Supreme Court of Florida

No. SC10-1335

FREDDIE LEE HALL,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[December 20, 2012]

PER CURIAM.

This case is before the Court on appeal of an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.203. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons expressed herein, we affirm the order denying relief.

FACTS AND PROCEDURAL HISTORY

Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder of Karol Hurst. Hall v. State (Hall I), 403 So. 2d 1321, 1323 (Fla. 1981).

We upheld Hall's conviction and sentence on direct appeal. Id. at 1325.

On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1 through 8, 1982. Hall v. State (Hall II), 420 So. 2d 872, 873 (Fla. 1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. Id. Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. Hall v. Wainwright (Hall III), 733 F.2d 766, 769 (11th Cir. 1984), cert. denied, 471 U.S. 1107 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. Id. at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. Hall v. Wainwright (Hall IV), 805 F.2d 945, 946 (11th Cir. 1986), cert. denied, Hall v. Dugger, 484 U.S. 905 (1987). The Eleventh Circuit affirmed the denial. Id. at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in Hitchcock v. Dugger, 481 U.S. 393 (1987) (holding that all mitigating factors, not just statutory mitigation, should be

considered by the judge and jury). This Court held that any error in the sentencing was harmless. Hall v. Dugger (Hall V), 531 So. 2d 76, 77 (Fla. 1988).

The governor then signed a second death warrant on September 20, 1988. Hall v. State (Hall VI), 541 So. 2d 1125, 1126 (Fla. 1989). Hall filed his second 3.850 motion, alleging error under Hitchcock v. Dugger, 481 U.S. 393 (1987). The trial court found that this Court's ruling on the issue in Hall V was a procedural bar to Hall raising the claim again. Hall VI, 541 So. 2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. Id. Ultimately, we determined that a Hitchcock error occurred, and that such error could not be considered harmless. Id. at 1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. Id.

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. Hall v. State (Hall VII), 614 So. 2d 473, 479 (Fla. 1993). Hall sought postconviction relief, which was denied. Hall v. State (Hall VIII), 742 So. 2d 225, 230 (Fla. 1999). We affirmed the denial. Id. at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded,

and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." Id. at 229.

After Atkins v. Virginia, 536 U.S. 304 (2002), was decided, Hall filed a motion to declare section 921.137, Florida Statutes (2004),[1] unconstitutional. While the motion was pending, we adopted Florida Rule of Criminal Procedure 3.203 as a mechanism to file Atkins claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr.

1. Section 921.137, Florida Statutes was enacted during a regular session of the Florida Legislature in 2001. See ch. 2001-202, § 1, Laws of Fla. The statute has been amended once to transfer duties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. See ch. 2006-195, § 23, Laws of Fla.

Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion in limine that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

DISCUSSION

Hall asserts that he is mentally retarded pursuant to Atkins. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded

misapplies the Supreme Court's ruling in Atkins and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. See Franqui v. State, 59 So. 3d 82 (Fla. 2011). We again decline to adopt this line of reasoning. As we stated in Franqui:

> Nixon asserted, as does Franqui, that the Supreme Court in Atkins noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize the higher cut-off IQ score of 75. Nixon, 2 So. 3d at 142. We disagreed, reasoning that Atkins recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. Nixon, 2 So. 3d at 142.

Id. at 94 (citing Nixon v. State, 2 So. 3d 147 (Fla. 2009)).

Section 921.137, Florida Statutes (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule define the elements of a mental retardation claim as discussed in Atkins: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age

eighteen. See Atkins, 536 U.S. at 318; § 921.137(1), Fla. Stat. (2012); Fla. R. Crim. P. 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), Fla. Stat. (2012). This statute was adopted prior to the Supreme Court's ruling in Atkins. See Ch. 2001-202, § 1, Laws of Fla.

In Cherry v. State, 959 So. 2d 702 (2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. . . . [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes. . . .

Cherry, 959 So. 2d at 712-13.

In Nixon, the appellant challenged our decision in Cherry, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed, reasoning that while Atkins recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation. Nixon v. Florida, 2 So. 3d 137, 143 (Fla. 2009) (citing Jones v. State, 966 So. 2d 319, 326 (Fla. 2007)).

The cutoff was recently reaffirmed in Franqui. Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. Franqui v. State, 59 So. 3d 82, 106 (Fla. 2011) (citing Franqui v. State, 699 So. 2d 1312 (Fla. 1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. Id. at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an Atkins claim, which was summarily denied on February 21, 2008. Id. at 89-90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. Id. at 90 (citing Franqui v. State, 14 So. 3d 238 (Fla. 2009)). Testing revealed Franqui's IQ fell somewhere between 71 and 80. Id. at 91. The trial court, after

considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. Id.

On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to Atkins. In Franqui, we found that (1) the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in Atkins; (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded Atkins; (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in Thompson v. State, 3 So. 3d 1237 (Fla. 2009), where we reversed the trial court's summary denial of Thompson's postconviction motion. Although

Thompson's motion alleged an IQ of 74 or 75,[2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in Cherry. Thompson, 3 So. 3d at 1238-39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." Thompson, 3 So. 3d at 1238.

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in Foster v. State, 929 So. 2d 524 (Fla. 2006). Hall mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retardation, [he] does not meet the second prong of the test set forth in Atkins . . . .' " Id. at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.

Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in Atkins. We have previously found this argument to be meritless. See, e.g., Cherry, 959 So. 2d at 712-13; Nixon, 2 So. 3d at 142; Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008); Jones v. State, 966 So. 2d 319, 329 (Fla. 2007); Brown v. State, 959 So. 2d 146, 148-49 (Fla. 2007); Burns v. State, 944 So. 2d 234, 248 (Fla. 2006); Rodgers

2. Thompson, 3 So. 3d at 1239 (Wells, J., dissenting).

v. State, 948 So. 2d 655, 666-68 (Fla. 2006); Trotter v. State, 932 So. 2d 1045, 1049-50 (Fla. 2006); Johnston v. State, 960 So. 2d 757, 761 (Fla. 2006); Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005).

Hall next contends that the lower court improperly limited his introduction of evidence of the second two elements to establish mental retardation. We have recognized that all three elements must be established for a defendant to show that he or she is mentally retarded and thus ineligible for execution.

> The defendant must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, the defendant must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Thompson, 3 So. 3d at 1238 (quoting Cherry, 959 So. 2d at 711) (internal brackets omitted). Thus, we have concluded that because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry. See, e.g., Cherry, 959 So. 2d at 714 ("Because we find that [the defendant] does not meet this first prong of the section 921.137(1) criteria, we do not consider the other two prongs of the mental retardation determination."). Hall's argument that the lower court improperly limited his introduction of evidence after he failed to establish the requisite IQ is thus without merit.

See Jones v. State, 966 So. 2d 319, 325 (Fla. 2007); Burns v. State, 944 So. 2d 234, 249 (Fla. 2006); § 921.137(4), Fla. Stat. (2012).

Third, Hall complains that the trial court abused its discretion in refusing to admit the report prepared by Dr. Mosman through the testimony of Dr. Prichard. In its order, the court noted that Dr. Mosman's report "lacked critical detail and information indicating how he obtained [Hall's] intelligence quotient of sixty-nine (69)." The court determined that the report did not constitute competent evidence and that Hall's failure to comply with the court's order to compel was highly prejudicial to the State and excluded the report from evidence. Because the underlying data to support the report were not available, the State could not conduct a proper voir dire and Hall could not otherwise establish the adequacy of the underlying data to support Dr. Mosman's report. Accordingly, we find that the trial court did not abuse its discretion in excluding the report.

Finally, Hall alleges that the lower court should have been precluded from holding an evidentiary hearing on Hall's alleged mental retardation and should have entered a life sentence because the court previously found him to be mentally retarded. We disagree.

In Bobby v. Bies, 129 S. Ct. 2145 (2009), the United States Supreme Court addressed a similar issue. Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnapping, and attempted rape of a ten-year-old boy nearly

one decade prior to the Court's decision in Atkins. Bies, 129 S. Ct. at 2149. Bies' IQ fell in the 65 to 75 range, indicating that he is "mildly mentally retarded to borderline mentally retarded." Id. at 2149-50. On postconviction review, the trial court agreed that Bies was mildly mentally retarded, but concluded that he was still eligible for execution. Id. at 2150. After the Supreme Court issued Atkins, and the Ohio Supreme Court adopted it in State v. Lott, 779 N.E.2d 1011(Ohio 2002), Bies presented his Atkins claim to the state's postconviction court.[3] Id. Bies moved for summary judgment, arguing that the record established his mental retardation and that the State was precluded and estopped from disputing it. Id. The court denied summary judgment because Bies' mental retardation had not been established under the Atkins-Lott framework, and ordered a full hearing. Id. at 2151. Bies took his claim to the Federal District Court, arguing that the Fifth Amendment's Double Jeopardy Clause barred the State from relitigating the issue of his mental condition. The court agreed and ordered vacation of Bies' death sentence. The Court of Appeals affirmed. Id. The Supreme Court reversed, stating that "[t]he State did not 'twice put Bies in jeopardy.' " Id. Further, the court stated that no state-court determination of his mental retardation entitled him to a life sentence. Id. at 2152.

3. Unlike Florida, Ohio reviews mental retardation where the defendant's IQ is above 70 as a rebuttable presumption.

Here, Hall argues that the issue should be estopped because of the trial court's finding that Hall was mentally retarded as mitigation. As summarized by the Supreme Court in Bies,

> even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in Atkins. Mental retardation as a mitigator and mental retardation under Atkins . . . are discrete legal issues. The Atkins decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321. This reality explains why prosecutors, pre-Atkins, had little incentive vigorously to contest evidence of retardation. . . . Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.

Bies, 129 S. Ct. at 2153. Accordingly, we deny relief on this claim.

For the foregoing reasons, we affirm the court's denial of Hall's 3.203 motion.

It is so ordered.

POLSTON, C.J., LEWIS, and CANADY, JJ., concur.
PARIENTE, J., concurs with an opinion.
LABARGA, J., dissents with an opinion, in which PERRY, J., concurs.
PERRY, J., dissents with an opinion, in which LABARGA, J., concurs.
QUINCE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

In 1991, the trial judge who sentenced Freddie Lee Hall to death found Hall to be mentally retarded. Yet, in 2010, the same trial judge found the same defendant not to be mentally retarded. What is the reason for this apparent anomaly? The answer lies in the fact that the trial court in 2010 was applying the statutory definition of mental retardation that acts as a bar to execution, which did not exist in 1991. Between 1991 and 2010, two developments in the law occurred: (1) the Legislature enacted section 921.137(1), Florida Statutes (2001); and (2) the United States Supreme Court decided the case of Atkins v. Virginia, 536 U.S. 304 (2002).

In Atkins, the United States Supreme Court dramatically changed the legal landscape pertaining to mental retardation and death penalty jurisprudence. The Supreme Court held that it was unconstitutional under the Eighth Amendment for a mentally retarded person to be executed, but the Court also left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on the execution of such individuals. Id. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)).

In Florida, our jurisprudence on this issue is constrained by the Legislature's enactment, as long as the Legislature defines mental retardation within the constitutional parameters of Atkins. As set forth in Cherry v. State, 959 So. 2d 702

(2007), the defendant must present evidence of a significant subaverage general intellectual functioning as a threshold for establishing mental retardation. This requirement derives from the language of section 921.137(1), Florida Statutes, which this Court in Cherry interpreted as providing a "strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning." Cherry, 959 So. 2d at 712. Based on the legislative definition of mental retardation, the Court rejected the application of the standard error of measurement (SEM) to the IQ score—not because we considered it the better policy but because we were adhering to the plain language of the statute. Id. at 712-14.

Applying both the statutory definition and our precedent in this case, the trial court found that there was not competent, substantial evidence to support a finding of an IQ score at or below 70. An outlier test, which was performed by Dr. Mosman, could not be considered because Dr. Mosman's testimony had not been preserved prior to his death.

Nearly twenty years before, in 1991, the trial court resentenced Hall to death and found him to be mentally retarded as a mitigating factor with "unquantifiable" weight. Yet the circumstances in 1991 were different. In 1991, Hall's evidence went unchallenged, whereas in 2010, there was a true adversarial testing of whether Hall was mentally retarded under Florida's statutory definition of mental retardation. In contrast to the 2010 postconviction hearing, during Hall's 1991

resentencing, the State did not contest the evidence Hall presented, but instead relied on its own evidence to establish seven strong aggravators to outweigh the mitigators.

Although the State in 1991 did not contest whether Hall suffered from mental retardation, the trial court noted throughout the sentencing order that it was troubled as to whether the mental health experts presented by the defendant had exaggerated Hall's inabilities. The trial court made certain statements throughout the sentencing order that questioned whether Hall suffered from mental retardation, including an in-depth discussion as to whether his behavior and abilities were consistent with a person who had mental retardation. The court explained in relevant part as follows:

> [Hall's] behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he made previously . . . would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside. . . . Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing

> in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial. . . . In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

When discussing mental retardation, the trial judge found as follows: "There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this fact are thus 'unquantifiable.' " In evaluating the mitigation in conjunction with the aggravation, the court again noted concerns as to whether the evidence showed that Hall was in fact mentally retarded, stating that "the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant."

In 1999, when Hall filed his initial motion for postconviction relief, the trial court again expressed reservations on the issue of mental retardation, stating that Hall "is probably somewhat retarded." Hall v. State (Hall VIII), 742 So. 2d 225, 230 (Fla. 1999) (emphasis added). At that time, I joined with Justice Anstead in relying on Justice Barkett's position that executing mentally retarded individuals is cruel and unusual punishment, a position that later became the holding of the United States Supreme Court in Atkins. Hall VIII, 742 So. 2d at 231 (Anstead, J.,

specially concurring).

When those decisions were rendered in 1991 and 1999, Atkins had not yet established the prohibition on executing mentally retarded individuals as cruel and unusual punishment. A trial court could find that a defendant was mentally retarded without regard to any statutory definition of mental retardation and those findings would serve as mitigation in much the same way as mental illness or brain damage. Therefore, because mental retardation was not a bar to execution, the State would not have had the same interest in controverting the expert testimony if, as occurred here, there was such overwhelming evidence in aggravation. Thus, as it applies to this case, until this current postconviction proceeding, there was no true adversarial testing on the issue of whether Hall's mental deficits qualified as mental retardation under a statutory definition that was enacted only after Hall's direct appeal and prior postconviction proceedings.

I appreciate the views expressed in the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent: "[T]he imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded." Dissenting op. at 27 (Labarga, J.). Unquestionably, clinical definitions of mental retardation recognize the need for application of the SEM and

the use of clinical judgment. In fact, the American Psychiatric Association (APA) proposes a revision to the definition of mental retardation that will replace the use of a numerical score for mental retardation and instead refer to an Intellectual Development Disorder (IDD). However, unless this Court were to recede from Cherry, 959 So. 2d at 712-13, as reaffirmed in Nixon v. State, 2 So. 3d 137, 142-43 (Fla. 2009), and more recently in Franqui v. State, 59 So. 3d 82, 92-94 (Fla. 2011), a plain language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state.

Florida, while not unique in its use of a bright-line cutoff score of 70, is not in the majority, although there is no clear national consensus. Among the states around the nation that continue to have the death penalty, ten states have a statutory bright-line rule that do not apply the SEM, including Florida.[4] On the other hand, sixteen states do apply the SEM, including ten states without a statutory bright-line cutoff.[5] At least an additional two states through court

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4. These states are the following: Arkansas (Ark. Code Ann. § 5-4-618(a)(2) (2012)); Delaware (Del. Code Ann. tit. 11, § 4209(d)(3) (2012)); Florida (§ 921.137(1), Fla. Stat. (2012)); Idaho (Idaho Code Ann. § 19-2515A(1)(b) (2012)); Kentucky (Ky. Rev. Stat. Ann. § 532.130(2) (2012)); Maryland (Md. Code Ann., Crim. Law § 2-202(b)(1)(i) (2012)); North Carolina (N.C. Gen. Stat. Ann. § 15A-2005(a)(1) (2012)); Tennessee (Tenn. Code Ann. § 39-13-203(a)(1) (2012)); Virginia (Va. Code Ann. § 19.2-264.3:1.1(A) (2012)); and Washington (Wash. Rev. Code Ann. § 10.95.030(2)(c) (2012)).

5. The states that apply the SEM without a statutory bright-line rule are as follows: California, see In re Hawthorne, 105 P.3d 552, 557-58 (Cal. 2005);

decision do not apply the SEM.[6] The application of the SEM to IQ scores in the remaining four states is unclear.[7]

This national survey of the states that have the death penalty illustrates that there is no clear consensus among the states regarding the use of the SEM, but the use of a bright-line cut off in some states versus the use of the SEM in other states indicates that there will be some inconsistency in findings of mental retardation based on the exact same circumstances.

It is certainly of concern that in some states Hall would be mentally retarded

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Georgia, see Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991); Indiana, see Woods v. State, 863 N.E.2d 301, 303-04 (Ind. 2007); Mississippi, see Chase v. State, 873 So. 2d 1013, 1028 n.18 (Miss. 2004); Missouri, see State v. Johnson, 244 S.W.3d 144, 153 (Mo. 2008) (en banc); Nevada, see Ybarra v. State, 247 P.3d 269, 274-76 (Nev. 2011), cert. denied, 132 S. Ct. 1904 (2012); Ohio, see State v. Were, 890 N.E.2d 263, 293 (Ohio 2008); Pennsylvania, see Comm. v. Miller, 585 Pa. 144, 153-54 (Pa. 2005); Texas, see Ex parte Hearn, 310 S.W.3d 424, 430 (Tex. Crim. App. 2010); and Utah, see State v. Maestas, No. 20080508, 2012 WL 3176383, at *41 (Utah July 27, 2012).

The states that apply the SEM but include a statutory bright-line cut-off are as follows: Arizona, see State v. Grell, 135 P.3d 696, 701 (Ariz. 2006); Louisiana, see State v. Dunn, 41 So. 3d 454, 470 (La. 2010); Nebraska, see State v. Vela, 777 N.W.2d 266, 304-05 (Neb. 2010); Oklahoma, see Smith v. State, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010); Oregon, see Or. Rev. Stat. Ann. § 427.005(10)(b) (2012); and Tennessee, see Coleman v. State, 341 S.W.3d 221, 245-47 (Tenn. 2011).

6. These states are: Alabama, see Ex parte Perkins, 851 So. 2d 453, 455-56 (Ala. 2002); and Kansas, see State v. Backus, 287 P.3d 894, 905 (Kan. 2012).

7. These states are New Hampshire, South Carolina, South Dakota, and Wyoming.

by those states' definitions, while in others, like Florida, the bright-line cutoff requires a contrary finding. Unfortunately, mental retardation, unlike age, is not a fixed objective test, and therefore these variations appear to have been contemplated by the United States Supreme Court when Atkins was decided. For example, the State of Texas, which leads the nation in executions, declined to establish a bright-line IQ cut off for execution without "significantly greater assistance from the legislature." Ex parte Hearn, 310 S.W.3d 424, 430 (Tex. Crim. App. 2010). The Hearn Court stated that any IQ score could actually represent an IQ that is either five points higher or five points lower than the person's actual IQ after factoring in the SEM. Id. at 428.

At some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137(i). See Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."). Without a change from the Legislature or further direction from the United States Supreme Court, I conclude that the statute adopted by the Legislature and the precedent set forth by this Court require that the trial court's order finding Hall not to be mentally retarded be affirmed.

LABARGA, J., dissenting.

I dissent from the holding of the majority that application of the statutory bright-line cutoff score of a full scale IQ of 70 for determining mental retardation as a bar to execution comports with the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 317 (2002), under the facts and circumstances of this case. I write to express my deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided Atkins, and even though evidence was presented below that he remains retarded, we are unable to give effect to the mandate of Atkins under the definition of "mental retardation" set forth in section 921.137(1), Florida Statutes (2012). In 1993, on appeal from Hall's resentencing, Justice Barkett, joined by Justice Kogan, pointed out in her dissent that the trial judge in this case found that Hall "has been mentally retarded all of his life." Hall VII, 614 So. 2d at 479 (Barkett, C.J., dissenting). At that time, mental retardation was not an absolute bar to execution, but was considered generally in mitigation. Subsequently, on postconviction appeal in 1999, Hall's claim that execution of mentally retarded persons violated the United States Constitution was found to be procedurally barred. See Hall VIII, 742 So. 2d at 226. In his special concurrence in Hall VIII, Justice Anstead, joined by Justice Pariente, expressed the view that execution of mentally retarded persons such as

Hall violated the Florida Constitution. Id. at 230-31 (Anstead, J., specially concurring). In 2001, Hall again attempted to obtain relief on his claim that he may not constitutionally be executed because he is mentally retarded. This Court denied relief, noting that the trial court had followed Penry v. Lynaugh, 492 U.S. 302, 340 (1989), in which the Supreme Court had held there is no constitutional bar to prevent execution of the mentally retarded. See Hall v. Moore, 792 So. 2d 447, 449 (Fla. 2001). One year later, the United States Supreme Court overruled Penry in Atkins and held that execution of the mentally retarded violates the constitutional prohibition against cruel and unusual punishment. Atkins, 536 U.S. at 321. Thus, ever since the trial court found him to be retarded, Hall has urged this Court to hold that, because he is mentally retarded, he may not be executed. But for the vagary of the timing of the trial court's conclusion in relation to the timing of the Supreme Court's decision in Atkins, Hall would not be on death row today.

The situation present in Florida, in which the Legislature has established a bright-line cutoff score that this Court has upheld, now creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed. I believe this result is not in accord with the rationale underlying the constitutional bar to execution of the mentally retarded, which the United States Supreme Court set forth in Atkins. A state's procedural safeguards must protect

against an erroneous conclusion that the offender is not mentally retarded. In order to meet constitutional muster, I believe that Florida's statutory and rule provisions, which were put into place with the laudable goal of assuring that mentally retarded individuals are not executed, must be crafted—or at a minimum construed—so as to avoid the unwarranted risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

In its 2005 holding that the Constitution prohibits execution of defendants who were under the age of eighteen at the time of the murder, the Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), explained:

> The Atkins Court neither repeated nor relied upon the statement in Stanford[8] that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating Stanford, that " 'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' " 536 U.S., at 312 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. Id., at 319-320. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment " 'places a substantive restriction on the State's power to take the life' of a

8. Stanford v. Kentucky, 492 U.S. 361 (Fla. 1989).

> mentally retarded offender." Id., at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

Roper, 543 U.S. at 563-64 (emphasis added). Similarly, I urge this Court to bring its own judgment to bear on the question of the constitutional acceptability of the execution of persons who, under all the facts and data reasonably relied upon by mental health experts, have been determined to be mentally retarded when the execution is permitted solely by the Legislature's inflexible definition of mental retardation. The Court in Roper reminds us that the prohibition against cruel and unusual punishment in the Eighth Amendment must be interpreted in part "with due regard for its purpose and function in the constitutional design." Id. at 560. "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Id. at 560-61. The Supreme Court noted that when it decided Atkins, "[w]e held that standards of decency have evolved since Penry and now demonstrate that execution of the mentally retarded is cruel and unusual punishment." Roper, 543 U.S. at 563. The difficulty has been in finding a reliable way in which to determine which capital defendants fall into this class of persons for whom execution is barred.

The Atkins Court noted that the accepted definitions for mental retardation refer in pertinent part to "significantly subaverage intellectual functioning."

Atkins, 536 U.S. at 308 n.3. That Court did not prescribe any specific IQ score as a bright-line cutoff, although the Court noted that "mild" mental retardation is typically used to describe people with an IQ level range of 50 to 70. Id. However, this typical description was not given as a mandated cutoff score, and the Court later noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." Id. at 317. This prediction certainly proved prescient in Florida, as Florida courts have continued to struggle with evaluation of the claims of mental retardation raised by capital defendants. I recognize that it is because of this very difficulty in determining which offenders are in fact mentally retarded that the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." Id. (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). We must focus, however, on the Supreme Court's mandate that the ways developed by the States must actually be "appropriate" to enforce the restriction. In my view, the imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded. This is true where, as here, ample evidence has been presented that the defendant has been mentally retarded from an early age despite the achievement of an IQ

score over 70 on IQ testing. The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

In 2010, the United States Supreme Court decided Graham v. Florida, 130 S. Ct. 2011 (2010), in which it held that sentencing juvenile offenders to life in prison without the possibility of parole for non-homicide offenses violates the Cruel and Unusual Punishment clause of the United States Constitution. Id. at 2034. In explaining its decision, the Court noted that in Atkins it barred execution of offenders "whose intellectual functioning is in a low range." Id. at 2022. Hall certainly meets that standard and has met that standard for his entire life.

The United States Supreme Court has not been unwilling to recede from or overrule its precedent when it concludes that execution of certain classes of persons violates the Eighth Amendment. Nor should this Court be unwilling to do the same. Where, as here, the evidence has long established that a defendant is functionally mentally retarded, I believe there is a justifiable concern of constitutional magnitude in putting such a defendant to death. That same concern should lead this Court to revisit its precedent that has heretofore bound this Court

to the inflexible test set forth by the Legislature for identification of mentally retarded persons who are not constitutionally subject to execution. For all the foregoing reasons, I also encourage the Legislature to reexamine its definition of mental retardation set forth in section 921.137(4), in light of the principles set forth in the United States Supreme Court's decision in Atkins.

PERRY, J., concurs.

PERRY, J., dissenting.

If the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed. Hall "has been retarded his whole life." I do not disagree with my esteemed colleagues that section 921.137(1), Florida Statutes (2012), and our caselaw provide that a defendant must establish an IQ below 70 to be ineligible to be executed, but that statute as applied here reaches an absurd result. Because this is my belief, I respectfully dissent.

The record before us is replete with indications of Hall's mental retardation. This Court has twice noted the evidence demonstrating Hall's mental retardation:

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

> Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development.
>
> Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

Hall VIII, 742 So. 2d at 231 (Anstead, J. specially concurring) (quoting Hall VII, 614 So. 2d at 479-80 (Barkett, CJ. dissenting)). Hall is a poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded. The fact that our statutory standard does not agree only serves to illustrate a flaw in the statute.

As the United States Supreme Court articulated in Atkins, those with disabilities in areas of reasoning, judgment, and control of their impulses "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Atkins, 536 U.S. at 306. Indeed, "our society views mentally retarded offenders as categorically less culpable than the average criminal." Id. at 316. Thus, while there is agreement about the execution of mentally retarded offenders, there remains disagreement, and difficulty, in determining which offenders are retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Id. at 317. Atkins thus left this determination to the states.

Prior to Atkins, this State adopted section 921.137, which provides in relevant part:

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.

§ 921.137(1), Fla. Stat. (2012)

As we observed in Cherry, mental health practitioners are expected to look at IQ as a range rather than an absolute.

> The concept of mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental

> retardation. The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in.
>
> And the Diagnostic and Statistical manual which is what we—meaning the mental health professionals—rely on when arriving at diagnostic hypotheses. That manual guides us to look at IQ scores as being a range rather than absolute. And the manual talks about a score from 65, a band, so to speak, from 65 to 75—and of course, lower than 65—comprising mental retardation.

Cherry, 959 So. 2d at 711-12 (quoting Dr. Peter Bursten). Nevertheless, this Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary. Id. at 714.

Thus far, our interpretation of the statute and applicable rule has led us to a dogged adherence to a bright-line cutoff of a score of 70 on the IQ test.[9] Yet, even when a defendant is able to demonstrate a lower IQ, the rest of the statute allows the courts to reason that the defendant is not mentally retarded. See, e.g., Dufour v. State, 69 So. 3d 235, 244-53 (Fla. 2011) (finding that despite IQ scores of 62,

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9. This is so even despite subsection four of section 921.137, which provides, in part:

> At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation.

§ 921.137(4), Fla. Stat. (2012); see also Fla. R. Admin. P. 65G-4.011(2) (2012).

67, and 74, Dufour failed to establish deficits in adaptive functioning because he was able to complete his GED and live independently); Hodges v. State, 55 So. 3d 515, 527, 535 (Fla. 2010) (finding that although Hodges had IQ scores of 62, 66, and 69, he did not establish deficits in adaptive functioning because he was able to copy letters drafted by others and sign his own name and was able to support himself as a short-order cook, garbage collector, and dishwasher); Rodgers v. State, 948 So. 2d 655, 661 (Fla. 2006) (finding that the trial court did not err in finding that the defense expert's recitation of Rodgers' IQ of 69 was less credible evidence than court-appointed experts who found higher IQs); Burns v. State, 944 So. 2d 234, 248 (Fla. 2006) (finding that despite an IQ of 69, Burns was unable to establish deficits in adaptive functioning because he was able to support himself); Rodriguez v. State, 919 So. 2d 1252, 1266 (Fla. 2005) (finding that despite his low IQ, his behavior in trial proceedings indicated that he was not mentally retarded). We have interpreted the statute as requiring a threshold for the courts to even consider retardation, but then allow the same courts to subjectively reason away the bar to execution. Thus, under this interpretation of the statutory scheme, a defendant can be found mentally retarded but not have it serve as a bar to execution because his IQ is too high, and if his IQ is low enough, he can still be found not to be mentally retarded because he can hold a pen to paper. Thus, it appears there is no reasonable way to be declared mentally retarded for the

purposes of proving ineligibility for execution in Florida. If the proscription against executing the mentally retarded is to mean anything, it cannot be wielded as this double-edged sword.

The current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the statute was adopted. Once the statute is applied, Hall morphs from someone who has been "mentally retarded his entire life" to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation. Because this cannot be in the interest of justice, I dissent.

LABARGA, J., concurs.

An Appeal from the Circuit Court in and for Sumter County,
Richard Tombrink, Jr., Judge - Case No. 1978-CF-0052

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