

IN THE SUPREME COURT OF FLORIDA

**Case No. SC10-1335
Circuit Case No. 1978-CF-0052**

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT IN AND FOR HERNANDO, COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

Carol C. Rodriguez

Florida Bar No. 0931720

Assistant CCRC

Raheela Ahmed

Florida Bar No. 0713457

Capital Collateral Regional

Counsel - Middle

3801 Corporex Park Drive, Suite 210

Tampa, Florida 33619-1136

813-740-3544

Attorneys for Appellant

Freddie Lee Hall

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Hall's motion for post-conviction relief seeking a determination of mental retardation brought pursuant to Florida Rules of Criminal Procedure 3.203 and 3.851.

Citations shall be as follows: The record on appeal from Mr. Hall's trial original trial proceedings shall be referred to as "R" followed by the appropriate volume and page numbers. The record on appeal from Mr. Hall's re-sentencing proceeding shall be referred to as "RS-ROA" followed by the appropriate volume and page numbers. The post-conviction proceedings on Mr. Hall's mental retardation claim on appeal shall be referred to as "PC-ROA, MR" followed by the appropriate volume, and page numbers. References to Mr. Hall's post-conviction Evidentiary Hearing held on December 7, 2009, regarding his mental retardation claim shall be referred to as "PC-ROA" followed by "EH" for evidentiary hearing, the appropriate volume, "T" for transcript and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Freddie Lee Hall has been sentenced to death and is on death row at Union Correctional Institution. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to present issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Hall, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	12
STANDARD OF REVIEW	13
ARGUMENT I	
THE LOWER COURT’S FINDING THAT MR. HALL IS NOT MENTALLY RETARDED IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, AND VIOLATES <i>ATKINS</i> AND THE FIFTH AND EIGHTH AND FOURTEENTH AMENDMENTS	
A. The Federal Constitution Bars The Execution of The Mentally Retarded.....	14
B. Florida R. Crim. P. 3.203.....	17
C. Intelligence (IQ) Tests.....	17
D. Assessment and Measurement of Adaptive Behavior.....	18
E. This Court has appeared to recognize that significantly sub-average generally intellectual functioning may not necessarily require an IQ score of 70 or below as an absolute requirement for a finding of mental retardation.....	23

F. Setting a bright line requirement of 70 IQ or below is inconsistent with recognized standards for determining mental retardation and unconstitutional.....25

G. In determining a person’s IQ for purposes of assessing mental retardation the standard error of measurement must be taken into account.....27

H. A majority of the scores on standardized intelligence (IQ) tests taken by Mr. Hall fall within the mental retardation range (65 to 75) established by the United States Supreme Court in *Atkins*.....30

I. Adaptive functioning deficits require proof of limitations in two or more in adaptive skill areas, which include communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure, and work.....33

J. Mr. Hall has presented substantial competent evidence regarding his adaptive deficits that cannot be ignored by the court when assessing his mental retardation claim.....42

ARGUMENT II

TRIAL COURT ERRED IN GRANTING THE STATE’S MOTION IN LIMINE AND LIMITING THE PRESENTATION OF EVIDENCE BY DEFENDANT ON THE MENTAL RETARDATION PRONGS VIOLATING MR. HALL’S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLORIDA LAW.42

ARGUMENT III

THE TRIAL COURT ERRED BY STRIKING DR. MOSMAN’S PSYCHOLOGICAL REPORT RELIED UPON DEFENSE EXPERT VIOLATING MR. HALL’S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLORIDA LAW49

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. HALL’S MOTION TO IMPOSE A LIFE SENTENCE BASED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL.63

CONCLUSION AND RELIEF SOUGHT66

CERTIFICATE OF SERVICE69

CERTIFICATE OF COMPLIANCE.....70

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	3
<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970)	3
<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S.Ct. 2242 (2002)	<i>passim</i>
<i>Bender v. State</i> , 472 So.2d 1370 (Fla. 3d DCA 1985)	59
<i>Bies v. Bagley</i> , 519 F.3d 324 (6th Cir. 1994).....	3
<i>Bobby v. Bies</i> , 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009).....	3
<i>Brown v. State</i> , 397 So. 2d 320 (Fla. 2d DCA 1981)	64
<i>Brown v. State</i> , 959 So. 2d 146 (Fla. 2007)	23
<i>Burks v. United States</i> , 437 U.S. 1 (1978)	3
<i>Burns v. State</i> , 944 So.2d 234 (Fla. 2006)	23
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	3
<i>Calhoun v. Honda Motor Co., Ltd.</i> , 738 F.2d 126 (6th Cir.1984).....	59
<i>Canakaris v. Canakaris</i> , 382 So. 2d 1197 (Fla. 1980)	14
<i>Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n</i> , 884 So.2d 1087 (Fla. 4th DCA 2004)	62
<i>Cherry v. State</i> , 959 So. 2d 702 (Fla. 2007)	23, 47
<i>City of Oldsmar v. State</i> , 790 So. 2d 1042 (Fla. 2001)	64

TABLE OF AUTHORITIES

Cases

Department of Health & Rehabilitative Services B.J.M., 656 So.2d 906 (Fla. 1995)64

Ford v. Wainwright, 477 U.S. 399 (1986)16

Foster v. State, 929 So. 2d 524 (Fla.2006)15, 24

Furman v. Georgia, 408 U.S. 238 (1972)27

Gentile v. Bauder, 718 So. 2d 781 (Fla. 1998)64

Gomez v. Couvertier, 409 So.2d 1174 (Fla. 3d DCA 1982)59

Hall v. State, 403 So. 2d. 1321 (Fla. 1981).....1

Hall v. State, 420 So. 2d 872 (Fla. 1982).....1

Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983)1

Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 2344 (1985)1

Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986), *cert. denied*, *Hall v. Dugger*, 108 S.Ct. 248 (1987)1

Hall v. Dugger, 531 So. 2d. 76 (Fla. 1988)1

Hall v. State, 541 So. 2d 1125 (Fla. 1989)1

Hall v. State, 614 So. 2d 473 (Fla. 1993).....2

Hall v. State, 742 So. 2d 225 (Fla. 1999).....2

Hill v. State, 921 So. 2d 579 (Fla. 2006)23

Horton v. W.T. Grant Co., 537 F.2d 1215 (4th Cir.1976)59

<i>Hurst v. State</i> , 18 So. 3d 975 (Fla. 2009)	14
<i>Johnston v. State</i> , 960 So.2d 757 (Fla. 2006)	13, 14, 23
<i>Johnston v. State</i> , 27 So.3d 11 (Fla. 2010).....	47
<i>Jones v. State</i> , 966 So. 2d 319 (Fla. 2007)	23
<i>Nixon v. State</i> , 2 So. 3d 137 (Fla. 2009)	23
<i>Phillips v. State</i> , 984 So. 2d 503 (Fla. 2008)	23
<i>Polk v. Ford Motor Co.</i> , 529 F.2d 259 (8th Cir. 1976), <i>cert. denied</i> 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976)	59
<i>Proffit v. State</i> , 428 U.S. 242 (1976)	27
<i>Thompson v. State</i> , 3 So. 3d 1238 (Fla. 2009)	23
<i>Sattazahn v. Pennsylvania</i> , 537 U.S. 101 (2003)	3
<i>Sikes v. Seaboard Coast Line R.R.</i> , 429 So.2d 1216 (Fla. 1st DCA 1983), <i>review denied</i> , 440 So.2d 353 (Fla.1983)	59
<i>State v. Dixon</i> , 283 So. 2d 1, 9 (Fla. 1973)	27
<i>State v. Mcbride</i> , 848 So. 2d 287 (Fla. 2003)	64
<i>Thompson v. Crawford</i> , 479 So. 2d 169 (Fla. 3d DCA 1985)	64
<i>Welty v. State</i> , 402 So.2d 1159, 1163 (Fla.1981).	62
<i>Zack v. State</i> , 911 So. 2d 1190 (Fla. 2005)	15, 23, 30

Amendments, Statutes, Rules

U.S. Const. Amend. V	3, 49, 63
----------------------------	-----------

U.S. Const. Amend. VIII	<i>passim</i>
U.S. Const. Amend. XIV	<i>passim</i>
C. Ehrhardt, Florida Evidence §704.1 (2d ed. 1984).....	59
C. Ehrhardt, Florida Evidence §705	59
<i>Fla. Stat.</i> § 921.137.....	<i>passim</i>
<i>Fla. Stat.</i> § 90.403.....	60
<i>Fla. Stat.</i> § 90.702.....	58
<i>Fla. Stat.</i> § 90.704	58, 59, 62
<i>Fla. Admin. Code R.</i> 65G-4.01(1) & (2)	17, 42, 66
<i>Fla. R. Crim. P.</i> 3.203.....	17
<i>Fla. R. Crim. P.</i> 3.203(b)	<i>passim</i>
<i>Fla. R. Crim. P.</i> 3.851.....	<i>passim</i>

Other Authorities. And Publications

AAMR Mental Retardation: <i>Definition, Classification and Systems of Support</i> 5 (9th ed. 1992) (AAMR 9th ed.)	15, 16
Alan S. Kaufman & Elizabeth O. Lichtenberger, <i>Assessing Adolescent and Adult Intelligence</i> 197 (3d ed. 2006)	27
American Association on Mental Retardation, <i>Mental Retardation: Definition, Classification, and Systems of Supports</i> 8 (Luckasson et al. eds., 10 th ed. 2002).....	<i>passim</i>

Other Authorities. And Publications

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed. 2000)15, 66, 67

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed., text rev. 2002)19, 28

AAMR, *Mental Retardation: Definition, Classification and Systems of Supports 1* (10th ed. 2002) (AAMR 10 ed.) Robert L. Schalock, *Introduction to Adaptive Behavior and its Measurements 2* (Robert L. Schalock ed. 1999).....19

James R. Thompson, et al., *Adaptive and Maladaptive Behavior Functional and Structural Characteristics, in Adaptive Behavior and its Measurements 15* (Robert L. Schalock ed., 1999)19

Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 *J. Forensic Psychology Practice*. 1 (2006)20

Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 *J. Legis.* (2003)20

Sara S. Spencer, et al. *Vineland Adaptive Behavior Scales, Second. Expanded interview Form Manual*, 2840

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Mr. Hall was tried in Putnam County in 1978. The jury found him guilty of first degree murder and recommended death. The original sentence was imposed on June 27, 1978 and affirmed in *Hall v. State*, 403 So. 2d. 1321 (Fla. 1981). A Motion To Vacate sentence was filed in September 1982, and later, this denial was affirmed in *Hall v. State*, 420 So. 2d 872 (Fla. 1982). The Federal District Court denied a Petition for Habeas Corpus. *See Hall v. Wainwright*, 565 F.Supp.1222 (M.D. Fla. 1983). The Eleventh Circuit Court of appeals affirmed in part and reversed in part, remanding for hearing. *See Hall v. Wainwright*, 733 F.2d 766 (11th Cir. 1984, cert denied, 105 S.Ct. 2344 (1985)). On remand, the Federal District court denied relief and the Circuit Court of Appeal affirmed. *Hall v. Wainwright*, 805 F.2d 945 (11th Cir. 1986), cert. denied, *Hall v. Dugger*, 108 S.Ct. 248 (1987). A State Habeas Corpus Petition was denied. *Hall v. Dugger*, 531 So. 2d. 76 (Fla. 1988). Mr. Hall appealed the Circuit Court's order denying his motion to vacate death sentence. This court held that it was reversible error to preclude defense counsel from presenting non-statutory mitigating circumstances in sentencing proceedings and remanded. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989). Following recusal by the original trial judge, re-sentencing proceedings were conducted and Mr. Hall was re-sentenced to death. On appeal following

resentencing, this court affirmed the sentence. *See Hall v. State*, 614 So. 2d 473 (Fla. 1993). Mr. Hall sought post-conviction relief following affirmance of his sentence and his motion to vacate was denied. Mr. Hall appealed to this Honorable Court who upheld the Circuit Court's decision. *See Hall v. State*, 742 So. 2d 225 (Fla. 1999). Mr. Hall filed a Federal Habeas Petition on August 7, 2000, which was administratively closed on July 11, 2001, pending the resolution of his state court proceedings.

Mr. Hall filed a motion in Circuit Court to declare *Fla. Stat.* § 921.137 Unconstitutional in light of *Atkins v. Virginia*, 122 S.Ct. 2242 (2002) (holding that execution of mentally retarded defendants is excessive and prohibited under the Eighth Amendment) as the Florida Statute did not apply retroactively to bar the execution of mentally retarded individuals such as Mr. Hall that had already been sentenced. As such, Mr. Hall asserted that the Statute was unconstitutional.

While the aforementioned motion was pending before the Circuit Court, this Honorable Court adopted *Fla. R. Crim. P.* 3.203 as a mechanism to afford defendants who had already been sentenced prior to *Atkins* an opportunity to raise claim of mental retardation. On November 30, 2004, Mr. Hall filed a timely Successor 3.851 Motion as outlined by *Fla. R. Crim. P.* but the trial court took no action on the motion.

On March 27, 2008, Mr. Hall filed a Motion To Prohibit Re-Litigation of the Mental Retardation Issue and asserted that requiring him to establish again a fact that had been found by the trial court (mental retardation) was prohibited by Collateral Estoppel and constituted a violation of the Double Jeopardy principles violating his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of Florida's Constitution. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *see Burks v. United States*, 437 U.S.1, 16 (1978); *see Arizona v. Rumsey*, 467 U.S. 203,211 (1984); *see Bullington v. Missouri*, 451 U.S. 430,445 (1981); *see Sattazahn v. Pennsylvania*, 537 U.S. 101,109 (2003). The trial court denied Mr. Hall's motion for relief. Mr. Hall appealed the trial court's non final order. Mr. Hall relied upon *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 1994) in support of his argument. The United States Supreme Court reversed and remanded in *Bobby v. Bies*, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009). The Circuit Court held an evidentiary hearing on the Defendant's Successive Motion to Vacate his sentence under Florida Rules of Criminal Procedure 3.851 and 3.203, the rule Barring Execution of the Defendant Due to Mental Retardation on December 7-8, 2009. The Circuit Court denied relief an order issued on May 26, 2010 (PC-ROA. Vol. IV, pp. 585-595) and Amended Order dated June 16, 2010. (PC- ROA. Vol. IV, pp. 596-606).

STATEMENT OF FACTS

When *Atkins v. Virginia* was decided by the U.S. Supreme Court in 2002, Mr. Hall's case was final in terms of its' procedural posture. The Defendant, Freddie Lee Hall, presented evidence that consisted of structured interviews of relatives, psychological and intelligence testing and results of medical, psychiatric and scholastic records to his sentencing court in support of his claim that he is a mentally retarded man.

Mr. Hall began school in 1951, at age 6. He failed the second grade year and guidance counselors commented on document in 1952 (age7), regarding his low mental maturity. His slow performance is documented in school records and in 1955 (age 10) he was described as "mentally retarded". The school records document Hall's continued slow performance through 1956-1958, and he was again described as "mentally retarded" in records by school counselors in 1961.

A DOC report referenced Hall as having an IQ of 68 at age 24 on August 22, 1969, Dr. Jethro Toomer (Psychologist) testified that Hall's IQ in August, 1988, was 60. In 1991, Dr. Harry Krop's (Psychologist's) administration of a WAIS-R yielded a score of 73 and in 1995, Dr. Zimmerman's (Psychologist's) administration of a WAIS yielded a 74 IQ.

In the Court's Findings of Fact For Sentencing order which was filed in open court on February 21, 1991, the judge made a factual finding that Freddie Lee Hall was mentally retarded and stated as follows:

(b) **Freddie Lee Hall has been mentally retarded his entire life.**

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.

(RS- ROA, Vol. V, p. 653).

At Hall's evidentiary hearing, Dr. Prichard testified that Hall was socially promoted, information that was corroborated by a DOC Classification report dated December 24, 1968. Mr. Hall dropped out in the 11th grade and attempted to join the military. He was rejected from military service due to very low score following his mental examination test. Hall's pre-sentence investigation report dated December 20, 1968, confirms that he functioned mentally at a low level and was socially promoted in school.

Based upon all of the evidence presented in 1991, the trial court found Hall mentally retarded but expressed in the sentencing order difficulty in the weighing of this type of mitigating evidence at sentencing. Mr. Hall informed the court that he would rely upon all of the evidence he had already submitted in the record as to his deficiencies and formally requested that the trial court take judicial notice prior evidence contained in the record in support of his claim of mental retardation.

Specifying information in ROA (Record on Appeal from Re-Sentencing Proceedings held in 1990), ROA, Vols. IV, (pp. 528-684), V (pp. 685-883), VI, (pp.884-1081), VII, (pp. 1082-1280), VIII (pp. 1281-1450), IX (pp. 1451-1637), X (pp. 1638-1693), X I (pp.1694-1878) ,XII (pp. 1879-2053), XIII, (pp. 2054-2259) be afforded judicial notice.

In support of his claim of mental retardation Mr. Hall provided at the evidentiary hearing a report dated November 19, 2001, prepared by psychologist Dr. Bill E. Mosman, which documented Hall's full scale intelligence test score at 69. According to Dr. Mosman's report, he administered a Wechsler Adult Intelligence Test - 3rd Ed. (WAIS - III) on August, 2002, and Hall scored a Verbal IQ score of 73, a Performance IQ score of 70, and a Full Scale IQ Score of 69. A Leiter Adult Intelligence Scale was administered and Hall scored a Verbal IQ score of 55, Performance SIQ score of 47. Hall's Full Scale IQ score was reported at 51 on this test. A Slosson Intelligence Test Revised was administered and results indicated that Hall functions at the mental age equivalency level of a 10 year 6 month old child. The WRAT-III was administered and results indicated general functioning consistent with a first grade child (ages 7 or 8). A Vineland Adaptive Behavior test was completed and a composite score of 51 was recorded. Based upon the testing and evaluation of Mr. Hall, Dr. Mosman concluded in his report that Mr. Freddie Lee Hall is mildly mentally retarded.

In August, 2002, Psychologist Dr. Prichard administered a Wechsler Adult Intelligence Scale-3rd Edition. Dr. Prichard testified at Hall's evidentiary hearing that he obtained a score of 71 in his testing of Hall and that the 71 score is statistically consistent with the FSIQ score of 69 as recorded nine months previously by Dr. Mosman. Dr. Prichard testified that he reviewed Dr. Mosman's report and that he relied upon it in his analysis of Mr. Hall.

Dr. Prichard testified at Hall's evidentiary hearing that it is not unusual in his profession for information regarding evaluations to be communicated between psychologists in written report format. He testified that his profession requires that any raw material data associated with psychological testing can only be released directly to another licensed psychologist. Dr. Prichard testified that he did not request and did not have the raw material data associated with Dr. Mosman's testing of Hall. He stated that Dr. Mosman is deceased.

The State orally moved the trial court to impose sanctions against defense counsel for violation of an early discovery order issued by the court based upon the Defendant's failure to provide Dr. Mosman's raw material data to the State. Defense counsel informed the trial court that Dr. Mosman's report was promptly provided to the State by Hall's previous defense counsel, but that Dr. Mosman's raw material data had never been obtained by the Defendant so no violation of the court's discovery order occurred. In view of the fact that Dr. Prichard testified that

he had never received or used the raw material data, the Defense argued that there was no unfair advantage or prejudice to the State.

No witness or evidence was presented to refute Dr. Prichard's testimony that such data can only be released between licensed psychologists. No witness or testimony was presented to refute Dr. Prichard's testimony that he never possessed this raw material data. No witness or evidence was presented to establish that the raw material data was necessary for the expert to have in order to render an opinion. The State presented no witness or evidence that this information had been requested from Defense. No expert witness or evidence was submitted to support the State's claim of prejudice.

The trial court held that Defendant's counsel had inadvertently violated an early discovery order issued by the court due their failure to provide Dr. Mosman's raw material data to the State and that the State had suffered prejudice. The Court ruled to strike Dr. Mosman's report.

Dr. Prichard testified that individuals may score low intelligence scores of 67 or 68 and not be diagnosed as mentally retarded if their adaptive skills are adequate. (PC-ROA, Vol. V, EH., T. - p. 174) Dr. Prichard testified that an individual who scores a full scale intelligence (IQ) of 71,72 or 73 and suffers significant adaptive deficits may be diagnosed as mentally retarded. Dr. Prichard testified that mental retardation is a static condition that generally shows little

change over the course of an individual's life. (PC-ROA, Vol. V. EH., T. - p. 271-272) .

Mr. Lugene Ellis, Hall's brother, testified that Mr. Hall was never able to function independently. He explained that Hall was not able to hold an independent job and worked for him as a fruit picker (PC-ROA, Vol. V. EH., T. - pp. 71). Ellis described Hall as having problems performing even the simple task of fruit picking and that he did not seem to realize what was required. (PC-ROA, Vol. V. EH., T. - pp. 71-72). He described Hall's low intelligence and difficulties in performing and understanding the simplest of tasks. Mr. Ellis explained that Hall never drove, lacked knowledge about vehicles and was even unable to complete simple instruction of filling up a tractor with oil without emptying the can. (PC-ROA, Vol. V. EH., T. - p. 74).

Mr. Ellis described Hall as unlike any of the other eleven (11) siblings in their family. (PC-ROA, Vol. V. EH., T. - p. 67). In addition to describing Hall's very abnormal behavior, he described Hall's serious speech impediments and described Hall as speaking foolishly all of the time. (PC-ROA, Vol. V. EH., T. - p. 69) Mr. Ellis described additional deficits in Hall adaptive skills as manifested by his inability to read, testified that Hall could not write and that he is currently unable to understand Hall's writing in letters that he is **currently receiving** from prison. (emphasis added) He testified that the quality of his brother's

correspondence is so poor that it is unreadable and believes no person can read it. (PC-ROA, Vol. V. EH., T. - p. 70). Freddie Lee Hall's serious speech impediments and impaired social skills are examples of his adaptive functioning deficits. (PC-ROA, Vol. V. EH., T. - pp.124-125).

Mr. Ellis testified that he still visits his incarcerated brother and described his continuing communication problems. (PC-ROA, Vol. V. EH., T. - p. 75) He described Hall's bizarre behavior when consuming food which continues to current day. (PC-ROA, Vol. V. EH., T. - p. 75) Bishop Hall testified that he has been visiting his brother throughout the last 31 plus years that he has been incarcerated. The last visit was a month ago and he stated that he may have visited approximately 3-4 times during the year. He testified to visiting UCI every time traveling through area, approximately two to four times a year. (PC-ROA, Vol. V. EH., T. - p. 94) Bishop Hall testified that he visits Freddie Hall and listens to him and he talks to him but advises that some things he talks about do not make sense. Hall's letters cannot be understood. (PC-ROA, Vol. V. EH., T. - p. 96) Bishop Hall testified that Freddie Hall cannot read. Hall quotes scripture that is not synonymous to known scripture, just what he thinks it means. (PC-ROA, Vol. V. EH., T. - p. 97)

Following invocation of the rule, Bishop James Hall, another of Hall's siblings, was called to testify at Hall's evidentiary hearing and corroborated

testimony provided by Mr. Ellis as to Hall's many adaptive deficits. Bishop Hall testified that his brother just did not function normally, and he acted very different from the other children. (PC-ROA, Vol. V. EH., T. - p. 84) He testified as to Hall's serious speech impediments. (PC-ROA, Vol. V. EH., T. p. 85)

Bishop James Hall testified that he was aware that Hall had a very low IQ in school and lacked the ability of his other siblings, that his brother could not write and did not finish school. (PC-ROA, Vol. V. EH., T. -p. 88). Although records show Hall completed 11th grade , Bishop Hall testified that Hall was just socially promoted by the school. (PC-ROA, Vol. V. EH., T. - p. 88). He testified that Hall had never lived independently (PC-ROA, Vol. V. EH., T. – p. 88) and had only held menial jobs. Bishop Hall explained that Hall had never been able to care for himself and that siblings had taken care of him. He testified that Hall was unable to bathe or look after himself and that these deficits continued through to adulthood. (PC-ROA, Vol. V. EH., T. - p. 87).

Bishop Hall described his brother as someone who was never able to read, and stated that his brother could not write anything that you could understand. (PC-ROA, Vol. V. EH., T. - p. 85) He described his Hall's bizarre pattern of writing as circular and over the course of prison visits spanning thirty odd years testified that he has never seen Freddie Hall read anything. (PC-ROA, Vol. V. EH., T. - p. 100). Bishop Hall testified that he visits his brother while incarcerated and that his

inability to read and write is the same today. Bishop Hall testified that the letters currently written by Mr. Hall which he receives from prison cannot be read, it has his name on it but he is unable to understand any of the contents in them. (PC-ROA, Vol. V. EH., T. - p. 86) Hall's letters were described as words all over the page of such poor quality that Bishop Hall testified he didn't even attempt trying to read it. (PC-ROA, Vol. V. EH., T. - p. 99) Bishop Hall also testified that Hall's conversation is not like ours, he described Hall as someone who is on another level, and that what he attempts to communicate cannot be understood. (PC-ROA, Vol. V. EH., T. - p. 86).

SUMMARY OF ARGUMENT

The Trial Court erred by failing to grant the Defendant's Motion to Impose A Life Sentence following Atkins based upon the record in 2002. The Trial court erred by failing to take judicial notice of substantial evidence which Mr. Hall presented at his 1990 re-sentencing which had resulted in a factual finding that Mr. Freddie Lee Hall is mentally retarded. The trial court abused its' discretion by failing to consider all of the evidence on this issue in spite of a motion filed by defendant for the court to take judicial notice, and abused its' discretion by ignoring the 1990 factual finding that Mr. Hall is mentally retarded. The United States Supreme Court recognized a standard error of measurement of plus or minus five points applicable to the intelligence score in accordance with the DSM-IV-TR

practice manual used by psychologists when evaluating for mental retardation diagnosis. To ensure that the constitutional right to equal protection under the law is afforded to Florida citizens, this Court must recognize the applicability of a standard error of measurement applies on intelligence tests and accept that the prohibition against imposition of a death sentence to mentally retarded individuals extends to those who score within a professionally recognized mental retardation range as opposed to a fixed arbitrary score.

The trial court erroneously applied improper criteria in assessing Mr. Hall's mental retardation by adopting the State's position that an individual with an IQ above 70, is never to be considered mentally retarded. The trial court abused its' discretion by restricting the evidence that Defendant sought to introduce on the three prongs to establish mental retardation, in spite of plain language in *Fla. Stat.* § 921.137 and *Fla. R. Crim. P. 3.203* which requires that all three prongs must be assessed.

STANDARD OF REVIEW

Argument I:

The standard of review of a trial court's finding regarding a defendant's mental retardation is whether competent, substantial evidence supports the finding. *Johnston v. State*, 960 So.2d 757 (Fla. 2006).

Arguments II, III, IV:

The standard of review for actions taken by the trial court is an Abuse of Discretion Standard.

Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

ARGUMENT I

THE LOWER COURT'S FINDING THAT MR. HALL IS NOT MENTALLY RETARDED IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, AND VIOLATES *ATKINS* AND THE FIFTH AND EIGHTH AMENDMENTS.

A. The Federal Constitution Bars The Execution Of The Mentally Retarded.

The Supreme Court of the United States held in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), that it is a violation of the Eighth Amendment of the United States Constitution to execute the mentally retarded. This Court has recognized the holding in *Atkins* and acknowledged that it represents a matter of federal constitutional law. *See Hurst v. State*, 18 So. 3d 975, 1008 n.9 (Fla. 2009); *see Phillips v. State*, 984 So. 2d 503,509 (Fla. 2008); *see Johnston v. State*, 960 So. 2d

757,760-61 (Fla. 2006); *see Foster v. State*, 929 So.2d 524,531 (Fla. 2006); & *see Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

The *Atkins* Court relied upon definitions employed by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA), which use definitions that are substantially the same.

The AAMR definition of mental retardation cited in the *Atkins* decision is as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) (AAMR 9th ed.).

The APA defines mental retardation similarly:

The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, *Diagnostic and Statistical Manual of*

Mental Disorders 41 (4th ed. 2000). This definition is often referred to as the DSM-IV-TR definition.

In 2002, the AAMR modified its definition to read:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 1(10th ed. 2002) (AAMR 10 ed.).

The Supreme Court held in *Atkins* that the execution of mentally retarded persons constituted cruel and unusual punishment in violation of the Eighth Amendment. *See Atkins*, 536 U.S. at 321. The *Atkins* Court did not define who is mentally retarded for purposes of eligibility for a death sentence but it referred generally to two definitions of mental retardation from the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA). *Id.* at 309 n.3. Clinical definitions of mental retardation typically require subaverage intellectual functioning, significant limitations in adaptive skills, and manifestation before the age of 18. *See id.* at 318. Rather than adopt a definitive meaning of mental retardation, however, the Court left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986)).

B. Florida R. Crim. P. 3.203

Following the *Atkins* ruling, this Court adopted rule 3.203 of the Florida Rules of Criminal Procedure, effective on October 1, 2004, that provides the procedure for inmates to use who seek relief pursuant to *Atkins* based upon grounds of mental retardation and the standard for determining retardation as follows:

(b) Definition of Mental Retardation. As used in this rule, the term “mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from general conception to age 18. The term “significantly subaverage general intellectual functioning,” for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code. The term “adaptive behavior” for the purpose of this rule, 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.

Fla.R.Crim. P. 3.203(b).

C. Intelligence (IQ) Tests

A wide range of standardized IQ tests have been developed over the years, many of which are now considered generally accepted within the field of psychological testing. The Wechsler scales for children and adults and the

Stanford-Binet scale are the most commonly administered and most highly respected measures of IQ. *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* 8 (Luckasson et al. eds., 10th ed. 2002) ed. at 59. Administration of either the Stanford-Binet or the Wechsler scale is appropriate for most individuals, unless they have particular characteristics such as language impairment that would influence performance on these tests. Other IQ tests have been designed to suit a variety of specific patient characteristics, including age, race and cultural background, limited verbal ability, and profound cognitive impairment.

The Wechsler Adult Intelligence Scale is in its third revision (WAIS-III). It is designed to assess intelligence as a global, multi-faceted construct. It contains verbal and perceptual-motor subtests and yields a verbal score (V), a performance score (P), and a full-scale score (FSIQ). The WAIS-III has a mean score of 100, with a standard deviation of 15. *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* 8 (Luckasson et al. eds., 10th ed. 2002) ed. at 59.

D. Assessment and Measurement of Adaptive Behavior

In addition to having substantial limitations in intellectual functioning, an individual must have significant limitations in adaptive behavior in order to be

diagnosed as mentally retarded. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2002) at 41. Adaptive behavior is included in all major classification systems and there is a professional consensus that it is an essential component of mental retardation. Robert L. Schalock, *Introduction to Adaptive Behavior and its Measurements 2* (Robert L. Schalock ed. 1999). Adaptive behavior refers to how effectively an individual can meet the demands of daily life and to what extent an individual can live independently, in comparison to what would be expected of his age group, sociocultural background, and community. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2002) at 42 ; James R. Thompson, et al., *Adaptive and Maladaptive Behavior Functional and Structural Characteristics, in Adaptive Behavior and its Measurements* 15, 16 (Robert L. Schalock ed., 1999).

For the purposes of measurement, adaptive behavior is a combination of conceptual, social, and practical skills that people learn in order to function in everyday life. *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds., 10th ed. 2002) at 14. Conceptual skills include cognitive abilities, communication, and academic skills such as language, the use of money, and self-direction. Social skills include interpersonal relationships, self-esteem, lack of gullibility, and the

ability to follow rules. *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds., 10th ed. 2002) at 42. Practical skills are independent living skills such as toileting, eating, housekeeping, transportation, and occupational skills. *Id.* at 42. Limitations in adaptive behavior may result from not knowing how to perform a skill (acquisition deficit) or not knowing when to use a learned skill (performance deficit). *Id.* at 73,74. Either type of deficit can contribute to mental retardation. *Id.* at 74. Adaptive behavioral strengths are likely to coexist with weaknesses. Precise and accurate assessment of adaptive behavior is crucial for diagnoses of mild mental retardation because in borderline cases it may well tip the scales either towards or away from a diagnosis. Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 *J. Forensic Psychology Practice*. 1, 21 (2006). Three commonly used tests to measure adaptive behavior are the Vineland Adaptive Behavior Scales, the AAMR Adaptive Behavior Scales, and the Scales of Independent Behavior. *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Support* (Luckasson et al. eds., 10th ed. 2002) at 88-90. Requiring a finding of developmental onset does not require that the diagnosis have been made before the age of eighteen or that standardized testing used to support the diagnosis have been administered before the age of eighteen. Peggy M. Tobolowsky, *Atkins*

Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution, 30 J. Legis. at 99 (2003). Such a requirement would be unconstitutional because it would amount to discrimination against people whose need for special education was overlooked and who did not have access to adequate clinical or social services as a child. The age-of-onset requirement therefore only requires that there is evidence, not necessarily test scores, that intellectual and adaptive deficits became manifest before the age of eighteen. *See Id. at 99*. There is substantial evidence in Hall's early history that supports the fact that his intellectual and adaptive deficits manifested prior to age 18. In support of his mental retardation claim, Dr. Gregory Prichard evaluated Mr. Hall and reported that he started the first grade in public school in 195, age 6, and then failed. A second grade report in 1952 by the school guidance counselor reported 7-year-old Hall's mental maturity as far below his chronological age. In 1953, 8-year-old Hall was described as very inattentive and extra slow in comprehension. In 1954, 9 year old Hall was described as slow in all his work and in 1955 when he was in the 4th grade and age 10, Mr. Hall was characterized as "Mentally Retarded" by school counselors. During his 5th grade year, Hall was again described as slow in all phases of his work and described as mentally maladjusted. In 1957 (at age 11-12), Hall was described as "Mentally Retarded". In 1958 (at age 12-13), "Mentally Retarded" and in 1961 (at age 14-15) Hall was once more described as "Mentally Retarded."

Records indicate that Hall was referred for special education but there is no evidence that he was ever provided with any special education services. (See: Transcript of Re-sentencing hearing, December, 1990, Testimony of Ms. H. Foster, Superintendent of Schools, pp. 869-873). Hall's elementary school grades were Cs, Ds and Fs, in a vast majority of classes in grades 1 through 6. In middle school, grades 7 and 8, Hall had one D and eleven Fs and in High School his grades were Ds and Fs in all classes before he dropped out in 11th grade. (ROA, Vol. VI, p. 5.) (See: Transcript of Re-sentencing hearing, December, 1990, Testimony of Ms. H. Foster, Superintendent of Schools, pp. 869-873). Hall was socially promoted, a fact corroborated by a DOC Classification and Admission Summary Report dated December 24, 1968. (ROA, Vol. VI, p. 6.) (See: Transcript of Re-sentencing hearing, December, 1990, Testimony of Ms. H. Foster, Superintendent of Schools, pp. 869-873). Freddie Lee Hall never lived independently, held menial jobs for short periods of time and was unable to manage money. In 1965 (at age 19), Hall scored low on a mental examination and was classified as 4F and rejected for military service. (ROA, Vol. VI, p. 6.) (See: Transcript of Re-sentencing hearing, December, 1990, Testimony of Ms. H. Foster, Superintendent of Schools, pp. 869-873). All of the information in Mr. Hall's school and military records show a history of low intellectual functioning and strong evidence of his mental retardation claim. Therefore, based upon the

foregoing malingering should not be suspected and it should be presumed that the onset of mental retardation in Hall's case occurred before the age of 18.

E. This Court has appeared to recognize that significantly sub-average generally intellectual functioning may not necessarily require an IQ score of 70 or below as an absolute requirement for a Finding of Mental Retardation.

The *Atkins* Court recognized that IQ scores ranging from 70 to 75 are generally considered to be the cutoff for the intellectual functioning prong of the test for mental retardation. *See Atkins*, 536 U.S. at 309 n.5. However, Mr. Hall fully acknowledges that this court has said that proof of mental retardation under *Atkins* requires a movant to demonstrate that they have an IQ of 70 or below. *See Nixon v. State*, 2 So. 3d 137,142(Fla. 2009); *see Phillips v. State*, 984 So. 2d 503,510 (Fla. 2008); *see Jones v. State*, 966 So. 2d 319,329(Fla. 2007); *see Cherry v. State*, 959 So. 2d 702,712-13 (Fla. 2007); *see Brown v. State*, 959 So. 2d 146,149 (Fla. 2007); *see Johnston v. State*, 960 So. 2d 757,781 (Fla. 2006); *see Burns v. State*, 944 So.2d 234,246 n. 12 (Fla. 2006); *see Hill v. State*, 921 So. 2d 579, 584(Fla. 2006); & *see Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

In *Thompson v. State*, 3 So. 3d 1238 (Fla. 2009), however, this Court appears to have receded from the bright line cut off and seemed to recognize that significantly subaverage generally intellectual functioning may not necessarily require an IQ score of 70 or below. In *Thompson's* motion he alleged that his IQ

was 74 or 75 before the age of 18. *See id.* at 1239 and this court reversed the trial court's summary denial and remanded for an evidentiary hearing on the mental retardation claim. In *Foster v. State*, 929 So. 2d 524 (Fla. 2006), this Court recognized the threshold of 75 as established by the United States Supreme Court in *Atkins*. In referring to Mr. Foster's IQ score this Court stated **“even if the Defendant's IQ score is considered evidence of mental retardation”** and then determined that Mr. Foster failed to meet the second prong to establish mental retardation lacking significant limitations in adaptive skills such as communications, self care, and self determination that became manifest before age 18. *See id.* at 540 (emphasis added). The *Foster* case is significant because in it this Court acknowledged that in certain cases an individual with an intelligence (IQ) score up to 75 may still be evaluated for mental retardation and found mentally retarded if significant limitations in adaptive skills exist and were evident prior to age 18.

Dr. Prichard testified that Mr. Hall scored a 71 IQ, therefore, Mr. Hall is clearly within the range to be evaluated for mental retardation. Dr. Prichard testified that Mr. Hall suffers from significant limitations in his adaptive skills. Substantial evidence exists in this record to support Dr. Prichard's testimony and Hall's claim of significant limitations in adaptive skills. Evidence in school

records, notations from teachers, and witness testimony supports a finding that these deficits manifested prior to Hall reaching age 18.

F. Setting a Bright Line Requirement of 70 IQ or Below is Inconsistent With Recognized Standards for Determining Mental Retardation And Unconstitutional.

It is necessary for this court to recede from prior cases that impose a bright line 70 IQ cut off score because it is mandated by the norms and standards established by the professional organizations in the field of mental retardation (AAMR and APA) which the United States Supreme Court relied upon in deciding *Atkins*. The AAMR (now known as AAIDD) and APA are in agreement that some individuals with scores above 70 can be mentally retarded and neither of these organizations intends for a fixed cutoff point for making a diagnosis of mental retardation. AAMR, *Mental Retardation* at 58. The AAMR (and its successor organization, the AAIDD) states that mental retardation is defined as “approximately 70 to 75.” *Id.* A recent authoritative source in this area is the 2010 edition of *Intellectual Disability* published by AAIDD (formally AAMR) which states as follows:

Determining a Cutoff Score

The significant limitations in intellectual functioning criteria for a diagnosis of ID (the term Mental Retardation has been replaced by ID/Intellectual Disability) is an IQ score of approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments’ strengths and

limitations. It is clear from this significant limitations criterion used in the Manual that AAIDD (just as the American Psychiatric Association, 2000) does not intend for a fixed cutoff point to be established for making the diagnosis of ID (Mental Retardation). Both systems (AAIDD and APA) require clinical judgment regarding how to interpret possible measurement error. Although a fixed cutoff for diagnosing an individual as having ID (Mental Retardation) is not intended and cannot be justified psychometrically, it has become operational in some states (Greenspan & Switzky, 2006). It must be stressed that the diagnosis of ID (Mental Retardation) is intended to reflect a clinical judgment rather an actuarial determination. A fixed cutoff score for ID is not psychometrically justifiable.

AAIDD, *Intellectual Disability* at 39-40 (11th ed. 2010).

Imposing a bright line requirement of 70 IQ or below is unconstitutional, and is particularly objectionable in this case, where Dr. Prichard has specifically found Hall's IQ to be 71, and testified that the difference between a score of 71 and 69 is statistically insignificant. (PC-ROA, Vol. V, EH.-T- pp. 180). In Dr. Prichard's clinical judgment Hall also has adaptive behavior deficits in communication skills, functional academic skills, and health and safety skills. Furthermore, Dr. Prichard has concluded from the consistently poor performance reported in Hall's early school records and interviews with Hall's siblings that his mental retardation manifested prior to age 18.

Adhering to a rigid formalistic assessment of mental retardation, in particular by emphasizing a myopic one-dimensional reliance on IQ scores which are by definition imprecise and indicative of a range of intellectual functioning, risks the arbitrary infliction of capital punishment prohibited by the Eighth and

Fourteenth Amendments and condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), *Proffitt v. State*, 428 U.S. 242 (1976) and *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Mr. Hall urges this Court to reconsider its' position as to imposing a bright line rule in his case as it is contrary to the position taken by the U.S. Supreme Court in *Atkins*.

G. In Determining a Person's IQ For Purposes of Assessing Mental Retardation, the Standard Error of Measurement Must be Taken Into Account.

All measurement, both physical and psychological, has some potential for error. For example, when someone's height is being measured, the result will be influenced by many factors including the particular tool being used, the eyesight of the measurer, the care taken by the measurer, and whether the person being measured is wearing shoes or slouching. Psychological testing has even greater potential for error because it is more subjective. Error may be introduced by the examiner making a timing mistake, failing to record responses, over-prompting, mishandling stimuli objects, or neglecting to repeat parts of the instructions. *See* Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 197 (3d ed. 2006). Error may also be introduced by the defendant's mood and general health, luck, or other undetermined factors. *See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds. 10th ed. 2002 at 61). In any kind of

measurement there are always tradeoffs between cost and accuracy. The standard error of measurement (SEM) helps to quantify the errors in intelligence tests in order to facilitate the most accurate interpretation and presentation of scores. *See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds., 10th ed. 2002) ed. at 57, 58. Both the AAMR (currently the AAIDD) and the APA definitions of mental retardation stress the importance of considering SEM when evaluating IQ scores. *See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds., 10th ed. 2002) ed. at 58; & *see American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed., text rev. 2002). SEM varies between measures and between age groups within each measure. Each measure is accompanied by a table of calculated SEMs by age group. Generally, SEM is estimated to be between three and five points for well-standardized IQ tests. This means that if a person were retested using the same measure, there would be a two-thirds likelihood that he would score within three or four points above or below his previous score. *See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* (Luckasson et al. eds., 10th ed. 2002) ed., at 57. Consequently, an IQ of 70 is not accurately understood as a precise score, but rather as a range of confidence with parameters of at least one SEM (meaning

scores between 66 and 74 would be expected 67% of the time) or with parameters of two SEMs (meaning scores between 62 and 78 would be expected 95% of the time). *See id.* Any score in between 67 and 75 would be consistent with the existence of mental retardation. The SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests. “Mentally retarded” means a disability . . . characterized . . . by significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning that is at least 2 standard deviations below the mean. The diagnosis of mental retardation involves clinical judgment and evaluation of all three diagnostic criteria (intellectual functioning, adaptive behavior, and age of onset. Establishing a fixed cut-off score would ignore the role of clinical judgment in the diagnosis of mental retardation. In addition to these scientific objections to using a cut-off score, such scores are also objectionable on legal grounds. Focusing on a “number” implies that the diagnosis of mental retardation is more mechanical and more objective than it really is, and tends to obscure the inevitable clinical factors that affect performance on standardized cognitive measures. These clinical factors must be taken into account in judging whether a particular person exhibits “significantly subaverage intellectual functioning,” meriting a diagnosis of mental retardation.

Ultimately, in cases on the margin, experts need to exercise their own judgment, as do judges and juries.

The 2002 AAMR System indicates that the SEM [standard error of measurement] is considered in determining the existence of significant subaverage intellectual functioning . AAMR, *Mental Retardation* at 58-59, DSM-IV-TR at 41-42 (2000). An IQ score “is most accurately understood not as a precise score but as a range of confidence with parameters of at least one SEM . . . This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation.” AAMR, *Mental Retardation* at 57.

This Court has previously rejected the application of a standard error of measurement. *See Zack v. State*, 911 So. 2d 1120 (Fla. 2005). This position is contrary to norms and standards established by the professional organizations in the field of mental retardation (AAMR and APA) which the United States Supreme Court relied upon in deciding *Atkins*. Mr. Hall urges this Court to reconsider its’ position on the standard error of measurement as it is contrary to the position taken by the United States Supreme Court in *Atkins*.

H. A majority of the Scores on standardized intelligence (IQ) tests taken by Mr. Hall fall within the mental retardation range (65 to 75) established by the United States Supreme Court in *Atkins*.

With the exception of an intelligence test administered by an unsupervised graduate student that is clearly an outlier when compared to all of Mr. Hall’s tests

results, all standardized intelligence tests which he has taken fall within the mental retardation range (65 to 75) established by the United States Supreme Court in *Atkins*. Additionally, Mr. Hall has presented substantial evidence of his significant adaptive deficits throughout his test history as summarized below:

Mental Health Evidence In Support of Mental Retardation Claim

Dates/Age of Defendant	Administrator/Tests /Records	Results
12/24/68 Age 23	Department of Corrections Beta IQ	IQ Score 76 Reading level 2.6
2/11/69 Age 23	California Achievement	Level 3.8
2/13/69 Age 23	Department of Corrections Report	4-F Military
8/22/69 Age 24	Department of Corrections Vocational Report Psychological DOC Screening Report	Adaptive Deficits Reading level 2.6
9/13/78 Age 33	Department of Corrections Confidential Evaluation DSM- Diagnosis	“borderline retardation in intellectual ability”
1/10/79 Age 33	Department of Corrections Kent IQ Test	Score 79 Borderline Intelligence Social difficulties Illiteracy Reading level 2.8
9/8/86 Age 41	Dr. Barbara Bard Woodcock Johnson Psycho-educational Battery	Severe deficits (adaptive deficits)
9/10/86 Age 41	Dr. Dorothy Lewis, M.D. NYU Medical Center Neuropsychological Evaluation (Halstead-Reitan)	Chronic Brain damage Severe learning disabled
9/10/86 Age 41	Marilyn Feldman, M.A. WAIS -R	V77, P85; FSIQ - 80 Organic Brain Damage Limited Intelligence

Dates/Age of Defendant	Administrator/Tests /Records	Results
9/15/86 Age 41	Dr. Lelie Prichep, Ph.d. NY Medical Center Neurometric Exam	Moderately Abnormal
8/22/88 Age 43	Dr. Jethro Toomer, Ph.d. Psychologist , Florida International University Revised Beta/Bender Gestalt Adaptive Behavior Evaluated DX: Mental Retardation	IQ: 60 Organic Brain Damage
10/18/90 Age 45	Dr. Johnathan Pincus, M.D. Georgetown University Hospital Neurological Exam/Evaluation	DX: Mildly Retarded
3/16/90 Age 45 1/8/91 Age 46	Dr. Harry Krop, Ph.D. Psychologist WAIS-R DX: Functional Retardation	V70, P79; FSIQ-73 Cognitive deficits Mental Age 13 years
10/6/90 Age 45	Dr. Kathleen M. Heide, Ph.D Criminologist	Cognitive deficits; Adaptive Deficits: Restricted Personality Development
5/12/95 Age 48	Dr. Mark Zimmerman, Psychologist WAIS Wide Range Assessment Woodcock Johnson Westwood Adult Scale Revised Retention Test Short category test Adaptive Functioning Evaluation DX: Mentally retarded and brain damaged. Possible psychosis.	V73, P77; FSIQ 74 Deficiencies noted Deficiencies noted Deficiencies noted Mildly Deficient Brain Damage Deficits
11/19/01 Age 51	Dr. Bill E. Mosman, Psychologist WAIS III Leiter Adult Intelligence Scale Slosson Intelligence WRAT-III Vineland	V73; P70; FSIQ- 69 V55; P47; FSIQ-52 Mental Age - 10 1st grade child Adaptive Deficits

Dates/Age of Defendant	Administrator/Tests /Records	Results
	DX: Mental Retardation	
8/14/02 Age 57 8/15/02	Dr. Gregory Prichard, Psychologist WAIS-III WRAT-III Vineland DX: Mentally Retarded	V74, P73; FSIQ-71 1st – 2d grade level Adaptive Deficits
11/25/08 Age 63	Dr. Joseph Sesta WAIS-IV IQ Testing Administration Only	FSIQ-72

I. Adaptive Functioning Deficits require proof of limitations in two or more adaptive skill areas, which include communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure, and work.

A diagnosis of mental retardation requires not only subaverage intellectual ability but also significant deficits in adaptive functioning. “*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.” DSM-IV-TR at 42. To meet this prong of the test, clinical definitions of mental retardation found in both the DSM-IV-TR and the AAMR require proof of limitations in two or more adaptive skill areas, which include communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure, and work. *See Atkins*, 536 U.S. at 309 n.3 (*quoting* AAMR 9th ed. at 5, and DSM-IV-TR at 41).

J. Mr. Hall has presented substantial competent evidence regarding his significant adaptive deficits that cannot be ignored by the court when assessing his mental retardation claim.

At Hall's resentencing in 1990 expert testimony was presented by Dr. Toomer that Hall's IQ was 60, that he suffered from organic brain damage, chronic psychosis, a speech impediment, and learning disability and was functionally illiterate with a short-term memory of a first grader. Four of the defense experts who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. The trial judge wrote that the evidence presented by Mr. Hall 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." (*See Re-Sentencing Order*) (S-ROA, pp. 650). However, the trial court did not find that he was under the influence of extreme mental or emotional disturbance. The trial court found that Mr. Hall may have lacked some ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law but could not determine to what extent he was impaired at the time of the crime. (*See: Re-Sentencing Order*) (RS-ROA, pp. 651).

As noted in the dissenting opinion by Chief Justice, Barkett with Justice Kogan, concurring, the trial court found that Hall suffered organic brain damage

and that he 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 school records reflect his mental deficiencies, and 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 v. State*, So. 2d 473, 479-480 (1993).

Mr. Hall presented testimony at the Post Conviction Evidentiary Hearing on Mental Retardation regarding his adaptive deficits. Hall's brother, Mr. Lugene Ellis testified that Mr. Hall was never able to function independently, never held an independent job, and worked for him as a fruit picker. (PC-ROA, Vol. V. EH., T. - pp. 71) He described Hall as unable to understand simple tasks and unable to understand how to even pick fruit. (PC-ROA, Vol. V. EH., T. - pp. 71-72). He described Hall's low intelligence, that Hall never drove, lacked knowledge about vehicles and did not understand the meaning of filling up a tractor with oil without emptying the can. (PC-ROA, Vol. V. EH., T. - p. 74). He described Hall as unlike any of the other 11 siblings in their family referring to Hall as acting abnormally, possessing serious speech impediments and speaking foolishly all of

the time. (PC-ROA, Vol. V. EH., T. - p. 67, 69). He testified that Hall was never able to read, and could not write. (PC-ROA, Vol. V. EH., T. - p. 70).

Mr. Ellis testified that he still visits his incarcerated brother and described Hall's serious communication problems. (PC-ROA, Vol. V. EH., T. - p. 75). He described Hall's bizarre behavior when consuming food which he observed during a recent visit. (PC-ROA, Vol. V. EH., T. - p. 75) . He testified regarding the poor quality of Hall's letters and that it is entirely unreadable and he believes no person can read it. (PC-ROA, Vol. V. EH., T. - p. 70).

Bishop Hall testified that he has been visiting his brother throughout the last 31 plus years that he has been incarcerated. The last visit was a month before the evidentiary and visited Hall 3-4 times during the year at Union Correctional Institution. (PC-ROA, Vol. V. EH., T. - p. 94). Bishop Hall testified that when Freddie Lee Hall speaks he does not make sense. Furthermore, his letters cannot be understood. (PC-ROA, Vol. V. EH., T. - p. 96). He testified that Freddie Lee Hall cannot read, and nonsensibly quotes scripture according to what he thinks it means. (PC-ROA, Vol. V. EH., T. - p. 97). Like Mr. Ellis, Bishop Hall testified that Freddie Lee Hall did not function normally, acted very differently than other siblings and suffered serious speech impediments. (PC-ROA, Vol. V. EH., T. - pp. 84- 85). Bishop James Hall testified that he was aware that Freddie Lee Hall had a very low IQ in school, lacked ability of other siblings, could not write and

did not finish school and progressed due to social promotion. (PC-ROA, Vol. V. EH., T. - p. 88).

Bishop Hall testified that Freddie Lee Hall never lived independently and only held menial jobs. (PC-ROA, Vol. V. EH., T. – p. 88) Bishop Hall testified that Freddie Lee Hall had never been able to care for himself and that his siblings had taken care of him. He testified that Freddie Lee Hall was unable to bathe or look after himself and that these deficits continued through to his adulthood. (PC-ROA, Vol. V. EH., T. - p. 87). Bishop Hall testified that he has visited Freddie Lee Hall on a continuing basis over the 30 years he has been incarcerated and has never observed him capable of reading anything and Hall is unable to write anything that can be understood. (PC-ROA, Vol. V. EH., T. - pp. 85,100) Bishop Hall testified that Freddie Lee Hall's letters have his name on it but he is unable to understand the contents whatsoever. (PC-ROA, Vol. V. EH., T. - p. 86) He described the letters as having words all over the page and of such poor quality that reading attempts are futile. (PC-ROA, Vol. V. EH., T. - p. 99) Bishop Hall testified that Hall's conversation is unlike ours, and describes Hall as someone on another level, whose attempts to communicate cannot be understood. (PC-ROA, Vol. V. EH., T. - p. 86).

The prior testimony of experts and testimony by Mr. Hall's siblings in 1990 and again at the December, 2009, Evidentiary Hearing establishes that Hall

consistently relied on others for virtually all direction of his life and daily living, including finances, healthcare, and employment. Mr. Hall relied on others to handle his money and held menial jobs which he had difficulty performing. In order to learn new tasks Mr. Hall required many repetitions, a lot of time, and continuous drill.

The fact that the onset of Mr. Hall's mental retardation occurred before age eighteen is established by the record. Freddie Lee Hall's siblings testified that he was different from all his siblings, suffered serious speech impediments and impaired social skills. They testified that he had a low IQ in school and was socially promoted before he dropped out. (PC-ROA, Vol. V. EH., T. – 88) School records label Freddie Lee Hall as "mentally retarded."

As a child, Freddie Lee Hall was slow to master hygiene, dressing, and toileting skills, and his older siblings had to help teach him how to dress and groom. Hall's siblings did all the cooking, cleaning, and laundering. Others managed Hall's money. The court records and interviews with Hall and his siblings substantiate his poor self-direction as a child and later as an adult and the fact that he could not live independently. Testimony by both of Hall's siblings regarding his low IQ, difficulties in school, serious speech impediments and impaired social skills establish the fact that Freddie Lee Hall had serious adaptive functioning deficits which manifested early in his life.

Freddie Lee Hall's pre-sentence investigation report (PSI) dated December 20, 1968 states that he functions mentally at a low level and states that he was socially promoted in school. A DOC Classification report dated December 24, 1968 confirmed that Hall was socially promoted. DOC records dated February 13, 1969 showed that Freddie Lee Hall was rejected by military due to a very low score on his mental examination test. The aforementioned PSI and DOC reports provide information concerning Mr. Hall at age 23 and 24, due to the fact that these reports were compiled within 5-6 years of the age 18 cutoff they strongly corroborate Mr. Hall's claim that the onset of his sub-average intellectual functioning manifested before he was 18.

The tenth edition of the AAMR revised the definition to require proof of limitations in adaptive behavior as expressed in "conceptual, social, and practical adaptive skills." The AAMR indicates that its Terminology and Classification Committee made this change because of a lack of a single standardized measure of adaptive behavior that measures all of the original skills. AAMR 10th ed. at 81. The Vineland Test is a recognized and acceptable test that is used by psychologist to measure an individual's adaptive behavior.

The authors of the Vineland test expressly state that retrospective interviews to obtain information about a subject's behavior at an earlier age is permissible in certain circumstances, including when the subject is in a restricted environment,

such as prison, and there is a question about the subject's adaptive functioning before coming to that environment. *See* Sara S. Spencer, et al. *Vineland Adaptive Behavior Scales, Second. Expanded interview Form Manual*, 28 (emphasis added).

The AAMR 10th edition recommends that because the adaptive functioning assessment typically takes the form of interviewing third-parties, the respondent should be someone who is well acquainted with the subject's behavior over an extended period, such as a parent, teacher, or direct-service provider. *See AAMR* 10th ed. at 85. Following a review of all of the underlying records, Dr. Prichard completed a Vineland to assess Hall's adaptive functioning and interviewed siblings, Lugene Ellis and Bishop James Hall sources very familiar with Hall who testified at the evidentiary hearing. Dr. Prichard concluded that Freddie Lee Hall suffers significant adaptive functioning deficits and that these deficits manifested prior to age 18.

Hall's siblings provided information to Dr. Prichard regarding Hall's early development difficulties in order to properly establish the onset component for a finding of mental retardation. In addition, these witnesses also informed Dr. Prichard and gave testimony at the Evidentiary Hearing regarding unusual behavior which they recently observed during their visits at Union Correctional Institution with Freddie Lee Hall. They testified that Mr. Hall today is still unable to read or write. Hall's siblings described very unusual and illegible letters which

they currently receive any time that Freddie Lee Hall attempts to correspond by letter with them. This testimony is proof that Freddie Lee Hall continues to suffer current limitations in adaptive behavior as expressed in conceptual, social, practical adaptive skills as defined in the tenth edition of the AAMR 10th ed. Revised at 81.

The trial court acknowledged that the testimony provided by Hall's siblings was relevant to the onset prong (prior to age 18) but found it to be insufficient. The court did not weigh substantial evidence on Hall's serious adaptive deficits that is in the record and as requested in the Defendant's Motion for Judicial Review. The trial court entirely overlooked the testimony given by Lugene Ellis and Bishop James Hall regarding Mr. Hall's current adaptive deficits in communications and inappropriate behavior and erred in finding that no evidence as to current adaptive deficits had been offered. Mr. Freddie Lee Hall offered substantial and uncontroverted evidence regarding many adaptive deficits at his 1990 re-sentencing. In 1990, the court found sufficient credible evidence as to Hall's sub-average intelligence and adaptive deficits to make a factual finding that Hall was mentally retarded and this condition had been lifelong in duration. The trial court's finding that Mr. Hall has now failed to meet his burden of proof as to adaptive deficits is not supported by the record, and is contrary to prior findings on the same issue.

ARGUMENT II

TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE AND LIMITING THE PRESENTATION OF EVIDENCE BY DEFENDANT ON THE MENTAL RETARDATION PRONGS VIOLATING MR. HALL'S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLORIDA LAW.

Following the United States Supreme Court's decision in *Atkins*, the State of Florida enacted Fla. Rule 3.203. Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty. The rule provides in pertinent part as follows:

(a) Scope. This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant's mental retardation becomes an issue.

(b) Definition of Mental Retardation. As used in this rule, 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 rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, 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.

(c) Motion for Determination of Mental Retardation as a Bar to Execution: Contents; Procedures.

(1) A defendant who intends to raise mental retardation as a bar to execution shall file a written motion to establish mental retardation as a bar to execution with the court.

(2) The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(3) If the defendant has not been tested, evaluated, or examined by one or more experts, the motion shall state that fact and the court shall appoint two experts who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(4) Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts.

(5) If the defendant refuses to be examined or fully cooperate with the court appointed experts or the state's expert, the court may, in the court's discretion:

(A) order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

(B) prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's mental retardation; or

(C) order such relief as the court determines to be appropriate.

(d) Time for filing Motion for Determination of Mental Retardation as a Bar to Execution. The motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or at such time as is ordered by the court.

(e) Hearing on Motion to Determine Mental Retardation. The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is mentally retarded as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

Fla. R. Crim. P. 3.203.

Fla. R. Crim. P. 3.203 (c)(2) requires that the Defendant file a Successor 3.851 Motion in order to seek an evidentiary hearing on the question of mental retardation. Mr. Hall filed the required Motion on November 4, 2004. (PC.ROA, Vol. I, pp.1-18). *Fla. R. Crim. P. 3.203* does not state that the prongs must be established in any particular order. In fact, the rule provides that at an evidentiary hearing on a motion for determination of mental retardation the court may consider not only the findings of the experts but also **all other evidence on the issue of whether the defendant is mentally retarded.** (emphasis added). The rule does not constrain a Defendant's ability to present evidence but actually permits a Defendant to present all other evidence available on the issue.

Dr. Prichard testified that he has evaluated an individual with an IQ below 70 and yet found that they were not mentally retarded. If an individual's ability to function independently in society are not impaired, even though they score an IQ of 67 or 68 they are not mentally retarded. He testified that when measuring IQ it is an estimate, and an error measurement of plus or minus four must be considered to determine where an individual's true IQ score falls within a range. (PC-ROA, Vol.V.- EH.- T. p.174).

The Trial Court Erred by Granting the State's Motion In Limine

The State filed a Motion in Limine to restrict the Defendant's presentation of evidence which was received by the Defendant a day before the evidentiary hearing. The State sought to control the presentation of evidence via its' Motion in Limine which sought to compel the Defendant to submit evidence regarding the intelligence prong at the outset of the hearing to establish the required sub - average intellectual functioning for a mental retardation diagnosis . If the Defendant did not meet the intelligence prong (via the bright line cut off score of 70), the State sought to prevent the Defendant from introducing any other evidence at the evidentiary hearing relative to the second prong (adaptive deficits) or the third prong (evidence of mental retardation's onset prior to age 18). (PC-ROA, Vol. I, p.184-189).

The trial court granted the State's Motion in Limine. (PC-ROA, Vol.V.-EH.- T. p 162). Due to the late filing of the State's Motion In Limine, the order of witnesses had been predetermined by the defense for presentation of evidence in accordance with *Fla. R. Crim. P. 3.203 (b)* as to all three prongs for determination of mental retardation, (1) significantly subaverage general intellectual functioning existing concurrently with (2) deficits in adaptive behavior and (3) manifested during the period from conception to age 18. Based on the foregoing, the court allowed the Defendant to proffer evidence on prongs (2) and (3) via witnesses scheduled to appear. The court's restriction upon Defendant's case adversely affected Defendant's ability to present substantive evidence as to his adaptive deficits and onset criteria.

Dr. Gregory Prichard testified at Hall's evidentiary hearing that an individual who scores 67 or 68 may have adequate adaptive skills and not be diagnosed as mentally retarded. Conversely, he stated that someone who scores at 71, 72 or 73 may suffer significant deficits and may be diagnosed as mentally retarded. (PC-ROA, Vol. V, EH., T. p. 174). Judge Tombrink is familiar with Mr. Hall's deficits, he is aware that teachers noted on Hall's early report cards (prior to age 18) that Hall is mentally retarded. When the Judge resentenced Hall in 1991, he made the factual finding that Hall is mentally retarded and has been so

throughout his life. However, in 2009, the Judge applied the strict cut off which the State urged applied pursuant to *Cherry v. State*. 959 So. 2d. 702 (Fla. 2007).

The court adopted the State's assertion that under the law, if an IQ is above 70, a person is not mentally retarded. (PC-ROA, Vol.V.- EH.- T. p 172). The judge ignored Dr. Prichard's expert opinion that an IQ score alone does not establish mental retardation. (PC-ROA, Vol.V.- EH.- T. p 174). The court erroneously granted the State's motion which restricted the Defendant's presentation of evidence on adaptive deficits and onset prongs in spite of the fact that the language in *Fla. Stat. § 921.137* and *Fla. R. Crim. P. 3.203* clearly state that all 3 prongs must be assessed.

In *Foster v. State*, 929 So. 2d 524 (2006), this Court remanded for evidentiary hearing where the Defendant demonstrated a colorable *Atkins* claim. Experts placed Foster's Intelligence at 75 and unlike Hall no notations from teachers as to mental disabilities were noted in his records. The approach used by the lower court in this case was rejected by this Honorable Court in *Johnston v. State*, 27 So.3d 11 (Fla. 2010) (Johnston's case remanded for a full evidentiary hearing when the trial court decided that it was not necessary to conduct an evidentiary to consider evidence as to the onset or adaptive functioning prongs when the Defendant had failed to meet the Intelligence prong).

In Written Closing Arguments filed in March, 2010, the State requested that the trial court ignore its' prior ruling granting the State's Motion In Limine at the beginning of Hall's evidentiary hearing and requested that the court make findings as to all three prongs. The State advised the court that making findings as to the three prongs was necessary, "in the interest of protecting the integrity of the Court's ruling." (PC-ROA, Vol. IV, p. 582). In view of the State's new position, Mr. Hall requested in his Rebuttal Closing that the trial court afford him opportunity to supplement the evidence record at a hearing before a final determination was made as to his mental retardation claim. (PC-ROA, Vol. IV, p. 582; *See* Defendant's Rebuttal Closing Argument). However, no further hearings were held before the court issued its' order finding that Mr. Hall was not mentally retarded. (PC-ROA, Vol. IV, p. 596-606; *See*: Amended Order Denying defendant Successive Motion Under Fla. R. Crim. P. 3.851 and 3.203 Barring Execution of the Defendant Due to Mental Retardation).

The trial court did not understand that all of the components must be evaluated in order for a diagnosis of mental retardation to be rendered. The trial court's decision to restrict the Defendant's presentation of evidence as to adaptive functioning and onset prongs during his evidentiary hearing to establish his mental retardation claim was error. Due to the overlapping features of the three prongs that must be met: intelligence, onset and adaptive deficits the court's decision

prevented Mr. Hall from the opportunity to fully present his case. The court's action resulted in a violation of Mr. Hall's rights under the Fifth and Fourteenth Amendments of the United States Constitution and corresponding Florida law.

ARGUMENT III

THE TRIAL COURT ERRED BY STRIKING DR. MOSMAN'S PSYCHOLOGICAL REPORT RELIED UPON DEFENSE EXPERT VIOLATING MR. HALL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLORIDA LAW.

Dr. Prichard reviewed a vast amount of information and reports relating to Mr. Hall's mental health issues. Among Dr. Prichard reviewed a report that was generated by a Dr. Mosman which was prepared on November 19, 2001. The report prepared by Dr. Mosman was a comprehensive 17 page report, and also included a 4 page forensic analysis and timeline. (See: Exhibit "G" (Proffer Only); PC.ROA, Vol. IV, p. 500-523).

In the Court's Amended Order Denying Defendant's successive Motion Under Florida Rules Of Criminal Procedure 3.851 and 3.203, Barring Execution Of The Defendant Due To Mental Retardation dated June 16, 2010, trial court found that Dr. Mosman's report lacked discussion as to the testing instrument used, how it was used in evaluating the defendant, lacked discussion regarding the raw data compiled or other notes. (PC.ROA, Vol. IV, p. 600).

The Court's conclusions regarding deficiencies in Dr. Mosman's report are not supported by the record as evidenced by the following summarization of Dr. Mosman's report as follows:

It is "[A] forensic evaluation to assist in the determination of whether or not Mr. Hall is mentally retarded within the meaning of *Fla. Stat.* § 921.137."

That it is Dr. Mosman's opinion "within a reasonable degree of clinical certainty that Mr. Hall is, in fact, mentally retarded within the meaning of *Fla. Stat.* § 921.137."

"That Mr. Hall does have significantly subaverage general intellectual functioning which existed concurrently with deficits in adaptive behavior and manifested during his developmental period, conception to age 18."

That "Mr. Hall's intellectual performance is two or more standard deviations from the mean score on standardized intellectual tests as determined by instruments specified by the rules of the Department of children and Family Services."

That "the Department of Children and Family Services HRS Regulation 160-2D, Chapter 3, outlines in detail the intellectual and adaptive instruments which are provided for the determination of mental retardation in the State of Florida."

That "the intellectual assessment shall be done with the Stanford Binet, The Weschler, or the Leiter."

That "Adaptive levels of functioning shall be assessed using the Vineland Adaptive Behavior Scales."

That "the intellectual and adaptive deficits occurred and had an onset during Mr. Hall's developmental period (from conception to age 18) and have continued throughout his life as would be expected of an individual suffering from mental retardation."

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, pp. 501-502).

Dr. Mosman reported that in performing the evaluation of Mr. Hall he was required to obtain familiarity with legal developments and forensic issues and used the following resources:

Ethical Guidelines For the Practice Of forensic Psychiatry, *American Academy Of Psychiatry And The Law*, May 1987, revised October 1991 and the Specialty Guidelines for Forensic Psychologists, *Law and Human Behavior*, 1991.

Committee on Ethical Guidelines for Forensic Psychologists, Specialty Guidelines for Forensic Psychologists, *Law and Human Behavior*, 1991. Guideline III. Competence and guideline VI, Methods and Procedures.

Melton, G.B., Petrila, J., Poythress, N.G. & Slobogin, C., (1987). Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals And Lawyers.

Donald Bersoff, Jane Goodman-Delahunty, J. Thomas Grisso, Valerie Hans, Norman Poythress, Jr., and Ronald Roesch. 1997. Training in Law and Psychology. *American Psychologist*.

David Shapiro, July 1999. The Forensic Practice. *The Florida Psychologist*.

Weiner, I.B. and Hess, A.K. (1987). Handbook of Forensic Psychology. Guideline VI.F. Public and Professional Communications. Nirbhay N. Singh, 1995, Moving Beyond Institutional Care for Individuals with Developmental Disabilities, *Journal of Child and Family Studies*.

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.502).

Dr. Mosman reported general historical information regarding deficits of Freddie Lee Hall as follows:

“The records indicate that there were sufficient prenatal deficits and Hall and his siblings were exposed to severe violence, torture, victimization, and impoverishment and could be described at a minimum.”

“Exposure to those developmental experiences are in and of themselves known to produce significant adjustment difficulties, Hall has very low intellectual abilities mental retardation and mental illness permeate his entire history.”

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.503).

Dr. Mosman reported historical testing information regarding Hall as follows:

Hall failed first grade and was reported with mental maturity far below chronological age, Hall was very inattentive and extra slow in comprehension in second grade. Slow in all work in 3rd grade (1954) and reported as mentally retarded in 4th grade (1955) with mental age equivalent of 8 years and 10 month old child. In 5th grade (1956) Hall was slow in all phases of work and reported as mentally unadjusted. In 1958, reported as mentally retarded and in 8th grade (1959) reported as mentally retarded and referred for special education or special teacher services. Progress notes reported Hall 21 of 21 with 7 F’s, and 4 D’s.

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.504).

During Hall’s developmental period he was described as being childlike, couldn’t understand, very late in developing speech, unable to read or write although younger sister tried to help him. Records indicate that Hall mentally did not function like other children and was socially promoted to remain eligible to play football. Hall was drafted and was rejected after obtaining very low scores on mental examinations as confirmed by Draft Board Clerk, Ms. Hawkins.

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.504).

Lake Butler Classification and Admissions Testing on December 24, 1968 shows Hall lacks ability to reason logically, reading at 2.6 grade level (equivalent to 8 or 9 year old child) and scoring 76 IQ on a Beta. At 24 years of age, Hall recorded reading level at 3.8 or equivalent to a 9 to 10 year old child in 1969. On July 13, 1978, psychologist Moore recorded a Kent IQ score of 79 and reading level of 2.8.

(See: Exhibit "G" (Proffer Only); PC.ROA, Vol. IV, p.505).

On September 13, 1978, a confidential evaluation within the Department of corrections reported Hall "would be considered Borderline Retardation in Intellectual Ability." Dr. Mosman reported Borderline Retardation as an Official Diagnosis I the DSM and consistent with existing Florida Statutes on Mental Retardation.

(See: Exhibit "G" (Proffer Only); PC.ROA, Vol. IV, p.505).

On Sept. 8, 1986, Dr. Bard did wide range testing and concluded Hall's scores were equal to a 6 to 11 year old child and cognitive process and functioning was reported between 0 and 4.7 grade in all areas. Dr. Richardson, neuropsychologist determined Mr. Hall had severe brain impairment, Dr. Pincus, a neurologist reported on August 22, 1988, and stated that he suspected mental retardation and brain damage. Dr. Dorothy Lewis, psychiatrist evaluated Hall on September 10, 1986 and concluded that he suffered brain damage and psychosis with onset in childhood. Student M. Feldman tested Hall on the same date on a WAIS-R obtaining a VIQ of 77, PIQ of 85, and FSIQ of 80.

(See: Exhibit "G" (Proffer Only); PC.ROA, Vol. IV, p.503, 506).

On Sept. 15, 1986, Dr. Princep's EEG of Hall determined moderately abnormal brain tracing, indicative of abnormal brain functioning. August 21, 1988, Dr. Barnard provided affidavit finding Hall possessing significant mental and emotional deficits. August 22, 1986, Dr. Toomer obtained a Beta score of less than 60 and noted organic brain damage. On Sept. 7, 1990, Dr. Heide reported significant mental and emotional abnormalities. On Dec. 5, 1990, Dr. Pincus determined that Hall has generalized brain damage with special difficulty in right hemisphere and co-existing thought disorder

(mental illness). Dr. Toomer testified that Freddie Lee Hall was mentally retarded in testimony at resentencing hearing on December 14, 1990. Dr. Krop tested Hall on Jan. 8, 1991; He scored VIQ 70, PIQ 79, and FSIQ 73 on a WAIS-R.

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.506).

Dr. Mosman reported as to his evaluation of Mr. Hall which was requested by counsel following the enactment of Florida Statute 921.137 in June, 2001.

Dr. Mosman reported that Hall had difficulty with short and long term memory that has been reported consistently for many years. (See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.507).

In his report, Dr. Mosman reported that the instruments used to assess Mr. Hall’s intellectual functioning, the Wechsler and Leiter are specifically listed as approved instruments in the Department of Children and Family Rules as appropriate and acceptable for determination of mental retardation. He reported using the Vineland Adaptive Behavior Scales as it is the approved instrument for the formal assessment of adaptive functioning in the rule. (See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.507).

Dr. Mosman reported the following results for Hall’s Wechsler Adult Intelligence Scale Test-III as follows:

Verbal IQ 73	Performance IQ 70	Full Scale IQ 69
Vocabulary 5	Picture Completion 4	
Similarities 8	Digit Symbol 5	
Arithmetic 5	Block Design 7	

Digit Span	7	Matrix Reas.	6
Information	5	Picture Arr.	4
Comprehension	3	Symbol Search	3
L-N Sequencing	3		

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, pp.508).

Dr. Mosman reported Hall’s scores on the Wechsler Adult Intelligence Scale Test-III, Verbal IQ 73, Performance IQ 70 and Full Scale IQ at 69. The score places Hall more than two standard deviations below the mean and within the Mentally Retarded Range for both current clinical diagnostic manual and relevant Fla. Stat. 921.137.

Dr. Mosman report described that Hall’s subtest scores had some variability (as most persons tested would show) but that there are no statistical differences in the variability between any of the subtest scores and average of the Verbal mean, 5.5, Performance Mean, 5.2, and or Full Scale Mean, 5.36. According to Dr. Mosman’s report this information indicates that Mr. Hall’s “general level of intellectual functioning” is that of a mentally retarded person. (emphasis added) (See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.508).

Dr. Mosman’s report provided a Diagnostic Discussion: DSM-IV-TR as follows:

Axis I	315.00	Reading Disorder
	315.1	Mathematics Disorder
	315.2	Disorder of Written Expression

- 295.90 Schizophrenia, Undifferentiated Type, in partial remission and fairly well-controlled with medication. Medication re-evaluation suggested.
- 995.54 Physical abuse as a child
- 995.52 Neglect as a child
- Axis II 317 Mild Mental Retardation. Hall could be alternatively Diagnosed as having 318.0 Moderate Mental Retardation. However, I believe that 317 is the less intrusive and more conservative diagnoses.
- Axis III Chronic historic anecdotal, testing, and neurological assessment data confirming the presence of organic brain damage.

DISCUSSION (by Dr. Mosman):

It is my opinion well within a reasonable degree of clinical certainty that the primary mental disorder/disability that Mr. Hall **has is Mental Retardation which, by definition, existed during childhood, his developmental years, and manifested with then existing concurrent deficits in adaptive functioning and measured sub-average levels of intellectual functioning.**

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.509) (emphasis added).

Freddie has a coexisting mental illness, Schizophrenia, chronic Undifferentiated type. But that has been secondary. The Vineland differentiates between mental retardation and psychosis

(See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.509).

Dr. Mosman reported that he formally assessed Mr. Hall’s adaptive functioning by administering a Vineland Behavior Adaptive Scales. Mr. Hall received A Communications Score of 40, a Daily Living Domain Standard Score of 56, and a Socialization Domain Standard Score of 71. The Adaptive Behavior

Composite Standard Score is 51. Dr. Mosman reported that these scores reveal that Mr. Hall not only has difficulties in receptive and expressive language but he has even more serious and severe difficulties in written language as of communications. In the areas of Daily Living Skills, Mr. Hall has severe deficits in both Community and Domestic areas of functioning with mild to moderate deficits in the areas of Personal Functioning. The Socialization Domain, as measured notes across the board deficits in Interpersonal Relationships, Coping Skills, and time structuring. The Composite Score is equal to a Standard Score of 51, which is over 3 standard deviations lower than what would be expected or seen in a non-retarded individual. (See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.510).

The Leiter Adult Intelligence Scale is a test was administered and stated in Mosman’s report as often used as a confirmatory tool in the assessment of mental retardation under the Florida’s Statutory scheme. Dr. Mosman’s report stated that Mr. Hall received a **Verbal IQ of 55, a Performance IQ of 47, and a Full Scale IQ of 52**. According to Dr. Mosman’s report, these scores are lower than the WAIS because this test specifically taps into processing and analytical functioning. (See: Exhibit “G” (Proffer Only); PC.ROA, Vol. IV, p.511).

Dr. Mosman evaluated Mr. Hall in 2001 before *Atkins* was decided and

prior to enactment of *Fla. R. Crim. P. 3.203* in 2004. Dr. Gregory Prichard was retained by counsel and prepared a report titled “Confidential Assessment” on February 3, 2003, for the purpose of filing a Successive Motion Pursuant to *Fla. R. Crim. P. 3.851* and *3.203* to establish Hall’s mental retardation claim. A copy of Dr. Mosman’s detailed report was provided to the State in compliance with the Court’s order dated February 1, 2005, and the report was reviewed by the State’s expert, Dr. Harry McClaren. (PC-ROA, Vol. I, pp. 61-63; & PC-ROA, Vol. V, Deposition of Dr. McClaren, September 10, 2009).

The comprehensive report prepared by Dr. Mosman detailed the sources, reports, and tests that were relied upon in conducting his evaluation. The report also included the results of the sub tests in addition to data regarding the composite scores. Dr. Mosman also incorporated information as to the analysis he undertook to evaluate Mr. Hall and specified the diagnostic codes applicable to each diagnosis.

Fla. Stat. § 90.702, Testimony by Experts, **provides as follows:**

that if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion.

Furthermore, Fla. Stat. §90.704, Basis of opinion testimony by Experts provides as follows:

that, the facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

An expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject. *See Bender v. State*, 472 So.2d 1370 (Fla. 3d DCA 1985); *see Sikes v. Seaboard Coast Line R.R.*, 429 So.2d 1216, 1222 (Fla. 1st DCA), *review denied*, 440 So.2d 353 (Fla.1983); & *see Gomez v. Couvertier*, 409 So.2d 1174 (Fla. 3d DCA 1982). § 90.704, *Fla.Stat.* (1985) provides that the witness may not serve merely as a conduit for the presentation of inadmissible evidence. *See Sikes*, 429 So.2d at 1222-23; *see McGhan Medical Reports Div. v. Brown*, 475 So.2d 994, 998 (Fla. 1st DCA 1985); & *see generally* C. Ehrhardt, *Florida Evidence* § 704.1 at 414 (2d ed. 1984). It is true that relevant testimony from a qualified expert is admissible only if the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation. *See Horton v. W.T. Grant Co.*, 537 F.2d 1215, 1218 (4th Cir.1976); *see Calhoun v. Honda Motor Co., Ltd.*, 738 F.2d 126, 132 (6th Cir.1984); *see Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir.), *cert. denied* 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976); & *see Fed.R.Evid.* 705. However, absolute certainty is not required.

At Hall's evidentiary hearing held on December 7, 2009, Dr. Prichard, Ph.D. testified that one of the reports he reviewed and relied upon was the one prepared by Dr. Mosman, Ph.D. in 2001. However, he testified that he independently evaluated Mr. Hall and had access to the same information referenced by Dr. Mosman in his report.

The State conceded that the rules of evidence would ordinarily allow Dr. Prichard to testify about another experts report but objected to Dr. Prichard's testifying about Dr. Mosman's report citing *Fla.Stat.* § 90.403. The State argued that they did not have the raw data, no test instruments or any of Dr. Mosman's notes and that due to Mosman's death, it was patently unfair to allow Dr. Prichard to testify based upon another expert's work or rely on an opinion of this nature. The State argued that the prejudice far exceeded any probative value. (PC-ROA, Vol. V, EH.-T- pp. 142). *Fla.Stat.* § 90.403, Exclusion on Grounds of Prejudice or Confusion, states as follows:

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

The Court sustained the State's objection but permitted Defendant to proffer Dr. Prichard's testimony regarding Dr. Mosman's report. (PC-ROA, Vol. V, EH.-T- pp. 179). In proffered testimony, Dr. Prichard stated that Dr. Mosman administered a WAIS, Wechsler Adult Intelligence Scale-Third Edition and that

Mr. Hall obtained a full scale IQ score of 69. (PC-ROA, Vol. V, EH.-T- pp. 179-80). Dr. Prichard testified that his evaluation of Hall which resulted in a full scale intelligence (IQ) score of 71 is essentially identical to the full scale intelligence (IQ) score of 69 reported by Dr. Mosman. Dr. Prichard stated that “statistically it is not even close to being different, so essentially (his score and Dr. Mosman’s) are identical scores.” (PC-ROA, Vol. V, EH.-T- pp. 180).

Nothing in Dr. Mosman’s report caused Dr. Prichard concern regarding the test administration or the specific findings communicated therein. Furthermore, Dr. Prichard opined that Dr. Mosman was competent based upon his reading of the lengthy report prepared in Hall’s case. (PC-ROA, Vol. V, EH.-T- pp. 179-180). The State offered no evidence to rebut Dr. Prichard’s testimony that Dr. Prichard and Mosman’s intelligence test scores are statistically identical. Therefore, reliance by Dr. Prichard on another expert’s report (Dr. Mosman’s) which reports a statistically identical score cannot be deemed unfairly prejudicial as claimed by the State. The trial court’s conclusion regarding prejudice is not supported by the evidence.

On February 1, 2005, the trial court entered an order directing Defense counsel to provide test instruments and raw material data used by Dr. Prichard in Hall’s case to the State. (PC-ROA, Vol. I, p. 60). The State argued that they did not have the raw data, and no test instruments used by Dr. Mosman although

defense counsel had been ordered in the 2005 Order to provide them. (PC-ROA, Vol. V, EH.-T- pp. 156).

Defendant argued that Dr. Prichard was entitled to rely upon inadmissible evidence in the form of an opinion as provided by Fla. Stat. §90.704. The trial judge, however, determined that a violation of the court's order had occurred but deemed it inadvertent (defense expert, Dr. Prichard and defense counsel never possessed copies of Dr. Mosman's test instruments or his raw material data). (PC-ROA, Vol. V, EH.-T- pp. 162). The judge determined that the fact that these materials were not provided to the State was in and of itself grossly unfair and prejudicial and ruled to exclude Dr. Mosman's report.

The court stated in its' order denying Hall's mental retardation claim that Dr. Mosman's report was excluded due to the fact that it did not constitute competent evidence, however, this conclusion is not supported by competent and substantial evidence in the record. (PC-ROA, Vol. V, EH.-T- pp. 162).

A trial court's decision to exclude evidence is reviewed for abuse of discretion. *See Welty v. State*, 402 So.2d 1159, 1163 (Fla.1981). While a trial judge has broad discretion to exclude evidence proffered by the defense, this discretion is not unlimited. *See Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n*, 884 So.2d 1087, 1093 (Fla. 4th DCA 2004).

In the trial court's order denying Hall relief on his mental retardation claim, the trial court referred to dr. Mosman's report as "an aberration amid all the other IQ results that have a score of 71 or higher." (PC-ROA, Vol. IV, p. 602). Although the Defendant filed a Motion for Judicial Notice as to abundant evidence related to his sub-average intellectual functioning and his lifelong adaptive deficits, the court did not acknowledge the existence of any of the prior evidence presented in support of Hall's low IQ (Dr. Toomer's report of 60 FSIQ in 1988) or indicate that it had assigned any weight to prior evidence that had previously establish a factual finding of mental retardation as a non-statutory mitigating factor. The court's limitation on Hall's presentation of evidence and failure to acknowledge competent and substantial evidence relevant to Hall's mental retardation claim is an abuse of discretion and denied Mr. Hall a fair evidentiary hearing. As a result, his rights under the 5th, 8th and 14th Amendments to the United States Constitution were violated. Mr. Hall respectfully requests that this court remand this case for an evidentiary hearing to be conducted on his mental retardation claim in accordance with the governing law.

ARGUMENT IV

**THE LOWER COURT ERRED IN DENYING MR. HALL'S
MOTION TO IMPOSE A LIFE SENTENCE BASED UPON
THE DOCTRINE OF COLLATERAL ESTOPPEL.**

The judicial doctrine of Collateral Estoppel prevents identical Parties from relitigating the same issues that have already been decided. *See State v. McBride*, 848 So. 2d 287 (Fla. 2003); *see Thompson v. Crawford*, 479 So. 2d 169 (Fla. 3d DCA 1985); *see Brown v. State*, 397 So. 2d 320 (Fla. 2d DCA 1981); *see Department of Health & Rehabilitative Services B.J.M.*, 656 So. 2d 906 (Fla. 1995); *see Gentile v. Bauder*, 718 So. 2d 781 (Fla. 1998); & *see City of Oldsmar v. State*, 790 So. 2d 1042 (Fla. 2001). The issue of whether Mr. Freddie Lee Hall was mentally retarded was decided by the trial court on February 21, 1991. On page 19, of Mr. Hall's re-sentencing order the trial court made a specific finding of fact that Mr. Hall has been mentally retarded his entire life.

After the United States Supreme Court determined that a National consensus prohibited the execution of the mentally retarded, Mr. Hall's counsel filed a Motion to Impose a Life Sentence Under The Doctrine of Collateral Estoppel . (PC.-ROA. Vol. 1, pp. 25-59). The trial court denied Mr. Hall's motion without prejudice in order dated February 1, 2005. Mr. Hall submits that it was error for the lower court to deny his Motion raising this legal argument and error to refuse to impose a life sentence in this case based upon the legal doctrine of Collateral Estoppel.

Dr. Valerie McClain, Ph.D., testified at Mr. Hall's evidentiary hearing that the criteria for establishing mental retardation based upon sub average intelligence has

required a score at least two deviations below the mean and deficits in adaptive functioning since 1977. Therefore, the criteria for assessing mental retardation used by experts who testified at Mr. Hall's 1991 re-sentencing hearing was the same then as is being used today. (PC-ROA, Vol. V. EH., T. - p. 59).

Based upon substantial evidence presented in the record, the trial court concluded in 1991, that Mr. Hall was mentally retarded. In view of the fact that Mr. Hall established his mental retardation in 1991, and the criteria for diagnosis has not changed, the Doctrine of Collateral Estoppel should be applied and life sentence imposed based upon evidence that is already in this record. Mr. Hall's presented substantial evidence and established that he is mentally retarded at his resentencing in 1990. The trial court abused its discretion by refusing to grant Defendant's Motion to Impose a Life Sentence based upon the existing record in 2002.

In 1990, Mr. Hall presented expert witnesses and offered such a substantial amount of evidence regarding his sub average intellect and adaptive deficits that the trial court made a factual determination that he is mentally retarded and that his condition had been a lifelong. In 2002, when the United States Supreme Court determined that execution of the mentally retarded was prohibited based upon a national consensus, Mr. Hall promptly filed a Motion for the trial Court To Impose a Life Sentence in his case. The United States Supreme Court's ruling in *Atkins*

should have resulted in immediate relief for individuals like Mr. Hall that were sentenced to death and had already been judicially found to be mentally retarded. Mr. Hall was entitled to a life sentence and the *Atkins* holding applied in 2002. The trial court's refusal to impose life is an abuse of discretion which warrants relief from this Honorable court.

CONCLUSION

Fla. Admin. Code R. 65G-4.011 authorizes consideration of a Wechsler Intelligence Scale; or the findings of an expert who utilizes individually administered evaluation procedures using valid tests and administration evaluation matters, administered and interpreted by trained personnel, **in conformance with instructions provided by the producer of the tests or evaluation materials.** *See Fla. Admin. Code R. 65G-4.01(1) & (2)* (emphasis added). Dr. Prichard's evaluation of Mr. Hall is in conformity with the instructions provided in the Wechsler Intelligence Scale manual and Vineland Adaptive Behavior tests and as directed by the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR). Dr. Prichard is a very experienced psychologist who has evaluated many incarcerated individuals to determine their status as to mental retardation. He has concluded that Freddie Lee Hall is mentally retarded.

The trial court did not take into consideration all of the evidence in this record when evaluating Mr. Hall's claim of mental retardation or afford consideration to the re-sentencing court's factual finding that the evidence in 1991 established Mr. Hall is mentally retarded. Therefore, the court's conclusion that Hall is not mentally retarded and not relieved from imposition of a death sentence under *Atkins* cannot be based upon all the evidence and is erroneous.

The United States Supreme Court specifically recognized and relied upon the definitions provided by the American Psychiatric Association (APA) in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) and by the American Association on Mental Retardation (AAMR) (now the AAIDD) in defining the small group of individuals entitled to protection under *Atkins*. Every individual included in this defined group is entitled to the Eighth Amendment's protection against execution. Freddie Lee Hall's history of lifelong adaptive deficits and sub average intellectual functioning entitle him to individual included within this group. Although the United States Supreme Court deferred the matter of defining mental retardation and the procedures used to determine its existence to the States, its categorical ban on execution of the mentally retarded nevertheless requires states to adhere to the basic principles of *Atkins* and requires application of consistent, appropriate, and reliable standards and procedures. Otherwise, the

Eighth Amendment takes on varied meanings in various locations, and will result in a return to a pre-Furman scheme of capital punishment.

The lower court improperly denied Mr. Hall's Motion to Impose a Life Sentence following the United States Supreme Court's decision that his status as a mentally retarded individual barred his execution. The lower court erred in denying Mr. Hall relief on his successive 3.851 motion filed pursuant to *Fla. R. Crim. P.* 3.203 because his mental retardation is established by substantial evidence in underlying record.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy hereof has of the foregoing Initial Brief has been furnished per rule electronically and by U. S. Mail, first-class, postage paid, to **Anthony Tatti**, Assistant State Attorney, Office of the State Attorney, 19 NW Pine Avenue, Ocala, Florida 34475, **Kenneth S. Nunnelley**, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, FL 32118, and **Freddie Lee Hall**, DOC #022762, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 22nd day of December, 2010.

_____/SIGNED_____

Carol C. Rodriguez

Florida Bar No. 0931720

Assistant CCRC

_____/SIGNED_____

Raheela Ahmed

Florida Bar No. 0713457

Capital Collateral Regional

Counsel - Middle

3801 Corporex Park Drive, Suite 210

Tampa, Florida 33619-1136

813-740-3544

Attorneys for Appellant

Freddie Lee Hall

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to *Fla. R. App. P.* 9.100 and 9.210.

_SIGNED_____

Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC

_/SIGNED_____

Raheela Ahmed
Florida Bar No. 0713457
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544

Attorneys for Appellant
Freddie Lee Hall