**IN THE SUPREME COURT OF FLORIDA**

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

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**FREDDIE LEE HALL**,

**Appellant,**

**v.**

**STATE OF FLORIDA**,

**Appellee.**

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

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The Appellant relies on his Initial Brief for all purposes and offers the following reply to the State's Answer Brief regarding issues I., II. and III.

## STATEMENT OF THE CASE

Appellant objects to the characterizations of the following facts presented in Appellee's Answer Brief as misleading, and/or inaccurate, as follows:

1) The State's Answer Brief referenced the testimony of Dr. Valerie McClain, Psychologist, to show that records do not indicate that Mr. Hall attended special classes. (Answer Brief at p. 4).

Although there is no evidence that Mr. Hall attended special classes, Dr. Mclain's full response provides a more accurate description of Mr. Hall's difficulties:

> Counsel: Was there any evidence that Mr. Hall was in any special classes?
>
> Dr. McClain: Not to my knowledge. It suggested he was slow and had difficulties with comprehension. **But there was a referral but not placement**. (V10, R59)

According to Dr. McClain's testimony, Mr. Hall was referred for placement in special classes, although actual placement was not achieved.

2) The State's Answer Brief states that Eugene Ellis (Hall's older brother) moved out of the family home at the age of 17. Although Mr. Ellis' initially testified to this effect, (V10, R68) during cross examination Mr. Ellis was able to more accurately recall the timing of his move and testified to have been between 19-21 years of age.

State's Counsel: If you were born in 1929 and moved out in 1945 or 1946 does that sound right?

Mr. Ellis: That don't sound just right. Might have been a little older, because I went in the Army September '48. I was in the home with my mother then. So I had to be older then.

State's Counsel: Okay.

Mr. Ellis: Because, after that, it's when I went to stay at my sister's when I got ready to go in the Service. I be home one and off and I got my card to go in the Army and I went in the Service in '51. (V10, R77)

Mr. Ellis clarified that he stayed at his sister's Lakeland home between seven months to a year commuting back and forth from Mr. Hall's residence and moved back into his mother's house where Mr. Hall lived. (V10, R78) He further testified that following his marriage he moved next door to his mother (also Hall's residence), visited Hall following his incarcerations and has never lost contact with him. (V10, R80)

3) The State minimizes the severity of Mr. Hall's behavioral and speech deficiencies in the answer brief stating, "Ellis said Hall just wasn't normal like

the other…kids." (V10, R68)

Mr. Ellis described far more alarming behavior as he referred to Mr. Hall as "a little different altogether." (V10, R68) Ellis testified as to [Hall] "he'd do things different. He'd go up into trees and beat cans to keep you from going to sleep and busted out the back windows in the house from something coming after him. He was real scary or something." (V10, R68) Ellis stated that "he'd [Hall] speak foolish talk all the time" and "didn't have a good understanding or something." (V10, R69) In describing Mr. Hall's communication difficulties, Mr. Ellis stated that Hall "could be misled." You could tell him something, and he could just be misled." (V10, R69) Insofar as Mr. Hall's speech being generally understood, Mr. Ellis testified "**we could understand him, because we was his sisters and brothers**. And we would just go along with him". (*emphasis added*) (V10, R70) Mr. Ellis testified that understanding of Mr. Hall's speech was possible because they were his siblings and knew how to react to him.

4) The State described Mr. Hall as working for his brother Ellis in New York and Florida where Mr. Ellis showed Hall what to do. However, Mr. Ellis described Mr. Hall's inability to understand that he was to pick up fruit from all of the trees that he shook down and not just a few of them. (V10, R71) Another example of Mr. Hall's inability to follow simple instructions was related by Mr. Ellis who asked Hall to check the oil and found that he emptied an entire case of oil into a

tractor overflowing onto the ground. (V10, R74)

5) The State describes Mr. Hall as careless with money. (V10, R72) Mr. Ellis testified that Mr. Hall was far worse than careless, stating that he would be paid at three or four o'clock Friday afternoon and might not have one quarter the following Saturday morning. (V10, R72)

6) The State inaccurately describes Bishop James Hall's testimony as follows: "Hall has heard defendant quotes (sic) scripture from the bible. (V10, R97). The record refutes this assertion :

> State Counsel: "So, he quotes scripture from the bible to you and then talks to you about what he thinks it means?
>
> Bishop Hall: "It's scripture that he quote. **It's not written** – as I said a few minutes ago, it's **not really synonymous to what I know about scripture.** (*emphasis added*) (V10, R97)

In prior testimony Bishop Hall described Freddie Hall's nonsensical communications related to scripture as follows:

> Defense Counsel: "Does he [Freddie Hall] ever make sense?"
>
> Bishop Hall: "**Some things don't even make sense, what he is talking about.** Sometimes he get his Bible and **try** to quote scriptures from his Bible. And I know the things he talk about **don't even make sense**, it's just something just to be talking about the Bible because he know I'm in that field. So he just be talking about the Bible but **not knowing what he be talking about".** (V10, R91)

During cross examination Bishop Hall testified his belief that Freddie Lee Hall is not able to read and does not read to him out of a Bible:

State's Counsel: "And you know now he can read, isn't that true?"

Bishop Hall: "I don't know that. He can't – he can't read."

State's Counsel: "I don't think he can read."

State's Counsel: "So, he doesn't read to you out of the Bible that he's showing you?

Bishop Hall: "**No**. He try to quote scriptures."

State's Counsel: "How does he do that?"

Bishop Hall: "I don't know. He tries to quote scriptures."

State's Counsel: "He tries to quote-"

Bishop Hall: "What **he think** in the Bible." (*emphasis added*) (V10, R96)

State's Counsel: "So, he quotes scripture from the Bible to you and Then talks to you about what he thinks it means?"

Bishop Hall: "**It's scripture that he quote. It's not written** – as I said a few minutes ago, it's **not really synonymous** to what I know about scripture."

Bishop Hall testified that during his visits with his brother Freddie Lee Hall "a lot of things he [Freddie Lee Hall] don't understand. Some things don't even make sense, what he is talking about." Bishop Hall testified not once but twice in the record that the scripture that Freddie Lee Hall attempts to quote is "not written"

and “not really synonymous to what I know about scripture.” He testified that Freddie Lee Hall knows that he is in that field (religious) and talks about the bible because of that but not knowing what he is talking about. (V10, R91-97) Clearly, Bishop Hall is familiar with scripture and cannot support the State’s contention that Freddie Lee Hall’s communications make sense or originate from recognized Biblical scripture.

## REPLY

## ARGUMENTS I. & II.

## HALL IS NOT "MENTALLY RETARDED AS A MATTER OF LAW

The State accurately reports that there are no records available of standardized Intelligence tests administered to Mr. Hall which document an intelligence score of 70 or below prior to his reaching age 18. Attempts to locate Florida Public School records for psychological testing administered during the 1950's could not be located. However, based upon actual review of Hall's academic records it is reasonable to believe that some testing must have occurred based upon the fact that Hall was recommended for placement in Special Education Classes and notations referring to him "mentally retarded" on his school record in 1955 at age ten. (V.10 R.59)

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. *Id. at 99.*

Mr. Hall informed the court that he would rely upon all of the evidence that introduced in his case as to all of his deficiencies and formally requested that the trial court to take judicial notice of prior evidence contained in his record in support of his claim of mental retardation. At the direction of the court, the Defense specified the relevant information to be reviewed as contained in the 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) to be afforded judicial notice.
Of particular note is the Trial Court's Findings of Fact in his Sentencing order filed in open court on February 21, 1991, which 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)

The testimony received by the trial court in 1991 from Dr. Jethro Toomer, Ph.d.'s who opined that Mr. Hall's IQ in August, 1988 was 60 and testified that he was mentally retarded is relevant to consideration of Hall's mental retardation

claim along with all evidence presented in support of this factor in 1991. *Fla. R. Crim. P.* 3.203(e), states: "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**. (*emphasis added*)

Mr. Hall submits that there is an abundant amount of evidence in this record which this Court should review and all of the evidence Hall that has been presented on the issue of his mental retardation should be considered in his behalf. Mr. Hall has a liberty interest at stake and failure to consider all of the evidence on his mental retardation claim as required by *Fla. R. Crim. P.* 3.203(e) in his efforts to seek a life sentence constitutes a due process violation.

For example, the record contains the following relevant information:

1) Mr. Hall was socially promoted throughout school record (school counselors wrote on records that he is "mentally retarded") and it is corroborated by a pre-sentence investigation report dated December 20, 1968 and a DOC Classification report dated December 24, 1968.

2) Mr. Hall dropped out in the 11th grade and attempted to join the military and was rejected due to a very low score on his mental examination test.

3) Dr, Jethro Toomer, Ph.d., administered a Revised Beta/Bender Gestalt on August 22, 1988 and testified that Mr. Hall's IQ is 60 and that he is mentally retarded.

4) The State and Defense presented substantial evidence at Hall's resentencing hearing which resulted in the trial court finding that Mr. Hall to have been mentally retarded all of his life on February 21, 1991.

5) A report prepared by Psychologist, Dr. Bill E. Mosman confirmed that a Wecshler Adult Intelligence Test - 3rd Ed. (WAIS - III) administered to Mr. Hall on

August, 2002 resulted in aVerbal IQ score of 73, a Performance IQ score of 70, and a **Full Scale IQ Score of 69.**

6) A report prepared by Psychologist, Dr. Bill E. Mosman confirms that a Leiter Adult Intelligence Scale was also administered to Mr. Hall who scored a Verbal IQ score of 55, Performance SIQ score of 47. Hall's **Full Scale IQ score was reported at 51.**

6) A report prepared by Psychologist, Dr. Bill E. Mosman confirms that a Slosson Intelligence Test Revised was also administered to Mr. Hall indicates that Hall functions at the **mental age equivalency level of a 10 year 6 month old child.**

7) A report prepared by Psychologist, Dr. Bill E. Mosman confirms that the **WRAT-III** was administered to Mr. Hall and his results indicate general functioning consistent with a **first grade child (ages 7 or 8).**

8) A report prepared by Psychologist, Dr. Bill E. Mosman confirms that a **Vineland Adaptive Behavior** test was administered to Mr. Hall and a composite score of **51** was recorded.

9) Dr. Mosman rendered an expert opinion in his report that Mr. Hall is **mildly mentally retarded.**

10) In August, 2002, Psychologist Dr. Gregory 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 at evidentiary hearing that Freddie Lee Hall is **mentally retarded.**

Dr. Valerie McClain, psychologist testified that the criteria to diagnose mental retardation changed to two standard deviations (i.e. IQ of 70 or below) in 1944. (V10, R. 59) Therefore, experts who opined that Mr. Hall was mentally retarded in 1991 used the same criteria in effect today. For this reason, it is difficult to reconcile how a person determined to be mentally retarded is no longer

retarded based upon a rule enacted post *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). Especially in view of the fact that it was the intent of the U.S. Supreme Court to protect all of the mentally retarded citizens of this country.

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 sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from general conception to age 18. The term "significantly sub-average 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).

Mr. Hall filed his initial brief on December, 2011. The State references in Answer Brief the case of *Franqui v. State of Florida*, (SC 05830) (January 6, 2011) and suggests that it is dispositive. Mr. Hall respectfully disagrees. In *Franqui* the Defendant did not produce any IQ score below 70. Mr. Hall has presented evidence in his history that places his IQ below 70.

In order to establish mental retardation under current Florida law and precedent, the defendant must satisfy a three-prong test for mental retardation. See § 921.137(1), *Fla. Stat*. (2009); *Fla. R. Crim. P.* 3.203; *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009); *Cherry v. State*, *959* So. 2d 702, 711 (Fla. 2007). We have "consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly sub-average general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon*, 2 So. 3d at 142 (citations omitted). In *Cherry*, this Court held that the language of section 921.137(1) is clear and unambiguous in mandating a strict cut-off IQ score of two standard deviations from the mean score, which is exactly 70. *Cherry*, 959 So. 2d at 713.

"Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons." *Williams v. State*, 37 So. 3d 187, 204 (Fla. 2006). The circuit court has discretion to accept or reject expert testimony. *Jones v. State*, 966 So. 2d 319, 327 (Fla. 2007) (citing *Evans v. State*, 800 So. 2d 182, 188 (Fla. 2003).

Dr. Gregory Prichard testified at the evidentiary hearing that were several IQ scores in Mr. Hall's history that suggest his IQ is potentially under 70. Dr. Mosman's test in 2001 which yielded an IQ score of 69, his own test where Hall scored a 71 and another IQ test administered by Dr. Krop in 1990 where Hall scored 73. (R. 180) Dr. Mosman's results was not in conflict with tests results obtained by Drs. Prichard or Dr. Krop who both tested Hall and testified at the evidentiary hearing. In fact, they were totally consistent with the test results that each obtained.

Dr. Prichard testified that he relied upon Dr. Mosman's report in making a decision in this case and that it was relevant to his analysis. (R. 180) He described Mosman's report during the proffer as lengthy, described each test and testified that it included two intelligence tests (WAIS-III = score 69, a Leiter Intelligence Test = score 52 and a Vineland Adaptive Behavior Scales and Adaptive Behavior

Composite = score 51. (R. 181-182) Dr. Prichard stated that Dr. Mosman also administered a Slosson Intelligence Scale and Wide Range Achievement Third Edition, Trail Making A and B. (R. 186) Dr. Prichard expressed absolutely no concerns related to Dr. Mosman's reporting as illustrated below:

Defense Counsel:

> "Did anything with regard to the testing cause you to have any concern with regards to how Dr. Mosman communicated to you any of these (Mosman's reported) results?"

Dr. Prichard:

> "No. I mean, Dr. Mosman - - I didn't know him, but he sounded Like a competent person in terms of just reading his report." (R.189)

A DOC vocational record in 1969 reports Mr. Hall's IQ at 68. Mr. Hall was tested on a WAIS III and produced a comprehensive report authored by Dr. Bill E. Mosman, Ph.d, J.D. in 2001 that recorded his IQ at 69. Judicial notice was requested for the Court to consider the Revised Beta/Bender Gestalt testing conducted by Dr. Jethro Toomer, Ph.D. on August 22, 1988 and his testimony pre *Atkins in 1991* that Hall's IQ is 60. Dr. Gregory Prichard , Ph.d. testified at hearing that Dr. Mosman's reported intelligence score of 69 on a Wecshler Adult Intelligence Test - 3rd Ed. (WAIS - III) is essentially identical to his score of 71 on his administration of the same test (WAIS III) and that **"statistically it is not even close to being different."** (V.5, R. 180) Mr. Hall asserts that the aforementioned

evidence is sufficient to meet the criteria to establish sub average intellectual functioning in accordance with Florida law.

Mr. Hall states that formal test results on a Vineland recorded a score of 51and voluminous testimony in current and past proceedings from numerous witnesses document the lifelong existence of his significant adaptive functioning limitations in communication, self-care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work consistent with a diagnosis of mental retardation. Mr. Ellis and Bishop James Hall testified that Mr. Hall's adaptive limitations continue in 2009, noting his bizarre letter writing habits and non-sensical scriptural quotes spouted by Hall during visit to the prison approximately one month before the hearing. Mr. Hall has submitted sufficient evidence to establish current adaptive functioning limitations in accordance with Florida law.

Mr. Hall has cited portions of the record for the court to consider in addressing his claim of mental retardation, specifically: The 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) to be afforded judicial notice. Including but

not limited to the Trial Court's Findings of Fact in his Sentencing order filed in open court on February 21, 1991, which 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)

Mr. Hall suggests that the onset prior to age 18 of his mental retardation has been clearly established through the testimony of lay and expert witnesses testifying in 1991 and at the 2009 evidentiary hearing. In support of his claim, Mr. Hall has provided early school records which document his extremely poor performance, recommended his placement in special education classes and actually refer to Hall as mentally retarded at age 10.

Mr. Hall has established that his suffers: (1) significantly sub-average general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Thus, he has established the three components of mental retardation required under Florida law and is entitled to relief.

## III. THE MOSMAN REPORT CLAIM

At page 35 of the Answer Brief Appellee inaccurately states the following: "Hall has, understandably, left the discovery violation out of his brief."

However, Mr. Hall's Initial Brief addresses this matter first at page 8 and then at page 62 states: "The trial judge, however, determined that **a violation of the court's order had occurred** but deemed it in advertent (defense expert, Dr. Prichard and defense counsel never possessed copies of Dr. Mosman's test instruments or his raw material data). (*emphasis added*) (V.5., R. 162).

The State filed a motion on **December 13, 200**4 to have Dr. McClaren appointed in this case. The state also requested in this motion that it be furnished with all written or recorded material either **provided by the defendant or independently obtained by or on behalf of** Dr. Prichard, including any and all psychological or psychiatric reports not specifically referenced in Dr. Prichard's report. The State's request includes all testing instruments and answer sheets, and any other **raw data** and/or notes associated with any and all psychological or psychiatric examinations **provided to** or conducted by Dr. Prichard.

The rule states that 3.203(3) 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 to the court.

There was promptness, no rush or urgency involved in the time Dr. McClaren had to review Dr. Mosman's report and present his findings. Dr. McClaren did not issue a report until a little over **three years later** on **January 17, 2008.** In this report, Dr. McClaren acknowledged that he had received and

reviewed a Forensic Psychological Evaluation and summary of Mr. Hall's timeline prepared by Dr. Mosman. He stated that Dr. Mosman found a WAIS-R II full scale IQ of 69 (full scale IQ=73; performance IQ=70) dated **September 24, 2001**. Dr. McClaren acknowledged also receiving a Forensic Psychological Evaluation dated February 4, 2003 by Gregory Prichard, Psy.D. indicating that Mr. Hall obtained a full scale IQ of 71 (verbal IQ equals 72; performance IQ equals 73) and noted, Dr. Prichard's raw data was also inspected.

In a second report dated June 9, 2008 after meeting with Mr. Hall, Dr. McClaren again referenced Dr. Mosman's past assessment and stated: " His [referring to Mr. Hall] history of intellectual assessment has repeatedly shown that he has operated within the borderline range of intellect over many years. Recent decreases in measured IQ by Drs. Prichard and Mosman may be accounted for by the renorming of intelligence tests, and possibly changes in his mental condition association with symptoms of Psychosis". (V.1, R.150)

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 simple report format. Dr. Mosman's report was deemed properly prepared by Dr. Prichard and Dr. McClaren did not indicate in either report he authored that any critical detail was lacking.

In the order denying Mr. Hall relief the trial court stated as follows:

> "Importantly, Dr. Mosman's report lacked critical detail and information indicating how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Mosman may have compiled and examined in evaluating the Defendant, and lacked discussion of any other notes that may have related to Dr. Mosman's evaluation of the Defendant." (V.5, R. 162)

Furthermore the trial court stated:

> "[T]he court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence." (V.5, R.162)

The trial court did not address any deficiency in Dr. Mosman's report until it drafted the order denying relief and basing its' ruling only on the unfair prejudice that it would have on the State as evident below:

Court: "All right, Then I'm going to sustain the objection of the state as to the testimony through conduit of Dr. Mosman for the reason that violation of - - I'm not finding an intentional violation, but an inadvertent violation of the previous discover order referenced February 1st of what year?"

Mr. Tatti: "2005:

Court: "The raw material that would relate to the testing by Dr. Mosman was not supplied. Therefore, the state is at great prejudice, unable to cross-examine, unable to challenge it through their own retained expert or otherwise. And therefore, it would be very unfair, grossly unfair, prejudicial to allow this in." (V.5, R. 162)

The record does not contain any evidence to support any finding that

Dr. Mosman's report lacked anything. State's assertions to this effect are **not supported** by any expert opinion or evidence in the underlying record.

The Trial court and State totally ignored Dr. Prichard's testimony at Mr. Hall's Evidentiary Hearing that his profession (psychological) requires that any raw material data associated with psychological testing can only be released directly to another licensed psychologist. Simply stated, Dr. Mosman was only authorized to release his raw material directly to a requesting psychologist – either Dr. Prichard or Dr. McClaren. Furthermore, Dr. Prichard did not determine that it was necessary for him to inspect Dr. Mosman's raw data to perform his work.

At Hall's evidentiary hearing the State informed the Court that Dr. McClaren was retained "to assist me in having access to material that I would not have access to but for a psychologist providing them to me. And to conduct an overall assessment of the history of Mr. Hall's intelligence testing, which he has done from the records I received. So I'm telling you at this point, there is a reasonable probability I will not call Dr. McClaren." (V.5, R. 39)

Clearly, based upon the State's representations regarding Dr. McClaren's role in this case as an aid to obtaining "materials" and the absence of any reference to raw material review in his January 17, 2008 report, the State was aware on or before January 17, 2008 that no raw material data from Dr. Mosman had reached State expert McClaren.

It is unclear why the State failed to notify defense counsel that Dr. McClaren had not received this information deemed critical by the State in 2008. Furthermore, it remains unclear how the State suffered prejudice as Dr. McClaren did not seek the information from the defendant's psychological expert or need this data to render his own opinion in report format as stated: " [B]ased on the review [of ]available information Mr. Hall does not meet the Florida Standard pursuant to Cherry in regard to a finding of mental retardation under the current Florida law". **(**V.1, R. 150)

There is no question that imposing a sanction excluding Dr. Mosman's reported FSIQ score of 69 is a harsh sanction and was very prejudicial to the Defense blindsided at the hearing and never provided with an opportunity to seek and produce the information. Mr. Hall submits that the trial court acted unreasonably and abused its' discretion in taking this action. 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).

## CONCLUSION

The State's expert Dr. Harry A. McClaren, Ph.D conducted no testing and was not called as a witness at Hall's evidentiary hearing held in accordance with *Fla. R. Crim. P.* 3.203. The competent and substantial evidence required to deny Mr. Hall's claim is lacking. Based on the foregoing Mr. Hall asserts that the lower court improperly denied relief and this Honorable Court should order that his sentence be vacated and a life sentence imposed, or for such relief as the Court deems proper.

## 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 ____ day of March, 2011.

Signed/Carol C. Rodriguez_____
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## 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**.**


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