

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC15-957

ROGER LEE CHERRY,

Petitioner,

vs.

JULIE L. JONES, etc.

Respondents.

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PETITIONER'S MOTION FOR REHEARING

COMES NOW, Petitioner, **ROGER LEE CHERRY**, by and through his undersigned counsel, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion remanding Mr. Cherry's case to the circuit court for an evidentiary hearing. As the following discussion indicates, Mr. Cherry submits that this Court has overlooked or misapprehended points of fact from the record. All other claims for relief previously presented to the Court are specifically argued again; no claim previously raised is hereby abandoned.

1. On March 27, 2014, the U.S. Supreme Court rendered its decision in Hall v. Florida, 134 S.Ct. 1986 (2014), which specifically overruled this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007). In Cherry, Mr. Cherry had appealed the circuit court's denial of his claim premised upon Atkins v. Virginia, 536 U.S. 304 (2002), after an evidentiary hearing had

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been held.

2. In Hall v. State, this Court determined, based on the record, that Hall had “demonstrated that he meets the clinical, statutory, and constitutional requirements to establish that his intellectual disability serves as a bar to execution.” 201 So. 3d 628 (Fla. 2016). Mr. Cherry submits that, like Hall, he has established unrefuted evidence that he suffers from intellectual disability.

3. Indeed, at his 2005 evidentiary hearing, Mr. Cherry presented the testimony of two experts - Dr. Peter Bursten, who was selected by Mr. Cherry, and Dr. Gregory Prichard, who was selected by the State (and was the same expert upon whom this Court relied in diagnosing Hall as suffering from intellectual disability, see Hall 201 So. 3d at 636-7). Both experts conducted comprehensive evaluations (SPC-R3. 875, 976; D-Exs. 4, 6). Both experts agreed that Mr. Cherry suffered from intellectual disability. In forming their opinions, the experts reviewed extensive background materials, nearly identical to those this Court relied on in Hall, including mental health reports, testing data, testimony, affidavits, reports relating to the crime with which Mr. Cherry was convicted and Mr. Cherry’s Department of Corrections (DOC) file (SPC-R3. 873, 947-49).¹ See Hall, 201 So.

¹Dr. Bursten characterized the background materials as an “excellent group of materials” (SPC-R3. 873).

3d at 632-3. The State presented no expert to refute the opinions of Drs. Bursten and Prichard.

4. Specifically, as to the first prong, the experts testified that Mr. Cherry did in fact meet the first criteria in diagnosing intellectual disability, i.e., sub-average intellectual functioning (SPC-R3. 924, 959). Drs. Bursten and Prichard reviewed the previous IQ testing as well as other types of assessments measuring intellectual functioning, as was considered by this Court in Hall. See Hall, 201 So. 3d at 633. The testing was consistent and placed Mr. Cherry in the range of intellectual disability.

5. Furthermore, as to the second and third prongs, deficits in adaptive skills and the onset before age 18, the experts evaluated Mr. Cherry's adaptive skills both currently and as a child. The doctors reviewed background materials including affidavits from individuals who knew Mr. Cherry as a child, adolescent and young adult, and observations and information that were obtained by various Department of Corrections' staff over the years Mr. Cherry was incarcerated. Dr. Bursten also spoke to Mr. Cherry's fifth grade elementary teacher; a social worker who was assigned to work with Mr. Cherry's family when he was a child; Mr. Cherry's estranged wife; and Mr. Cherry himself (SPC-R3. 879-80; D-Ex. 4). Further, Dr. Bursten administered the Scales of Independent Behavior - Revised Edition (SIB-R) with Mr.

Cherry.

6. The description of Mr. Cherry as a child, adolescent and young adult were largely consistent: When Mr. Cherry was a very young child, his aunt, Daisy Gandy, who lived with Mr. Cherry and his family, noticed that "something was wrong with Roger. He was very slow for his age and seemed much younger than he really was." (D-Ex. 2, tab 4, para. 8). Likewise, Mr. Cherry's aunt, Annie Mayfield, agreed that Mr. Cherry was "slow and hard to understand." (D-Ex. 2, tab 5, para. 7).² Dr. Prichard noted that all of the testimony and affidavits he reviewed of people who knew Mr. Cherry as a child and young adult described him as slow and intellectually disabled and that Mr. Cherry had been placed in special education classes while in school (SPC-R3. 965).

7. Dr. Bursten, who spoke to Mr. Livingston, Mr. Cherry's fifth grade teacher, indicated that he had described Mr. Cherry as meeting the category for special education, if any had been available (D-Ex. 4, at 8). Mr. Livingston also described Mr. Cherry as having difficulties following instructions, difficulties with social skills and difficulties with motor skills. On a scale of 1 to 10 as to independence, 1 being the lowest, Mr. Livingston rated Mr. Cherry as a 2.

²Several others, too, described Mr. Cherry as "slow" (See D-Exs. 2 and 3, tab 7, para 6; tab 8, para 6; tab 9, para 4-5; tab 11, para 4; tab 13, para 2; tab 14, para 5; tab 18, para 8-9; tab 19, para 2; tab 20, para 3; tab 22, para 3).

8. George Williams, a counselor from Mr. Cherry's middle school, told Department of Corrections officials, and later attested, that Mr. Cherry was placed in special education classes. Mr. Williams knew Mr. Cherry when he was 11 years old. He soon learned that Mr. Cherry had problems communicating. Rather than press Mr. Cherry academically, he asked Mr. Cherry to make sure the erasers and black boards were clean. "Clapping erasers was something Roger could do, and I always liked giving my disabled children a sense of accomplishment." (See D-Ex. 2, tab 10, para 4-5).

9. Even Mr. Cherry's peers knew that something was wrong with him intellectually: "he was so slow", "he didn't comprehend things very well" (D-Ex. 2, tab 17, para 4). Because of Mr. Cherry's limitations, he became a follower (D-Ex. 2, tab 19, para 5).

10. Additionally, Mr. Cherry's DOC records are littered with descriptions of him that support the doctors' diagnosis and finding that Mr. Cherry had deficits in his adaptive skills. At 17, upon entry into DOC, Mr. Cherry was described as "having difficulty manipulating the moderately complex factors of his environment" and "he does seem to be very inadequate in almost all areas and seems to have difficulty reasoning through to logical conclusions, problems of everyday living." (See D-Ex. 2,

tab 26).³ Several years later, in another DOC psychological screening report, Mr. Cherry was described in the following way: "He seems to be easily led by the dictates of his peers and allows his peers to make a pawn of him." (D-Ex. 2, tab 26).⁴

11. Dr. Prichard testified that in addition to Mr. Cherry's IQ score, the background materials supported the notion that Mr. Cherry's intellectual functioning is substandard (SPC-R3. 965). Dr. Prichard also administered the SIB-R to Officer Paxson, who was employed by the Florida Department of Corrections as a correctional officer (SPC-R3. 949-50). Dr. Prichard chose Officer Paxson because "he seemed to be very knowledgeable of the individuals [on death row]" and he seemed to take "an objective approach to answering the questions" (SPC-R3. 957-58).⁵ The score of the test was well within the range of demonstrating significant deficits in adaptive functioning (SPC-R3. 972). Dr. Prichard characterized this part of his evaluation as the "most compelling result" in diagnosing Mr. Cherry's intellectual disability (SPC-R3. 974-75).

³Dr. Prichard testified that the vignette demonstrates information about Mr. Cherry's functioning (SPC-R3. 964).

⁴Dr. Prichard testified that the description of Mr. Cherry, at the age of twenty, "would be very consistent with the kind of commentary people generally make about individuals who are mentally retarded." (Id.).

⁵In his report, Dr. Prichard described Officer Gary Paxson as having "known Mr. Cherry for about a year and a half, and [having] interacted with him frequently, almost daily." (D-Ex. 6, at 7).

12. Additionally, Dr. Prichard remarked that the **"[a]necdotal data also strongly and almost exclusively suggests the presence of intellectual and adaptive limitations recognized consistently over the course of Mr. Cherry's life."** (D-Ex. 6) (emphasis added). And, Dr. Bursten indicated that "at least fifteen [informants] independently referred to Mr. Cherry as being "'slow', 'retarded', etc., during preadolescent/developmental years." (D-Ex. 4). Mr. Cherry was described as not functioning at a normal level (Id.). Both doctors agreed that Mr. Cherry met the criteria of deficits in adaptive skills and onset before the age of 18 (SPC-R3. 933, 975; D-Ex. 6). In conclusion, Drs. Bursten and Prichard agreed that Mr. Cherry met the diagnosis for intellectual disability (SPC-R3. 875, 976; D-Exs. 4, 6).

13. As this Court recognized in Hall, "the definition that matters most is the one used by mental health professionals in making" the intellectual disability determination. Hall, 201 So. 3d at 637. And, "[a]s such , courts cannot disregard the informed assessments of the experts." Here, like in Hall, the record evidence and "unrefuted testimony at the [2005] evidentiary hearing is that [Cherry] meets the medical definition of intellectually disabled." Id. Thus, this Court should treat Mr. Cherry as it did Hall - to "vacate his death sentence and remand with instructions to enter a life sentence." Hall, 201 So. 3d at 638.

WHEREFORE, Mr. Cherry respectfully requests this Court to grant rehearing and remand for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by electronic service to all counsel of record on this 15th day of December, 2015.

/s/ Linda McDermott
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