IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1335

FREDDIE LEE HALL

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

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STATEMENT REGARDING ORAL ARGUMENT

The State defers to the Court as to whether oral argument would be helpful to the decision-making process. However, the law controlling the issues raised in Hall's brief is well-settled, and the State suggests that disposition without oral argument would be appropriate.

STATEMENT OF THE CASE

In his last appearance before this Court, the posture of the case was summarized in the following way:

> Freddie Lee Hall, a prisoner under sentence of death, appeals the trial court's order denying his motion for postconviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the trial court's order for the reasons expressed herein.
>
> Hall and an accomplice, Mack Ruffin, were convicted in separate trials of the February 1978 abduction and murder of a young woman. The facts of this crime are set forth in detail in our opinion on direct appeal. *See Hall v. State*, 403 So. 2d 1321, 1323 (Fla. 1981). Both Hall and Ruffin were sentenced to die in the electric chair. This Court affirmed Hall's conviction and sentence. *Hall,* 403 So. 2d at 1325. In September 1982, Hall's first death warrant was signed. Hall filed a rule 3.850 motion, and this Court affirmed the circuit court's denial of that motion and denied Hall's petition for a writ of habeas corpus. *Hall v. State*, 420 So. 2d 872, 874 (Fla. 1982). A federal district court granted a temporary stay of execution but eventually denied relief. *Hall v. Wainwright*, 565 F.Supp. 1222, 1244 (M.D. Fla. 1983). The Eleventh Circuit affirmed in part and reversed in part the district court's decision and remanded the case for an evidentiary hearing. *Hall v. Wainwright*, 733 F.2d 766, 778 (11th Cir. 1984). The district court again denied relief, and the Eleventh Circuit affirmed. *Hall v. Wainwright*, 805 F.2d 945, 948 (11th Cir. 1986). Hall

then petitioned this Court for a writ of habeas corpus based on a claim that his sentencing proceeding violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This Court held that any error in the sentencing proceeding was harmless. *Hall v. Dugger*, 531 So. 2d 76, 78 (Fla. 1988). Hall's second death warrant set execution for September 20, 1988. Hall filed his second rule 3.850 motion, which the circuit court denied. On appeal, this Court considered additional non-record facts and ordered that Hall be resentenced because of a *Hitchcock* error in sentencing. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989). On resentencing, the jury recommended a death sentence, and the judge imposed it, finding seven aggravators and "unquantifiable" nonstatutory mitigation. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir.Ct., Feb. 21, 1991) (Findings of Fact for Sentencing Order). This Court affirmed. *Hall v. State*, 614 So. 2d 473 (Fla. 1993).

Hall filed the present rule 3.850 motion to seek relief from this resentencing judgment, and it is the denial of that motion which is the subject of this appeal. The circuit court summarily denied all but one of Hall's thirty-three claims. The circuit court held an evidentiary hearing on August 25, 1997, as to Hall's claim that he was incompetent to proceed in the resentencing. Following the hearing, the trial court issued a sixty-five page order denying all relief. *State v. Hall*, No. 78-52-CF (Fla. 5th Cir.Ct., Oct. 31, 1997) (Final Order). Hall raises five claims in this appeal. [FN1]

> [FN1] Hall claims that: (1) the Florida capital sentencing statute is unconstitutional facially and as applied in allowing the death penalty for an incompetent or mentally retarded person; (2) Hall's resentencing was unconstitutional in that he is a mentally retarded person who was not competent to be resentenced; (3) execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions; (4) the trial court's summary denial of all but one issue raised in Hall's 3.850 motion violated Hall's rights to substantive and procedural

> due process; (5) fundamental error occurred in the trial court's finding that aggravators outweighed mitigators in the resentencing.

Hall v. State, 742 So. 2d 225, 225-226 (Fla. 1999). This Court affirmed the denial of relief. Hall subsequently brought the proceeding at issue in this appeal, in which he claimed that he is ineligible for execution because he is "mentally retarded." The Circuit Court of Hernando County conducted an evidentiary hearing on Hall's claim, the facts from which are summarized below.

STATEMENT OF THE FACTS

The Evidentiary Hearing Facts

Dr. Valerie McClain, psychologist, reviewed prior psychological evaluations and testing administered to Hall. She reviewed the trial transcripts, school records and medical records. (V10, R45, 54, 59). McClain explained that, according to the American Association of Mental Retardation, mental retardation is comprised of three prongs: 1) sub-average intelligence of two standard deviations below the norm established as average; 2) significant adaptive deficits in areas of functioning; and 3) evidence of these difficulties prior to age 18. (V10, R54-55). Although the definition of mental retardation is the same in the Diagnostic and Statistical

Manual,[1] the DSM IV also includes a standard of error measurement that is taken into consideration in diagnosing mental retardation. (V10, R55-56).

McClain said there was no evidence that Hall was in special classes in school and no evidence of IQ testing conducted prior to age 18.[2] (V10, R59).

McClain said, according to the Agency for Persons with Disabilities, the criteria for a diagnosis of mental retardation changed significantly in 1977. (V10, R59). The agency made a transition from using one standard deviation below the average (i.e., IQ of 85) to two standard deviations for consideration of mental retardation. (V10, R59). When an evaluation for mental retardation is being conducted for developmental services eligibility, the IQ has to be close to 70 because the agency[3] is "fairly stringent as far as using a 70 at this point." (V10, R61). If the IQ score is in the low 70's range, there has to be evidence of significant adaptive behavior problems. (V10, R61-2).

Lugene Ellis, Hall's older half-brother, is about 20 years older than Hall. Hall is the youngest of 11 children. (V10, R66-

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[1] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

[2] Hall was 18 years old in 1963. (V10, R59).

[3] Agency for Persons with Disabilities. (V10, R61).

7). Ellis moved out of the family home at 17 years old. He moved in with his older sister who lived an hour away but visited Hall every weekend. (V10, R68, 76).

Ellis said Hall "just wasn't normal like the other ... kids." (V10, R68). Hall's language skills were poor. He was afraid almost every night that "something (was) coming after him." He did not function as his brothers and sisters did. They could understand him and would "just go along with him." (V10, R69-70). Ellis did not know much Hall's schooling. Hall could not read well. Ellis could not understand Hall's writing at all. (V10, R70).

Hall worked for Ellis picking fruit in New York and Florida. Ellis showed Hall what to do. (V10, R71-2). Ellis said Hall was careless with his money, could not cook, and could not do his own laundry. Hall's mother did these chores for him. Hall could hardly take care of himself. (V10, R72-3).

Hall has been incarcerated most if his life. Ellis has kept in touch with him and occasionally visits him. (V10, R79-80).

James Hall is defendant's older brother by five years. Although they grew up together, Hall was different than his siblings. There was "something about him that it wasn't just a normal child." (V10, R83-4). Defendant stayed to himself most of the time. (V10, R85, 90). He stuttered when he talked. When he got frustrated, he "would pound something." (V10, R85).

Defendant could not read or write. His writings were "nothing you could understand." Defendant does not write from left to right. He writes "just all over the page." (V10, R85, 95, 99).

Defendant did not do well in school as he had a "very low IQ." His siblings took care of him. (V10, R87, 88). Hall did not recall defendant living on his own. (V10, R88). Defendant worked with Hall at a rock mine. (V10, R89, 92). Hall did not recall defendant ever driving. Defendant was not careful with his money. After he got paid, "he'd be broke" the next day. (V10, R89-90).

Hall often visits defendant in prison. (V10, R86, 93). Hall said defendant's "conversation is not like ours." Hall understands him and just lets defendant do the talking. (V10, R86, 91). Hall has heard defendant quotes scripture from the Bible. (V10, R97).

Dr. Harry Krop, psychologist, has been qualified to testify as an expert in mental retardation "on numerous occasions." (V10, R102, 105). He has evaluated several inmates pre-trial for mental retardation, as well as several others during their post-conviction cases. (V10, R106, 118).

Krop initially evaluated Hall for mental retardation in 1990, prior to Hall's resentencing trial. (V10, R108-09). Krop administered the Wechsler Adult Intelligence Scale-Revised ("WAIS"), and conducted a personal interview with Hall. (V10,

R109, 127). Krop interviewed several family members, reviewed the trial transcripts and other psychological reports or affidavits.[4] (V10, R110). He reviewed police reports and school records. (V10, R112). Krop administered the Wide Range Achievement Test-Revised ("WRAT-R") which measures a person's reading and math level skills. (V10, R110). In addition, Krop administered other neuropsychological tests which included the Wechsler Memory Scale, Rey Auditory-Verbal Learning Scale, Bender Gestalt Test, Right-Left Orientation Test, and Finger Tapping Test. (V10, R111).

Krop said a 1986 evaluation administered to Hall by Marilyn Feldman indicated Hall's IQ was 80. (V10, R114, 128). Krop said it was Dr. Toomer's opinion that Hall had "brain damage." Krop said Dr. Lewis "and her team" agreed there was brain damage. (V10, R114).

Krop said when he first met Hall, he was difficult to understand. Hall was "pretty suspicious" and wanted to know who Krop "was working for." (V10, R119). After establishing a rapport with Hall, Krop administered an IQ test which resulted in a full-scale IQ score of 73. (V10, R119-20, 127). Krop said the full-scale IQ scores are approximate figures based on the

[4] Dr. Krop reviewed reports written by Dr Lewis, Marilyn Feldman, Dr. Kathleen Heide, Dr. Jonathan Pincus, Dr. Jethro Toomer, Dr. Barbara Bard, and Leslie Prichep. He reviewed affidavits written by Dr. Barnard, James Hill, Katie Glenn, Diana Mitchell-Rigsby, Mr. Babb, Public Defender, and Richard Hagin. (V10, R112).

DSM-IV-TR, which includes a “standard error of measure.” (V10, R120). Krop said a person may do “worse than he is capable of doing.” Or, there may be problems with the administrator of the test. (V10, R120).

Dr. Krop concluded that, based on the results of the IQ testing, family interviews, review of records, and Hall’s difficulty in all areas of his life “in terms of adaptive functioning,” that Hall was “functionally retarded.” (V10, R122, 124). Based on the IQ score, Hall had a mental age of 13 years old. (V10, R123). Krop said evidence suggests that Hall has a neurocognitive impairment, which is the equivalent of brain damage. (V10, R124).

Dr. Krop said speech impediments and impaired social skills are examples of adaptive functioning deficits. (V10, R124-25). Hall has a “schizotypal personality disorder” but he is not psychotic. (V10, R125). Dr. Krop concluded that all the test scores that he reviewed are within the range of mental retardation in terms of a clinical assessment. (V10, R126).

Dr. Krop is aware that the Florida Supreme Court stated that, in order to be considered mentally retarded under Florida law for purposes of administering the death penalty, an IQ score has to be at 70 or below. (V10, R128).

Dr. Greg Prichard, psychologist, evaluated Hall on August 14-15, 2002, for a determination of mental retardation. (V10,

R160-61, 16; V11, R215, 256-57). Prichard has evaluated at least 2000 individuals[5] in order to make a determination of mental retardation. (V10, R165). In preparation for this case, Prichard reviewed a vast amount of material[6] relating to Hall. (V10, R169-70; V11, R215). In addition, he reviewed Dr. Mosman's report. (V10, R160-61).

Prichard explained the three-prong determination for a diagnosis of mental retardation: 1) significantly sub-average intellectual functioning, which is two standard deviations below the mean on an approved intellectual measure, the mean is 100 and a deviation is 15; 2) deficits in adaptive skills, where a person is unable to function independently in society because of cognitive limitations; and 3) manifestation of mental retardation prior to age 18. (V10, R170-71).

Prichard explained that mental retardation is a developmental disability and cannot be diagnosed as the result of a head injury in adulthood. (V10, R171). In addition, there

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[5] Dr. Prichard and Dr. Peter Bursten evaluated Roger Cherry in the *Cherry* case. *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007).

[6] The reports Prichard reviewed were written by Dr. Lewis, Dr. Prichep, Barbara Bard, Dr. Krop, Marilyn Feldman, Dr. Barnard, Dr. Pincus, Dr. Carrera, Dr. Heide, Dr. Toomer, and Dr. Mosman. In addition, Prichard reviewed DOC records trial transcripts, the sentencing order, and school records. (V10, R169-70; V11, R216).

is always an error in measurement when assessing a person's IQ. (V10, R173). The measurement of error in intellectual functioning is "plus or minus four." (V10, R173-74). Dr. Prichard gave an example: if a person has an IQ of 67, that person cannot be diagnosed as mentally retarded without also assessing adaptive behavior. An IQ score alone does not establish mental retardation. In addition, there has to be evidence that mental retardation existed before age 18. (V10, R174). Hypothetically, if an IQ score score is below 70, and adaptive deficits also exists, but there is no evidence of mental retardation recorded prior to age 18, "you could say with a reasonable degree of psychological certainty that the person is not mentally retarded." (V10, R175).

Dr. Prichard proffered testimony regarding an IQ score obtained by Dr. Mosman (deceased) in 2001 that Hall's full scale IQ was 69. (V10 R179, 182, 186). Dr. Mosman concluded that Hall was mentally retarded.[7] (V10, R185). Dr. Prichard's evaluation of Hall on March 15, 2002, indicated Hall has a full-scale IQ score of 71. (V10, R179, 180; V11, R218, 230, 257). In considering an error of measurement, Hall's IQ score falls within a range from

[7] In addition to the Wechsler Intelligence Scale-Third Edition, Dr. Mosman administered the Lieter Adult Intelligence Scale, the Vineland Adaptive Behavior Scales, the Slosson Intelligence Scale, the Wide Range Achievement Test-Third Edition, and the Trail Making B test. (V10, R185-86; V11, R200).

67 to 75. (V10, R180).

Dr. Prichard further proffered that Dr. Mosman diagnosed Hall with a reading disorder, disorder of written expression, schizophrenia, undifferentiated type, as well as physical abuse and neglect as a child. (V10, R189). Dr. Mosman diagnosed Hall with "mild mental retardation" to "moderate mental retardation." (V10, R189-90). Dr. Mosman also diagnosed Hall with organic brain damage. (V10, R190). The score for the Vineland Adaptive Behaviors Scales test that Mosman administered to a respondent resulted in an overall score of 51, indicating Hall had numerous deficits due to cognitive or intellectual limitations. (V10, R193-94). The IQ score of 69 that Dr. Mosman obtained is consistent with mental retardation. (V10, R196).

Dr. Prichard said intellectual deficits prior to age 18 have to be "noticed and documented." (V11, R201). Dr. Prichard did not rely on any of Dr. Mosman's results in forming his own conclusions about Hall. (V11, R204-05). Prichard never spoke to Mossman. (V10, R162, 189, 195; V11, R207).

Dr. Prichard administered the Wechsler Adult Intelligence Scale, Third Edition and the Wide Range Achievement Test to Hall. In addition, he administered the Vineland Adaptive Behavior Scales test to Hall's brother, James Hall, and Hall's sister, Deana Rigsby. (V11, R215, 230-31, 232, 236, 239). The results of the WAIS-III indicated Hall has a full-scale IQ score

of 71. (V11, R218, 230).

Dr. Prichard said a note in Hall's school records when he was seven years old indicated he was "far below his chronological age." Prichard did not see any formal IQ testing results in the records. (V11, R219). School records indicated Hall had academic difficulties and cognitive learning limitations. Hall was described as "mentally retarded" several times. (V11, R220). Dr. Prichard did not receive any material that included IQ testing from when Hall was a child. (V11, R268).

Dr. Prichard reviewed a 1965 military screening test which indicated Hall's intelligence level was too low for him to serve in the military. Department of Correction records which included a Beta IQ Test administered to Hall in 1968 indicated Hall did not have a "history of emotional disturbance … function[ed] below normal level ... [was] socially promoted in school." (V11, R223-24, 268-69, 270). The Beta test score indicated an IQ of 76. (V11, R270). In addition, a February 1969 IQ test also indicated a score of 76. (V11, R270). A DOC vocational report from August 1969 indicated Hall had an IQ of 68. (V11, R226-27, 270). Further, DOC records from 1978 (Hall's second incarceration) indicated Hall's intelligence quotient was "borderline retardation in intellectual ability." (V11, R225-26).

Dr. Prichard explained that mental retardation can manifest itself through various ways which include oxygen deprivation prior to birth, or cultural deprivation through the developmental years. (V11, R227).

Dr. Prichard reviewed Dr. Krop's 1991 report as well as Krop's trial testimony. (V11, R228). Dr. Prichard said Dr. Krop's report indicated Hall was "functionally retarded, was not able to adapt well, because of his cognitive limitations." (V11, R229).

Dr. Prichard proffered testimony as to Hall's adaptive behavior. (V11, R235, 257). Dr. Prichard administered adaptive behavior testing to Deana Rigsby, Hall's older sister by eight years. (V11, R236). After interviewing Rigsby and administering the Vineland test, Dr. Prichard determined Hall had significant adaptive deficits due to a composite score of 43, four standard deviations below the mean of 100. (V11, R238-39, 260). After interviewing James Hall and administering the Vineland test to him, Dr. Prichard determined a composite score of 39, in the same range as Rigsby's test score results. (V11, R239-40, 260). Dr. Prichard concluded Hall demonstrated "consistent adaptive deficits." (V11, R240).

Dr. Prichard reviewed 1986 reports written by Dr. Barbara Bard and Dr. Dorothy Lewis. Dr. Bard characterized Hall as an "illiterate adult … incapable of even the most basic living

skills." Further, Hall's speech was "incomprehensible and difficult to follow." (V11, R242). Dr. Lewis's report indicated Hall was "brain damaged." (V11, R242-43).

A 1988 report written by Dr. Jonathan Pincus indicated Pincus suspected Hall was "mildly retarded and brain damaged." (V11, R243). A 1988 report by Dr. Jethro Toomer discussed Hall's speech impediments and poor functioning in school. Dr. Toomer concluded Hall was emotionally disturbed, had severe impairment in cognitive functioning, and had organic brain damage. (V11, R243-44, 245). Toomer opined that Hall was "easily influenced." (V11, R246).

Dr. Prichard proffered his conclusion that Hall meets the three-prong requirement for a diagnosis of mild mental retardation. (V11, R258, 261).

Dr. Prichard said mental retardation is a condition that shows little change during the course of an individual's lifetime. (V11, R271-72). IQ tests previously administered to Hall from 1968 to 1986 resulted in scores ranging from 76 to 80. (V11, R274). Hall's IQ test scores dropped dramatically after 1987, up to an 11-point difference. (V11, R275). There was more consistency in the scores prior to 1987. (V11, R276). Dr. Sesta administered an IQ test to Hall in November 2008 which resulted in a score of 72 (V11, R279-80, 282). Of the four IQ tests given to Hall after 1987, only the one administered by Dr. Mosman

(with a score of 69) was below 70. (V11, R282). Thus, by taking the four-point error of measurement into account, Hall's score with Mosman's result of the test is between 65 and 73. (V11, R282).

Dr. Prichard obtained a score of 71. (V11, R287). Dr. Prichard is aware that the Florida Supreme Court's ruling in *Cherry* gives a cut-off score for a diagnosis of mental retardation as 70 or below. (V11, R287). Further the Court does not take into consideration a standard error of measure, that "70 or below. That's it." (V11, R287).

The Circuit Court Order

On June 8, 2010, the circuit court issued its amended order finding, *inter alia*, that Hall had not established that he is mentally retarded. (V4, R596-606). In pertinent part, the order reads as follows:

> During the course of the evidentiary hearing of December 7 and 8, 2009, the Defendant called a number of witnesses. Defendant's first witness was Dr. Valerie McClain. Dr. McClain testified that she did not obtain an I.Q. measurement from the Defendant, nor did she provide any testimony regarding the Defendant's I.Q. The Defendant's second witness was Lugene Ellis, a half-brother of the Defendant. Mr. Ellis testified regarding his recollection of the Defendant as a child but did not provide any quantitative testimony regarding the Defendant's I.Q. The Defendant's next witness was James Hall, a brother of the Defendant. Mr. Hall testified about the Defendant's problems with reading, writing, and caring for himself, but did not provide any quantitative testimony regarding the Defendant's I.Q.

On the second day of the evidentiary hearing, the Defendant called his final two witnesses. Defendant's first witness that day was Dr. Harry Krop. Dr. Krop testified that he conducted a confidential mental health evaluation of the Defendant in September of 1990, prior to the Defendant's resentencing proceeding. In preparation of the Defendant's September of 1990 evaluation, Dr. Krop testified that he reviewed multiple reports from a number of doctors, numerous witness affidavits, legal documents, police reports, school records, and prison reports all relating to the Defendant. (R. 110). In addition, Dr. Krop testified that he spoke with several members of the Defendant's family. In that same year, Dr. Krop testified that he administered the Wechsler Adult Intelligence Scale Revised to the Defendant and obtained an I.Q. score of seventy-three (73). (R. 120). Furthermore, Dr. Krop testified on cross-examination that he examined a report generated by Marilyn Feldman that indicated Feldman administered the Wechsler Adult Intelligence Scale Revised to the Defendant and obtained an I.Q. score of eighty (80), in 1986. (R. 128).

The Defendant's final witness was Dr. Gregory Prichard. Dr. Prichard evaluated the Defendant on August 14 and 15, 2002 for a determination of mental retardation. In compliance with Florida Rule of Criminal Procedure Rule 3.203(c)(2), Defendant attached Dr. Gregory Prichard's report, styled Confidential Assessment, to the subject motion. Dr. Prichard testified that on August 15, 2002, he administered the Wechsler Adult Intelligence Scale Third Edition to the Defendant and determined that the Defendant's I.Q. score was seventy-one (71). (R. 218). In addition to administering the Wechsler Adult Intelligence Scale Third Edition, Dr. Prichard also administered the Vineland Adaptive Behavior Scales and the Wide Range Achievement Test. (R. 215).

During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant. Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a

report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the Wechsler Adult Intelligence Scale Third Edition. Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman' s report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162).

Upon the State's objection of the Defendant's attempt to introduce Dr. Mosman's report through the testimony of Dr. Prichard, the Court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence. In support of its determination, the Court found that the Defendant violated the Court's Feburary 1, 2005 Order to Compel by not providing the State with the testing materials and raw data underlying Dr. Mosman's report. (R. 162). Specifically, the Court's Order to Compel ordered the Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any and all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report. (Order dated February 1, 2005).

The Court found that the Defendant's failure to furnish the State with the raw data and testing materials underlying Dr. Mosman's report pursuant to the Court's Order, was highly prejudicial and unfair to the State. (R.162). Moreover, the Court determined

that the prejudice and unfairness to the State could not be cured by the Defendant because Dr. Mosman was unavailable for cross-examination (Dr. Mosman was deceased), and neither the Defendant nor Dr. Prichard had the raw material that Dr. Mosman may have used in his evaluation of the Defendant. Without access to the test instrument or raw material that Dr. Mosman may have used, the State could not test the validity of Dr. Mosman's results through the use of its own hired expert. (R. 162). For these reasons, and because the Defendant failed to comply with the Court's February 1, 2005 Order to Compel, the Court excluded Dr. Mosman's report from evidence. However, the Court allowed the Defendant to proffer Dr. Mosman's report on record through Dr. Prichard's testimony.

During the course of the hearing, it became apparent that the Defendant could not provide clear and convincing evidence that would satisfy the first prong (i.e. significant subaverage general intellectual functioning) of its mental retardation claim. In effect, the Defendant was unable to show substantial competent evidence that indicated an I.Q score of 70 or lower. Dr. Prichard's report indicated an I.Q. score of seventy-one (71). (R. at 180). Aside from Dr. Mosman's report, the other reports that Dr. Prichard examined all revealed I.Q. scores of 71 or greater. Dr. Prichard testified that he reviewed the following reports that made record of Defendant's I.Q.: Beta Test administered by Department of Corrections in December of 1968: 76 I.Q.; Kent Test administered by Department of Corrections in January of 1979: 79 I.Q.; WAIS-R administered by Marilyn Feldman on September 10, 1986: 80 I.Q.; WAIS-R administered by Dr. Krop in March 1990: 73 I.Q.; WAIS-IV administered by Dr. Sesta on November 25, 2008: 72 I.Q.

Because the Defendant failed to provide clear and convincing evidence that would show a significant subaverage general intellectual functioning, the Defendant's claim of mental retardation under *Florida Statute* §921.137 and *Florida Rule of Criminal Procedure* 3.203, fails as a matter of law. Even if Dr. Mosman's report were to be admitted into evidence, it would be an aberration amid all the other I.Q. results that have a score of 71 or higher. One single I.Q. result that falls one point below 70, in contrast to

all of the other I.Q. tests showing an I.Q. greater than 70, would not meet the clear and convincing evidence threshold that both the Statute and the Rule require.

The Florida Supreme Court has made clear that all three prongs of a mental retardation claim must be met with clear and convincing evidence. *See Burns v. State*, 944 So. 2d 234, 249 (Fla. 2006); *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007); Florida Statute §921.137(4). "Thus, lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. Florida*, 2 So. 3d 137, 143 (Fla. 2009). At this point, the Defendant's mental retardation claim fails as a matter of law since the Defendant has failed to proffer evidence that would meet the first prong (*i.e.* significantly subaverage general intellectual functioning) of his mental retardation claim. However, in the abundance of caution, the Court will examine the Defendant's evidence proffered in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) prongs of his mental retardation claim.

The Florida Supreme Court has held, "defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior." *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008), citing Rodriguez v. State, 919 So. 2d at 1252, 1266 (Fla. 2005). ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (*quoting* trial court's order)). "Adaptive functioning refers to how effectively individuals cope with common life demands and ‘how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and. community setting.'" *Rodriguez*, 919 So. 2d at 1266 n. 8. Furthermore, the Florida Supreme Court has held retrospective diagnosis insufficient to satisfy the adaptive functioning component of the mental retardation definition. In Philips, the Court stated, "the statute and the rule require significantly subaverage general intellectual functioning to exist

concurrently with deficits in adaptive behavior. Phillips, 984 So. 2d at 510, *citing Jones v. State*, 966 So. 2d at 325-327, *citing* § 921.137(1), *Fla. Stat.* (2007); *Fla. R. Crim. P.* 3.203(b).

In *Philips*, the Florida Supreme Court held that the Defendant failed to demonstrate deficits in adaptive functioning that exist concurrently with his significant subaverage general intellectual functioning. *Philips*, 984 So. 2d at 511. The Florida Supreme Court stated that while Philips had an IQ of 70 in 2000, "his adaptive functioning was assessed by evaluating his behavior at or around age eighteen." *Id.* at 508. The Court determined this technique, conducted by Philips' only defense expert, Dr. Keyes, to be a retrospective diagnosis, and "insufficient to satisfy the second prong of mental retardation definition." *Id*. at 511, *citing Jones*, 966 So. 2d at 325-27.

As in *Philips*, in the instant case the Defendant's expert witness, Dr. Prichard, also utilized a retrospective technique in ascertaining Hall's adaptive functioning. Dr. Prichard testified that he made no attempt to determine Hall's level of present adaptive functioning at the time he administered the WAIS-III in August of 2002. (emphasis added) (R. 260, 284). Dr. Prichard evaluated the Defendant's sister, Deana Rigsby, and the Defendant's brother, James Hall (R. 236, 239). Dr. Prichard also examined a number of past reports from doctors who have evaluated the Defendant in the past. (R. 241-246). While the Defendant's evidence may yield some support in showing deficits in Defendant's adaptive functioning prior to 2002, the Defendant fails to provide any evidence that shows a concurrent, that is, a present deficit in his adaptive functioning.

Since the Defendant has been incarcerated in the Department of Corrections since 1978, the logical and necessary inquiry to determine "concurrent" deficits in adaptive functioning would have been to interview correction officers or classification officers, or perhaps, to review records documenting the Defendant's existence and interactions while in the custody of the Department of Corrections. Dr. Prichard concedes as much, stating, "I have done adaptive behavior testing

with prison guards before, current adaptive testing. I didn't do it in this case. I don't know why I didn't do it.. .But I did not interview a Department of Corrections person." (R. 280). In effect, Dr. Prichard engaged in a retrospective diagnosis in determining the Defendant's deficits in adaptive functioning, much like the approach employed by the. expert witness in Philips. As the Florida Supreme Court in *Philips* held, "a retrospective diagnosis is insufficient to satisfy the second prong of mental retardation definition." *Phillips*, 984 So. 2d at 510, *citing Jones*, 966 So. 2d at 325-327.

Florida Statute and Rule each make clear that a Defendant must prove each of the three components of a mental retardation claim by clear and convincing evidence. *Fla. Stat*. 921.137(1)(4); *Fla. R. Crim. P.* 3.203(b). Thus far, the Defendant has failed to provide any clear and convincing evidence that would meet either of the first two required components of his mental retardation claim. Therefore, as a matter of law, the Defendant's mental retardation claim fails. However, in the abundance of caution, this Court will proceed and consider whether the Defendant has proffered any evidence in support of the third prong of his mental retardation claim (*i.e.* the onset of the first two components occurring prior to the age of 18).

Specifically, the third component of a mental retardation claim requires that the onset of the Defendant's alleged significant subaverage intellectual functioning and deficits in concurrent adaptive functioning manifest prior to the age of 18. *See Fla. Stat*. 921.137(1); *Fla. R. Crim. P.* 3.203. In effect, the third component requires a retrospective assessment in order to determine whether the first two components. have manifested prior to the Defendant reaching the age of 18. In support of the third component of his mental retardation claim, the Defendant proffered testimony from two of his siblings, Lugene Ellis and James Hall. While each of them testified to the Defendant's various problems of adaptive functioning as a child and young adult, neither of these witnesses testified specifically about the Defendant's I.Q. The Defendant also relied on Dr. Prichard's testimony to support the third prong

of his mental retardation claim, but Dr. Prichard also did not have any quantitative evidence regarding the Defendant's I.Q prior to the age of 18. (R. 219). Dr. Prichard testified that the first I.Q. result of the Defendant was obtained in December of 1968, several years after the Defendant had turned 18 years of age. In that year, the Department of Corrections administered the Beta Test to the Defendant and obtained a score of 76. (R. at 268). In addition, Dr. Prichard testified that he took note of the Defendant's school reports from the years of 1952 to 1961 and testified that each school report indicated cognitive and learning deficiencies. (R. 218-219). However, Dr. Prichard testified that none of these school reports indicated a specific I.Q. test result. (R. 218).

While the evidence from the Defendant's siblings and Dr. Prichard in support of the third component of the Defendant's mental retardation claim may yield some support towards the Defendant in showing deficits in adaptive behavior prior to the age of 18, this evidence does not necessarily meet the clear and convincing threshold stated within the Statute. *See Fla. Stat.* 921.137(1)(4) Irrespective of whether the Defendant's evidence shows deficits in adaptive behavior prior to the age of 18, the third component also requires that the Defendant provide clear and convincing evidence that his I.Q. score measured 70 or below prior to the age of 18. This the Defendant has not shown. The Defendant has failed to provide any clear and convincing evidence that his I.Q. score was measured at 70 or below prior to 18 years of age. Incidentally, even if the Court were to apply the more lenient preponderance of the evidence standard to the Defendant's evidence, the Defendant would still fail to meet either of the first two prongs of his mental retardation claim, based on the evidence.

Ultimately, the Defendant's mental retardation claim fails as a matter of law because the Defendant has failed to provide clear and convincing evidence that would meet any of the three components of a 3.851 mental retardation claim. As the Florida Supreme Court has made clear, "the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental

retardation." *Nixon v. State*, 2 So. 3d at 142.

(V4, R599-605).

SUMMARY OF THE ARGUMENT

Hall is not mentally retarded as a matter of law. Longstanding precedent, which was reaffirmed in *Franqui*, requires a full scale IQ score below 70, something that Hall does not have. Under settled precedent, Hall cannot carry his burden of proof, and has failed to show, under controlling law, that he is exempt from execution under *Atkins* -- he is not mentally retarded and *Atkins* does him no good.

The collateral proceeding trial court did not abuse its discretion in not allowing the report of deceased psychologist Mosman into evidence. Hall has omitted the fact that the report was not received into evidence because of a discovery violation. And, even if that report had been received and considered, it would not affect the outcome. There is no abuse of discretion, and no basis for relief.

The collateral estoppel/issue preclusion claim is foreclosed by binding precedent. The fact that Hall's mental status was considered as mitigation years before *Atkins* was decided has no effect on the need to address a claim of mental retardation as a bar to execution under *Atkins* and the prevailing law. There is no double jeopardy, nor would it be appropriate to refuse to consider the retardation claim in light

of *Atkins*, which admittedly changed the landscape. There is no basis for relief.

ARGUMENT

I. & II. HALL IS NOT "MENTALLY RETARDED" AS A MATTER OF LAW[8]

On pages 14-49 of his brief, Hall discusses, at length, the problems he perceives with controlling law as it governs claims of mental retardation as a bar to execution. At its core, Hall's brief would have this Court overrule *Cherry, Zack, Phillips* and *Nixon* -- without that result, Hall cannot win. The problem for Hall, which admittedly he did not know about when he filed his brief, is this Court's decision in *Franqui v. State*, where this Court held explicitly that *Cherry* and *Nixon* mean what they say. If there had been any legitimate debate about the status of Florida law on the mental retardation issue, *Franqui* settled it:

> **Recognizing that Franqui's scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution, Franqui's counsel argued below and now argues on appeal that by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).** He asks the Court to revisit *Cherry* and *Nixon* to determine if we have misapplied the holding in *Atkins* by setting a bright-line, full scale IQ of 70 or below as the cut-off score in order to meet the first prong of the three-prong test for

[8] In Claim I, Hall at least pays lip service to the state of Florida law, which requires an IQ score of less than 70 to avoid execution due to mental retardation. In Claim II, Hall completely ignores that settled law.

mental retardation. He contends that *Atkins* approved a wider range of IQ test results that can meet the test for mental retardation. Therefore, the issue presented is solely a question of law subject to *de novo* review. As explained below, a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process.

Atkins v. Virginia

In *Atkins v. Virginia*, the United States Supreme Court overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), [FN8] and declared that the mentally retarded must be excluded from execution. *Atkins*, 536 U.S. at 318. In reaching its holding, the Supreme Court discussed the definitions of mental retardation promulgated by the American Association on Mental Retardation (AAMR) [FN9] and the American Psychiatric Association (APA). The Supreme Court found the two associations had similar definitions, defining the test for mental retardation as having three prongs: (1) significantly subaverage intellectual functioning; (2) limitations in adaptive functioning; and (3) mental retardation manifested before 18 years of age. *Id*. at 308 n.3. These same three prongs constitute the test for mental retardation under Florida law. The Supreme Court did note that an IQ between 70 and 75 or lower is typically considered the cut-off IQ score for the intellectual function prong of the mental retardation definition. *Id*. n.5. However, the Supreme Court did not mandate an IQ range of between 70 and 75 for a finding of mental retardation.

> [FN8] *Penry* held that executing mentally retarded people convicted of capital offenses is not categorically prohibited by the Eighth Amendment. This holding was abrogated in *Atkins,* when the Supreme Court held that executions of the mentally retarded are cruel and unusual punishments prohibited by the Eighth Amendment to the federal constitution.
>
> [FN9] The AAMR has since changed its name to the American Association of Intellectual and

> Developmental Disabilities. It will continue to be referred to here as AAMR.

The Supreme Court in *Atkins* recognized that "[n]ot 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." *Atkins*, 536 U.S. at 317. In addition, the Supreme Court noted that the statutory definitions for mental retardation that were already in existence were not identical, but generally conformed to the clinical definition provided by the AAMR and APA. *Atkins*, 536 U.S. at 317 n.22. [FN10] Consequently, the Supreme Court followed its approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), [FN11] and left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (*quoting Ford*, 477 U.S. at 416-17).

> [FN10] In footnote 22, the Supreme Court stated that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n.3, *supra.*" *Atkins*, 536 U.S. at 317 n.22. Footnote 3 notes that the APA and AAMR have similar definitions of mental retardation requiring proof of significantly subaverage intellectual functioning, existing concurrently with limitations in two or more areas of adaptive functioning, all manifesting before age 18. *Id*. at 309 n.3.
>
> [FN11]. *Ford v. Wainwright* involved insanity as a bar to the death penalty.

When *Atkins* was issued, Florida had already enacted its statute prohibiting the execution of the mentally retarded. § 921.137, *Fla. Stat*. (2001). Section 921.137(1), *Florida Statutes* (2009), which is almost identical to the 2001 version of the statute, provides in pertinent part as follows:

> **921.137 Imposition of the death sentence upon a defendant with mental retardation prohibited**.— (1) As used in this section,

> the term "mental retardation" means 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 by 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.

Cherry v. State

The proper interpretation of section 921.137(1) was raised in *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007), where the question before the Court was whether section 921.137(1) and rule 3.203 mandate a strict cut-off score of 70 or below on an approved standardized test in order to establish significantly subaverage intellectual functioning. [FN12] *Cherry*, 959 So. 2d at 712. In his appeal, Cherry contended in pertinent part that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete single number because of the standard error of measurement (SEM). However, we held in *Cherry*:

> 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. As pointed out by the circuit court, the 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 the statutes[.]

Id. at 712-13. This same holding was reiterated in *Nixon*, which we discuss next.

> [FN12] *Cherry* did not involve a claim that section 921.137 is unconstitutional in how it defines mental retardation. Instead, the claim sought clarification regarding Florida's definition of subaverage intellectual functioning.

Nixon v. State

In *Nixon*, the appellant raised several arguments challenging this Court's decision in Cherry. The essence of the arguments in *Nixon*, which are similar to the arguments Franqui makes in this case, is that based on language in *Atkins,* a firm IQ cut-off score of 70 or below is not the proper standard for determining mental retardation. *Nixon,* 2 So. 3d at 142. 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.

Nixon further asserted that this Court's definition of mental retardation violates both the United States and Florida constitutions because *Cherry's* interpretation of section 921.137 is inconsistent with the constitutional bar on the execution of mentally retarded persons. We found Nixon's claim without merit based in part on an earlier finding by the Court in *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007), that Florida's definition of mental retardation is consistent with the APA's diagnostic criteria for mental retardation. *Nixon,* 2 So. 3d at 143.

> Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that under current Florida law Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

Franqui v. State, 36 Fla. L. Weekly S1, 3-4 (Fla., Jan. 6, 2011). (emphasis added). In light of *Franqui*, Hall cannot win -- as the trial court found, **only one** IQ score (which was not considered because the examiner is dead and unavailable for cross-examination) was below 70. **All of the other scores, including the most recent score on the newest available test, exceed the cut-off score of 70 established by Florida law.**[9] Under settled law, which, after *Franqui* cannot be seriously debated, Hall loses.

While not perhaps strictly necessary to disposition of Claims I and II, Hall makes a number of assertions in his brief that are inaccurate. *Franqui* has settled the question of what Hall derisively calls the "absolute cut-off score of 70" -- that cut-off is exactly what Florida law requires. There can be no colorable argument that a "standard error of measure" is applicable, nor can there be any other colorable argument for

[9] The WAIS-IV, which the defendant in *Johnston* claimed was the best possible test, generated a score of 72 -- Hall simply has no facts to support his claim that he is mentally retarded.

manipulation of the IQ test scores. That issue is settled.

To the extent that Hall says that some error occurred because the trial court required him to go forward with evidence of the IQ score component before presenting evidence of "adaptive functioning" or "age of onset," those complaints (pages 42-49 of the *Initial Brief*) ignore the obvious and settled requirement that a defendant seeking exemption for execution because of mental retardation **must have an IQ less than 70 in order to satisfy Florida law.** If the defendant, like Hall, cannot establish the requisite IQ score, the remaining two components of the definition of mental retardation do not matter, and cannot save the claim. Stated differently, the fact that Hall's IQ is above the cut-off score is fatal to his claim of mental retardation as a bar to execution.[10]

To the extent that Hall claims that *Johnston v. State*, 27 So. 3d 11 (Fla. 2010), requires the trial court to consider all three components of the definition of mental retardation even though it is clear that the defendant cannot establish one or more of those components, that decision does not say that, and, in fact, says nothing at all about mental retardation, *Atkins*, or any other issue that is relevant to this appeal. There is no

[10] In any event, and to the extent that it matters at all, Hall has not identified any evidence that he wanted to present that he did not put on, at least as a proffer. His complaints are hollow.

requirement that a court considering a claim of mental retardation conduct a pointless exercise by "evaluating" all three components of the definition of mental retardation when it is clear beyond doubt that the defendant cannot establish one or more of them. Such a requirement would make no sense, and would do no more than expend judicial resources to no end. Hall's IQ is above the cut-off established by Florida law, and that is the end of the issue. He is not mentally retarded as a matter of law, and is not entitled to relief of any sort.

III. THE "MOSMAN REPORT" CLAIM

On pages 49-63 of his brief, Hall complains at length that the trial court "erred by striking" Mosman's report. Evidentiary rulings are reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion."). When the true facts surrounding the Mosman report are considered, there is no basis for relief.

In addressing the issue of the Mosman report, the trial court said:

> During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant.

Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the Wechsler Adult Intelligence Scale Third Edition. Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman's report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162).

Upon the State's objection of the Defendant's attempt to introduce Dr. Mosman's report through the testimony of Dr. Prichard, the Court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence. In support of its determination, the Court found that the Defendant violated the Court's Feburary 1, 2005 Order to Compel by not providing the State with the testing materials and raw data underlying Dr. Mosman's report. (R. 162). Specifically, the Court's Order to Compel ordered the Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any and all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report. (Order dated February 1, 2005).

The Court found that the Defendant's failure to

furnish the State with the raw data and testing materials underlying Dr. Mosman's report pursuant to the Court's Order, was highly prejudicial and unfair to the State. (R. 162). Moreover, the Court determined that the prejudice and unfairness to the State could not be cured by the Defendant because Dr. Mosman was unavailable for cross-examination (Dr. Mosman was deceased), and neither the Defendant nor Dr. Prichard had the raw material that Dr. Mosman may have used in his evaluation of the Defendant. Without access to the test instrument or raw material that Dr. Mosman may have used, the State could not test the validity of Dr. Mosman's results through the use of its own hired expert. (R. 162). For these reasons, and because the Defendant failed to comply with the Court's February 1, 2005 Order to Compel, the Court excluded Dr. Mosman's report from evidence. However, the Court allowed the Defendant to proffer Dr. Mosman's report on record through Dr. Prichard's testimony.

During the course of the hearing, it became apparent that the Defendant could not provide clear and convincing evidence that would satisfy the first prong (*i.e.* significant subaverage general intellectual functioning) of its mental retardation claim. In effect, the Defendant was unable to show substantial competent evidence that indicated an I.Q score of 70 or lower. Dr. Prichard's report indicated an I.Q. score of seventy-one (71). (R. at 180). Aside from Dr. Mosman's report, the other reports that Dr. Prichard examined all revealed I.Q. scores of 71 or greater. Dr. Prichard testified that he reviewed the following reports that made record of Defendant's I.Q.: Beta Test administered by Department of Corrections in December of 1968: 76 I.Q.; Kent Test administered by Department of Corrections in January of 1979: 79 I.Q.; WAIS-R administered by Marilyn Feldman on September 10, 1986: 80 I.Q.; WAIS-R administered by Dr. Krop in March 1990: 73 I.Q.; WAIS-IV administered by Dr. Sesta on November 25, 2008: 72 I.Q.

Because the Defendant failed to provide clear and convincing evidence that would show a significant subaverage general intellectual functioning, the Defendant's claim of mental retardation under Florida Statute §921.137 and Florida Rule of Criminal Procedure 3.203, fails as a matter of law. Even if Dr.

> Mosman's report were to be admitted into evidence, it would be an aberration amid all the other I.Q. results that have a score of 71 or higher. One single I.Q. result that falls one point below 70, in contrast to all of the other I.Q. tests showing an I.Q. greater than 70, would not meet the clear and convincing evidence threshold that both the Statute and the Rule **require.**

(V4, R600-602).

As that order makes clear, Hall got the benefit of Mosman's report, such as it was, when the trial court considered and rejected it. His complaints about the exclusion of evidence are groundless, and certainly do not establish a basis for relief.

To the extent that further discussion is necessary, while it is settled that experts can rely on matters that are not otherwise admissible, an expert is not permitted to serve as no more than a conduit for hearsay, which is what Hall wanted to do in this case.[11] *Linn v. Fossum,* 946 So. 2d 1032, 1037-1038 (Fla.

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[11] As the trial court found, the experts who were alive to testify did not have the raw test data underlying Mosman's report. The trial court explained this deficiency in detail in paragraph 17 of its order:

> During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant. Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the Wechsler Adult Intelligence Scale

2006); *Carratelli v. State*, 832 So. 2d 850, 861 (Fla. 4th DCA 2002).

And, putting aside the technical issue, the fact remains that the trial court excluded the Mosman report because of Hall's discovery violation. (V4, R600-601). Hall has, understandably, left the discovery violation out of his brief. There is no basis for relief, nor is there any reason for any further proceedings -- there was no abuse of discretion in excluding the Mosman report, and, in any event, Hall got the benefit of it because the trial court considered it. This claim has no basis.

IV. THE "COLLATERAL ESTOPPEL" CLAIM

On pages 63-66 of his brief, Hall says that the trial court should not have allowed litigation of his mental retardation claim in the post-*Atkins* era because the 1991 sentencing order made reference to mental retardation as mitigation. While Hall does not acknowledge it, this claim is foreclosed by precedent.

> Third Edition. Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman' s report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162). (V4, R600).

In a case from Ohio, the United States Supreme Court disposed of this precise claim:

> In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), this Court held that the Eighth Amendment's prohibition of "cruel and unusual punishments" bars execution of mentally retarded offenders. Prior to *Atkins,* the Court had determined that mental retardation merited consideration as a mitigating factor, but did not bar imposition of the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).
>
> In 1992, nearly a decade before the Court's decision in *Atkins*, respondent Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnaping, and attempted rape of a ten-year-old boy. Instructed at the sentencing stage to weigh mitigating circumstances (including evidence of Bies' mild to borderline mental retardation) against aggravating factors (including the brutality of the crime), the jury recommended a sentence of death, which the trial court imposed. Ohio's appellate courts affirmed the conviction and sentence. The Ohio Supreme Court, in its 1996 opinion on direct review, observed that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but concluded that "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." *State v. Bies*, 74 Ohio St.3d 320, 328, 658 N.E.2d 754, 761-762.
>
> After this Court decided *Atkins*, the Ohio trial court ordered a full hearing on the question of Bies' mental capacity. The federal courts intervened, however, granting habeas relief to Bies, and ordering the vacation of his death sentence. Affirming the District Court's judgment, the Sixth Circuit reasoned that the Ohio Supreme Court, in 1996, had definitively determined, as a matter of fact, Bies' mental retardation. That finding, the Court of Appeals concluded, established Bies' "legal entitlement to a life sentence." *Bies v. Bagley*, 519 F.3d 324, 334, n. 6 (6th Cir. 2008). Therefore, the Sixth Circuit ruled, the Double Jeopardy Clause of the Federal Constitution barred any renewed inquiry into the matter of Bies' mental state.

> We reverse the judgment of the Court of Appeals. The Sixth Circuit, in common with the District Court, fundamentally misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component. [FN1] First, Bies was not "twice put in jeopardy." He was sentenced to death, and Ohio sought no further prosecution or punishment. Instead of "serial prosecutions by the government[,] this case involves serial efforts by the defendant to vacate his capital sentence." *Bies v. Bagley,* 535 F.3d 520, 531-532 (6th Cir. 2008) (Sutton, J., dissenting from denial of rehearing en banc) (internal quotation marks omitted). Further, mental retardation for purposes of *Atkins,* and mental retardation as one mitigator to be weighed against aggravators, are discrete issues. **Most grave among the Sixth Circuit's misunderstandings, issue preclusion is a plea available to prevailing parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding. The Ohio courts' recognition of Bies' mental state as a mitigating factor was hardly essential to the death sentence he received. On the contrary, the retardation evidence cut against the final judgment. Issue preclusion, in short, does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties.**
>
> > [FN1] "[R]eplac[ing] a more confusing lexicon," the term "issue preclusion," in current usage, "encompasses the doctrines [earlier called] 'collateral estoppel' and 'direct estoppel.'" *Taylor v. Sturgell*, 553 U.S. ----, ----, 128 S.Ct. 2161, 2171 n. 5, 171 L.Ed.2d 155 (2008).

Bobby v. Bies, 129 S.Ct. 2145, 2148-2149 (2009). (emphasis added). In explaining the posture of a retardation claim pre-*Atkins*, the Court said:

> Moreover, **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* and *Lott* 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, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation. See App. 65 (excerpt from prosecutor's closing argument describing as Bies' "[c]hief characteristic" his "sensitivity to any kind of frustration and his rapid tendency to get enraged"); *id.*, at 39-54 (cross-examination of Bies' expert witness designed to emphasize Bies' dangerousness to others). **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.** *See Restatement* § 28, Comment c.

Bobby v. Bies, 129 S.Ct. at 2153. (emphasis added). That decision is dispositive, and this claim by Hall deserves no further discussion.

CONCLUSION

Hall's claims for relief are apparently based on the dual claims that he is entitled to relief because the trial court did not consider all three prongs of the retardation definition, and because the court refused to apply the issue preclusion doctrine in Hall's favor. Both of those claims are squarely refuted by the record of the proceedings. Hall cannot meet the criteria for a diagnosis of retardation under Florida law, which is clear and unequivocal, as this Court most recently said in *Franqui*. Likewise, the collateral estoppel/issue preclusion claim is

meritless under United States Supreme Court precedent. The denial of relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Carol C. Rodriguez and Raheela Ahmed,** CCRC – Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this _____ day of January, 2011.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL