hall would initiate conversations with Rev. Woodrow. He talked to Hall like he would talk to most any teenager.

He identified hearing exhibit 6 as an exchange of letters between him and Hall after Hall was convicted and sent to prison. Hall's letters show that Hall was capable of expressing himself. In Hall's letters, he requested Volumes I and II of Herbert W. Armstrong's autobiography and a King James Holy Bible of Prophecy in large print, black leather. Hall mentioned in one of his letters that he read a J.K. Rowling Harry Potter book, and half of another. Also, Hall discussed current events in the letters he wrote. At least twice in his letters, Hall mentioned that he was depressed.

His experience with Hall was that Hall had no trouble reading the correspondence he sent to Hall or understanding the conversations they had. One of the reasons he did not think Hall is mentally retarded is because of their conversations.

d. Russell Bartholome

Mr. Bartholome was a high school teacher who in the spring and summer of 1997 was asked to help with a youth group at Hillcrest Church of Christ where he had occasion to interact with Hall. Hall's dress and grooming seemed to be appropriate for his

age. Hall had a girlfriend in the church group briefly during that period of time, and he noticed that they had a hand-holding relationship. The girl was very smart, very capable, artistic, and well-read. Hall used a workbook provided to members of his group the same as other members. The reading level of the workbook was middle school to lower high school. The answers Hall filled in answered the questions that the workbook posed. They often had group discussions that involved posing questions to members of the group. Hall answered appropriately.

e. Linda Haynes

Ms. Haynes was a psychologist at the Irving School District when she evaluated Hall. She identified as an exhibit the report her committee proposed in April 1993 of an evaluation they made of Hall in March 1993. Hr'g Ex. 29 at 288-93. The goal of the evaluation was to determine whether Hall was seriously emotionally disturbed--whether he had emotional issues that were interfering with his ability to learn.

From looking at Hall's IQ scores, she did not have the impression that Hall was mentally retarded. The testing of Hall done for the Irving Independent School District showed on a WISC-R Hall's full-scale IQ score to be 71. Id. at 290. She did not recall that any of the committee members who participated in

the evaluation of Hall in 1993 considered him to be mentally retarded.

f. Ken Trainer

Mr. Trainer, who was Hall's workshop teacher when Hall was in the tenth grade, added little of significance to the testimony he gave when called as a witness by Hall at Hall's trial. As the school year progressed, Hall became more motivated, sometimes voluntarily coming in early in the morning or working late in the afternoon on his projects. Hall preferred not to do things when other students were in the class. They would pick on him, and he did not associate with the others easily.

The project Hall did on his own was a game console--a television monitor with a joystick. Hall came up with the idea for the project and showed Mr. Trainer a picture of what Hall wanted to do, and then the two of them drew the plans for the console. Over a period of time, he gained complete confidence in Hall's ability to use the woodworking tools. It would sometimes take Hall longer to catch on, but then he would catch on and be able to do the things the other students were doing. Hall could do the projects on his own after having been given instructions.

g. Dr. Price

Dr. Price had been involved in 232 capital cases since 1986, and he had testified 24 times in capital cases in the last eleven years, 54% of the time for the prosecution and 46% for the defense.

Dr. Price's opinion was that Hall's measured IQ at this time is 85 and that it was approximately 67 to 72 at the time of Amy Robinson's murder. He corrected what he said to say that his opinion was that Hall's measured IQ at the time of the crime was 67 plus or minus five points.

In his opinion, the evidence indicates that Hall had adaptive behavior deficits related to both his low intelligence and his adjustment problems. He means by "adjustment problems" the problems Hall was having in his life--problems with his family and coping and adjusting problems in school. His behavior deficits were not all the result of low intelligence, but were tied to his family, home, and failing in school, as well as low intelligence. He was unaware of any way to distinguish or separate adaptive function deficits caused by low intelligence from those caused by environmental factors. He did not think that there is any way they can be separated from a scientific standpoint. Because of Hall's prison environment, there is no

way a measurement could be made at this time of his adaptive behavior. In his opinion, the evidence indicated that Hall had problems with adaptive behavior and general adjustment to his environment, both home, school, and work, in the years 1998 through 2000.

He could not say that Dr. Cunningham's WAIS-III IQ score of 67 for Hall in the year 2000 was an accurate reflection of Hall's actual IQ. "There were a lot of things going on in Mr. Hall's life, even at the time of the trial, that could have had an effect on his measured IQ, and that may have lowered it." Tr. of Dec. 10, 2008, Hr'g at 204. If a defendant has knowledge that a low intelligence level will help him in the defense of a case, he can, in effect, rig the outcome of an IQ test in the sense of causing the test to make the defendant to appear less intelligent.

Dr. Price explained a phenomenon he has observed in the testing of persons facing the death penalty.

THE WITNESS: I've been testing inmates, death row inmates, and defendants for 26 years; and I've noticed something that's really interesting. They tend to do that faking, that doing more poorly than they can, much more at trial stage than after they've been in prison on death row for years. It's been a rare case indeed that I've had somebody try to rig the IQ score, as you said, when I've gone to test them on death row. It's been an interesting thing to observe

how consistent that's been, when at trial stage it happens sometimes.

THE COURT: Do you have any scientific explanation for that?

THE WITNESS: Well, I don't know if it's scientific. It's certainly a theory that I have that at trial stage, of course, everything is up in the air. They don't know what's going to happen. They're scared. They're anxious a lot of times or angry. And they just do that. Sometimes they try to fake. They get to death row for a few years, and for a lot of them all they really have is their self-respect. And they would rather, to put it kind of crudely, they would rather be executed than to look like they're dumb or in some way disturbed. They try -- especially on cognitive tests that I've given them. I can only think of one death row inmate that tried to score poorly on purpose on tests that I've given them. And, you know, I've tested hundreds.

Id. at 205-06.

When Dr. Price tested Hall in November 2008 he used three tests to have a quantitative indication of Hall's effort and his level of motivation, which are standard tests that would be conducted when doing a forensic evaluation of IQ. All three tests showed that Hall was putting forth good effort and was motivated to do his best. He conducted two IQ tests, one was the WAIS-III and the other was a RIAS. The RIAS is an accepted test for measuring IQ. Hall's score on that was 85. The gold standard in IQ testing is the WAIS. The RIAS correlates .75 with the WAIS. Hall's test score on the WAIS was 85. The giving of

two IQ tests, as he did, was desirable because it enables the person conducting the test to see if there is consistency in the testing. Research indicates that the RIAS score is a little higher than the WAIS, but not significantly so.

As a result of his evaluation of Hall in 2008, he concluded that Hall's intellectual functioning was low average; and, considering the standard of error, it would be from the borderline to the low average level of intellectual functioning. By "borderline," he meant an area between 70 and 85, which would put Hall at the high end of the borderline range of intelligence.

When asked to explain why Hall's IQ score was higher in 2008 than it had been in 2000, he explained:

I think that there are two opposing or two separate possible explanations for that. The first one would be, as it was related to Dr. Cunningham's testimony, the first explanation would be that the IQ score that I got on Mr. Hall in 2008 was inflated due to either bias on my part or that Mr. Hall had become more intelligent in the last eight years. That's one set of explanations.

On the other end, the other side of that could be that the IQs that he got in school in '91 and at trial stage were underestimates due to all the external factors going on in his life: the emotional turmoil, the chaotic home, the failure in school, and the resulting problems he had with self-esteem and with motivation and with effort.

So it's one or the other. It's either that it's artificially inflated on the one I gave, or it's an

underestimate on the IQ scores obtained when he was in school and at trial stage.

Id. at 211.

He said that he does not think his testing of Hall was biased. The test was administered properly, and his opinion is that the test score was not an artificial inflation.

A person's intelligence can improve over time. People are known to progress from being mildly mentally retarded at a certain age and later not meet the criteria of being mildly mentally retarded. That generally results because of an increase in the adaptive behavior skills of the person in question. It is more likely that a person's adaptive behaviors can improve over time rather than a person's IQ score. With respect to test results obtained from testing of Hall's IQ in the 90's and early 2000, Dr. Price said, "I think it's likely that those are not accurate, that they are somewhat of an underestimate because of the external factors, and I don't know about his effort and his motivation on those tests." Id. at 212. There was not any effort or motivation testing done at the time of the earlier tests. He discussed factors that can cause an IQ test score to be unreliably low.

Dr. Price responded to, and explained away, Dr. Cunningham's criticism of the things Dr. Price did in the testing of Hall in 2008. He explained why he did not have an unqualified opinion when he testified at trial that Hall was not mentally retarded. His opinion now is that Hall was not mentally retarded at the time of Hall's trial. He did not believe that the earlier IQ testing of Hall accurately reflected Hall's intelligence.

Dr. Price discussed the Flynn Effect. He disagreed with Dr. Cunningham's testimony concerning the level of reduction in an IQ score that should be made to take into account the Flynn Effect. It is not standard practice in the scientific community to adjust an IQ score for the Flynn Effect; he gave an explanation why that is so. He had never applied the Flynn Effect on any of his cases, either those where he testified for the defendant or those where he testified for the state.

He considered the WAIS-III manual to be a technical report from the publisher of the test that provides technical information about the test and is a reliable source for how to administer the test. He considered the DSM-III-TR to be a reliable source on the diagnosis of mental retardation.

On cross examination, there was a discussion of standardizing tests and steps that the manual suggests should be

taken in administering the tests. Dr. Price had no reason to believe that the WISC test that Nancy Stephens administered in 1991 was not administered and scored correctly. He believed the test that Dr. Cunningham gave in 2000 was properly administered and scored. According to the DSM-IV-TR, a mildly mentally retarded person can achieve academic achievement up to about the sixth grade level.

The 71 score Hall received on the WISC-R test in 1991 put Hall in the borderline range but not in the mentally retarded range. At that time, Hall's parents had recently divorced, his mother was living with an abusive man, and Hall was subject to that abuse and was witnessing the abuse of his mother. At the time Dr. Cunningham administered an IQ test in 2000, Hall was in jail, he recently had committed a capital murder and was on trial for that murder, and he was on suicide watch.

Through questioning on redirect examination, Dr. Price listed the different IQ test scores of Hall that he was aware of, only one of which was below 70. Dr. Price noted that the correct score on the IQ test Dr. Church administered in 2002 was 72.

V.

Analysis

The court has given consideration to the post-hearing briefs of the parties. In Hall's brief there is a sharp departure from the understanding the parties placed on the record at the commencement of the December 10, 2008, hearing that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. Supra at 9. Hall asserts now that the hearing should be followed by a finding of this court from a preponderance of the evidence whether Hall is mentally retarded. Pet'r Br. at 1, 36. He argues that this court should not give deference to the state court's adjudication on the merits of Hall's mental retardation claim or the state court's determinations of factual issues related to that claim. Id. at 12-14, 36.

Before devoting further attention to Hall's assertion that the state court's adjudication and determinations of factual issues are entitled to no deference, the court assumes, arguendo, that Hall is correct in that regard and that this court must make a finding as to whether Hall has proved by a preponderance of the

evidence that he is mentally retarded. After a thorough review of the record, the court finds that it is unable to find from a preponderance of the evidence¹¹ that Hall is, or ever has been, mentally retarded.

Put simply, the court has not been persuaded by the evidence that Hall's claim that he is mentally retarded is more likely so than not so, nor has the court been persuaded by the greater weight and degree of credible evidence before the court that Hall is mentally retarded, or that he ever has been.

Of the expert evidence offered by the parties, the court finds that the evidence of Dr. Price is more persuasive than that provided by Hall's expert witnesses. The latter impressed the court as serving more as advocates on behalf of Hall than he should not be executed than as objective witnesses. In contrast, Dr. Price impressed the court as being totally objective in his evaluation of Hall's level of intelligence and behavioral attributes, with the goal of informing the court rather than to serve as an advocate for either side.

¹¹"Preponderance of the evidence" generally is defined as "the greater weight and degree of credible evidence" before the fact-finder and "the amount of evidence that persuades [the fact-finder] that a claim is more likely so than not so." Fifth Circuit Pattern Jury Instructions, Civil § 3.1 (West 2006).

The court finds that the 85 IQ score for Hall on the testing done by Dr. Price in November 2008 is the best measure the court has been provided of Hall's general intellectual functioning. Therefore, the court cannot find that Hall has satisfied the first element of the definition of mental retardation that he have a "significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below]." ¹² Supra at 9.

The court has considered all of the test scores about which there is evidence in the record, and the court has concluded that none of them provides persuasive evidence that Hall has had at any relevant time significantly subaverage general intellectual functioning as contemplated by the Texas' Atkins test for mental retardation. The school personnel, who would be most intimately acquainted with Hall's intellectual functioning, expressed in the school records that Hall was learning disabled but not mentally retarded. The evidence indicates that those views were based on Hall's intelligence testing as well as his behavior. The court is not giving significant weight to the comment in one of the school records that sometime before October 1991 Hall scored in the mentally deficient range. That comment, without more, is not

¹²The definition to which the parties stipulated was referred to by the Fifth Circuit as "Texas' Atkins test for mental retardation." Hall v. Quarterman, 534 F.3d 365, 369 (5th Cir. 2008).

helpful to the evaluation of Hall's intelligence level at times pertinent to this action.

Helping to undermine the opinions expressed by Hall's experts that he is mentally retarded is the evidence putting into question the reliability of the results of intelligence testing he received. Because of the margin of error involved in a measured IQ score and the other uncertainties surrounding the reliability of intelligence testing, the court is unwilling to accept any of the reported IQ scores of Hall as satisfying the "significantly subaverage general intellectual functioning" feature of the definition of mental retardation. The court has taken into consideration the evidence that Hall's home and social environments and his emotional state could have artificially lowered some of Hall's IQ scores and that an IQ test administered to Hall while he was awaiting trial facing the death penalty could have resulted, consciously or otherwise, in an unreliably low score.

The record makes clear that Hall's environment could undermine the validity of his IQ test scores, and the court is not persuaded from the evidence that his environment did not so undermine Hall's pre-2008 test scores as to cause them to be unreliable as evidentiary support for his mental retardation

claim. The court is not impressed by Dr. Cunningham's testimony concerning utilization of the Flynn Effect. Also, the court has taken into account the evidence that IQ tests can be made unreliable by the conduct of the person administering the test.

Similarly, the court finds that much of the evidence on which Hall relies in support of the adaptive functioning feature of Texas' Atkins test for mental retardation is of questionable reliability. He relies on information provided by persons who had a natural tendency to help Hall prove that he is mentally retarded--his mother, his brother, the two attorneys who represented him unsuccessfully at his criminal trial, two investigators hired by his attorneys, and a fellow death row inmate. School personnel provided conflicting information about Hall's behavior. Information from prison personnel, Hall's minister, and other witnesses presented by respondent contradicted much of the behavior information on which Hall relies. The court also has considered on the adaptive functioning issue the undesirable home and social environments to which Hall was subjected and his emotional problems, all of which had the potential to adversely affect his adaptive functioning in ways that are unrelated to general intellectual functioning.

The court is not persuaded by the opinions of Hall's experts on the subject of adaptive functioning. Again, the court's perception is that the experts were advocating a case of mental retardation for the benefit of Hall rather than to make objective presentations to the court. The court finds Dr. Price's testimony on the subject of adaptive functioning to be the most persuasive. The other experts selectively used information that would support their adaptive functioning theory, and they seem to have disregarded information available to them that put into question their stated findings.

There is a possibility that Hall has adaptive functioning deficits that are related to low intelligence, but the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to what Dr. Price referred to as adjustment problems.

The court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons. However, the court has not been persuaded by the evidence that Hall's intellectual functioning goes below the dividing line between mental retardation, on the one hand, and less significant forms of learning disability, on

the other, or that limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning.

The court returns now to the contention made by Hall in his post-hearing brief that the state court's adjudication and determinations of factual issues are entitled to no deference.

If, as Hall suggests, the opinion of the Fifth Circuit that remanded this action to this court for a hearing on the subject of mental retardation included a holding that, because the state court did not give Hall the kind of hearing the Fifth Circuit thought he should have been given, this court should not give deference to the state court's adjudication and determinations of factual issues, the opinion of the Fifth Circuit would directly conflict with the 2001 Fifth Circuit decision in Valdez, 274 F.3d at 950-51, 959, that is discussed at supra 8. If that were so, the Fifth Circuit panel deciding Hall would have violated the rule in the Fifth Circuit that one panel may not overrule the decision, right or wrong, of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court. See United States v. Ruff, 984 F.2d 635, 640 (5th Cir. 1993). Under that rule, "where holdings in two . . . opinions are in conflict, the earlier opinion controls and constitutes the

binding precedent in the circuit." Boyd v. Puckett, 905 F.2d, 895, 897 (5th Cir. 1990). The court prefers to assume that the panel did not intend to violate that rule. Consistent with the belief that Judge Higginbotham expressed in his dissenting opinion (supra at 8-9 n.3), the court does not consider that the majority of the panel intended to say that upon remand this court should not give deference to the state court's mental retardation adjudication and the state court's determinations of factual issues related to Hall's mental retardation claim.

The court is satisfied that the parties were correct when they agreed at the commencement of the December 10, 2008, hearing that the issue properly before this court for decision is whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence.

At the outset of the court's deference determinations, the court considers arguments made by Hall in his post-hearing brief based on the provisions of 28 U.S.C. § 2254(d). Hall is now arguing that the state court's adjudication on the merits of his claim of mental retardation resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court,

Pet'r Br. at 12-13, 29-30, or, in the alternative, that the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, id. at 13-14.

Hall's first § 2254(d) contention is premised on Hall's belief that the state court's adjudication against Hall was that "even if Hall is mentally retarded . . . he is nonetheless subject to execution if he is only mildly mentally retarded," and, therefore, the adjudication was an unreasonable application of Atkins. Id. at 29. This contention undoubtedly refers to the alternative ultimate finding of fact made by the state court. Supra at 77. The fallacy in Hall's contention is that it takes issue with the wrong finding.¹³ The determination applicable here is the ultimate finding of the state court that Hall "cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in Tex. Health & Safety Code Ann. § 591.003(13)." Id. As reflected by language used in Ex parte Briseno, 135 S.W.3d 1, 7-8 (Tex. Crim. App.

¹³Considering that in Atkins the Supreme Court seemed to leave open the possibility that persons with a minor degree of mental retardation can be subject to the death penalty, Atkins, 536 U.S. at 317, the court cannot say that the alternative determination by the state court of the ultimate mental retardation factual issue involves an unreasonable application of clearly established federal law as determined by Atkins. However, the court need not devote further attention to that point because the main determination of the state court clearly does not involve an unreasonable application of Atkins.

2004), the state court based its main determination of the ultimate mental retardation factual issue on what the Fifth Circuit referred to as "Texas' Atkins test for mental retardation." Hall, 534 F.3d at 369.

As to Hall's second § 2254(d) contention, the court persists in its conclusion that the adjudication of the state court on Hall's mental retardation claim was not based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. Hall, 443 F. Supp. 2d at 821. The court concludes that the ultimate determination by the state court that Hall did not establish that he was mentally retarded was a reasonable determination in light of the evidence presented in the state court proceedings. And, the court concludes that all of the state court's determinations of evidentiary factual issues, Clerk's R., St. Habeas, Vol. 6 at 1570-92, in support of its determination of the ultimate issue of mental retardation were reasonable determinations of the facts in light of the evidence presented in the state court proceedings.

In Hall's post-hearing brief, he makes the point that in its opinion remanding the action to this court the Fifth Circuit criticized the state court for making determinations of fact based on erroneous information. As noted earlier in this

memorandum opinion, supra at 77 n.8, the information the Fifth Circuit thought was erroneous turned out not to be erroneous in one instance and not to be outcome determinative in the other.

On the issue that the parties agreed at the commencement of the December 10, 2008, hearing was the deciding issue, the court finds that Hall has not rebutted the presumption of correctness of the determinations of factual issues made by the state court on Hall's mental retardation claim by clear and convincing evidence.¹⁴ While the state court's determination of the ultimate fact issue was not expressly stated as a failure of Hall to carry his burden to prove mental retardation by a preponderance of the evidence, supra at 77, the only reasonable reading of the determination is that the state court found that

¹⁴The Fifth Circuit has defined the clear and convincing evidence standard as follows:

Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 396 (5th Cir. 2004) (quotation marks omitted). The definition in the Fifth Circuit Pattern Jury Instructions, Civil is worded as follows:

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

Hall failed to carry his burden. By no stretch of the imagination does the evidence before the court constitute clear and convincing evidence that the state court's determination was incorrect. That would be so even if the state court's ultimate determination were to be viewed to be an affirmative finding that Hall is not mentally retarded. Thus, the state court's determinations of factual issues are presumed to be correct; and, 28 U.S.C. § 2254(e)(1), therefore, requires that this court defer to those determinations.

VI.

Other Issues Presented in Hall's Post-Hearing Brief

Hall presents in his post-hearing brief what he refers to as Ring and Penry claims. Pet'r Br. at 30-36. He maintains that the Fifth Circuit "deferred its COA decision" on those claims. Id. at 14. Whether or not that is an accurate statement of what occurred, the fact is that the Fifth Circuit has not granted a certificate of appealability as to either of those claims. Therefore, the court will not undertake a decision as to either of them.

VII.

Conclusion

As explained above:

1. If appropriate for this court to decide the issue, this court finds that Hall has not proved by a preponderance of the evidence that he is, or ever has been, mentally retarded.

2. The court is of the opinion that the court should give deference to the state court's adjudication on the merits of Hall's mental retardation claim as well as to the determinations made by the state court of factual issues related to that adjudication. The state court adjudicated that Hall's mental retardation claim was not supported by the evidence received at Hall's criminal trial and in his state court habeas action. Hall has not shown that the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that it resulted in a decision that was based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. The determinations made by the state court of factual issues related to Hall's mental retardation claim are presumed to be correct,

and Hall has failed to rebut that presumption of correctness by clear and convincing evidence.

Therefore, Hall's application under 28 U.S.C. § 2254 must be denied.

VIII.

Order

For the reasons given above,

The court ORDERS that Hall's application under 28 U.S.C. § 2254 be, and is hereby, denied.

SIGNED March 9, 2009.



JOHN MCBRYDE
United States District Judge