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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-749

SONNY BOY OATS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF CASE AND FACTS

Procedural History

Mr. Oats claims intellectual disability[1] ("ID") precluding execution pursuant to the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002). His claim is governed by the ID test described in Florida Statutes § 921.137 and Rule 3.203(b) of the Florida Rules of Criminal Procedure, which requires (1) subaverage intellect, (2) deficits in adaptive function and (3) onset before the age of eighteen. The lower court denied the claim by ruling only on the early-onset prong of the test, stating, "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18" (PCR2. 1280). Mr. Oats appealed that ruling, this Court ordered briefing and briefing was completed with the filing of Mr. Oats' Reply Brief on July 15, 2013.[2]

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[1] While the term "mental retardation" has been used previously in this case, due to the revision of Rule 3.203 to replace that term with the more current "intellectual disability" and the U.S. Supreme Court's similar preference when addressing Florida's definition of the condition in *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) ("This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders."), this brief adopts the current term, "intellectual disability." This is done despite the State's prior objection to the use of the current term ("Y'all, let me interject something here again. . . . The DSM, the Florida statute and the applicable Rule of Criminal Procedure don't talk about "ID." They use the term "mental retardation." . . . I'm afraid we're heading down the road for some confusion down the road if we don't use the term that Florida uses." (Depo. of Dr. Denis Keyes at 36)).

[2] After this Court denied oral argument in this case, certiorari review was granted in *Hall* and Mr. Oats filed a renewed request for oral argument. Mr. Oats maintains

On May 27, 2014, the U.S. Supreme Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), in which the U.S. Supreme Court ruled that this Court's application of the ID test described in § 921.137 and Rule 3.203(b) violated the Eighth Amendment and *Atkins* by failing to prevent Florida defendants with ID from being executed. On July 2, 2014, this Court *sua sponte* ordered supplemental briefing "to address the impact, if any, of the United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (U.S. 2014), on the issues in this case." The instant brief follows.

Factual Background

An extensive recitation of the facts is contained in Mr. Oats' Initial and Reply Briefs. For purposes of analyzing *Hall's* bearing on the issue of Mr. Oats' ID, this brief will draw from certain critical facts, which bear reiteration here.

In 1990, an evidentiary hearing was held on ineffectiveness relating both to Mr. Oats' competency and penalty phase mitigation. ID was addressed by the experts in that hearing as part of their broad consideration of mental health issues.[3]

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that he was entitled to relief even before the decision in *Hall*; however, *Hall*, in shifting the focus from statutory language to the medical community's standards as to ID, actually strengthens his claim. Oral argument is warranted for a complete discussion of the interplay between Florida law and the medical community's standards as to *Atkins* claims generally and Mr. Oats' claim specifically. As set forth in the CONCLUSION below, Mr. Oats again requests the opportunity for oral argument in this appeal.

[3] The parties to this proceeding stipulated to the admission of the evidence from the

In that hearing, six experts found Mr. Oats to be ID.[4] There was testimony addressing the three prongs of the ID test, requiring subaverage intellect below the ID threshold of 70, deficits in adaptive functioning and onset before the age of eighteen.[5] Drs. Krop and Carbonell obtained IQ test results of 57 and 61. Dr. Carbonell explained Mr. Oats' deficits in adaptive functioning:

> Mr. Oats has some serious deficits in adaptive functioning. He communicates at a very low level. His reading skills are less than third grade. His mathematics and spelling are also less than third grade. He's generally always been with family or someone who could take care of him. He has never been able to maintain steady employment and he has those general sorts of adaptive ability deficits.

(PCR1. 247-48). Dr. Carbonell also found evidence of ID prior to the age of 18:

> There are reports from his family that he was slow developing, that he didn't do well -- slow walking, slow talking -- to reach those developmental milestones.
>
> He did poorly in school and more and more poorly as he got older, which is what you see with people with mild mental retardation; that is, they do okay for a little bit but their learning curve is just incredibly slow and then eventually, unless something special is done, flunk out.
>
> There was a -- something called a Slosson Quick Test that was given to him, I think, way back in the first or second grade and he hit right at

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1990 hearing (PCR2. 1384, 1389).

[4] The evidence was presented in order to demonstrate available mitigating evidence that counsel failed to develop and present in violation of *Strickland v. Washington*.

[5] While the DSM-II, applicable at the time, labelled ID as mental retardation, it included the three pongs which now appear in Rule 3.203.

> about 70. His achievement levels always lagged behind. IQ tests that were given to him about 10 years ago are very similar to this and he's consistently looked retarded.

(PCR1. 246-47). Dr. Carbonell further explained:

> Q: During his youth did Mr. Oats suffer any impairments?
>
> * * *
>
> A: Of course. He was retarded. He was enuretic until probably -- it's been reported until probably he was about 12-years old. He had trouble functioning in school. He reports having some, what he calls, falling-out spells. After the incident where he was hit in the head with the cane, he had reported fairly consistent headaches and those continued to this day. It's in almost all of his records you'll see somewhere that he has headaches.
>
> * * *
>
> Q: Was Mr. Oats impaired developmentally?
>
> A: Yes. I mean it's -- it's clear from early on he was having problems. His IQ starting in the first grade were very low and his family reports that he was doing very poorly.
>
> Also his, the -- the pattern of scores he gets on the tests is consistent with a developmental kind of impairment in that there is virtually no scatter.

(PCR1. 263-64). Dr. Phillips testified that "I think when we look at Mr. Oats from a developmental standpoint, it's very clear that the retardation is something that is genetic in origin. It's one of the cards that he was dealt." (PCR1. 32).

Mr. Oats' Putnam County school records show that Mr. Oats was held back and required to repeat the second grade (PCR1. 3498), an administration of the

Slosson in 1970 on which Mr. Oats' scored 70 (PCR1. 3498), that in the ninth grade Mr. Oats' received D's and F's, and that in the tenth grade Mr. Oats' grades were mostly F's (PCR1. 3499). This was competent evidence of early onset.

Indeed in his written report, Dr. Phillips relied upon this evidence and set forth details from Mr. Oats' school records showing onset before the age of 18:

> Review of his academic records reveals a longstanding history of academic difficulty. His elementary record is riddled with entries of "D's" and "C's" subsequent to which his predominant grades were "F's" once he began his secondary education. He was retained in the second grade and repeated the tenth grade, when he withdrew from Palatka Central High School to enroll in Marion County High School when he went to stay with his parents. Subsequently he dropped out of school.

(PCR1. 3443). Dr. Krop wrote in his 1987 report that: "Mr. Oats has always done poorly academically. . . . His grades were mostly C's and D's . . . ." (PCR1. 3471).[6]

At the conclusion of the 1990 hearing, the State submitted a written closing. Based on the evidence presented in 1990, the State conceded that "Under the DSM-III criteria, **the defendant falls in the mildly mentally retarded area. No doubt about that.**" (PCR1. 3248) (emphasis added). To be clear, on the record, in writing, in this case, the State of Florida has unequivocally conceded, indeed with "no doubt," that Mr. Oats is ID, yet still seeks his execution, despite its sworn

[6] Because *Atkins* had not yet issued and the diagnosis of mental retardation was presented as a mitigating circumstance, the State did not then contest the third prong of the mental retardation definition then found in DSM-II. Since it was not at issue, the experts in 1990 were not questioned further regarding the third prong.

obligation to uphold the Constitution, which includes the Eighth Amendment prohibition against executing ID individuals.

In 2002, Mr. Oats brought the instant ID claim, later amended to be based on the 2002 decision in *Atkins*, affirming the Eighth Amendment's prohibition on the execution of individuals with ID. An evidentiary hearing was conducted on this claim, beginning in September, 2010, and concluding in June, 2011.

At the beginning of the evidentiary hearing, Mr. Oats filed a motion challenging the constitutionality of the clear and convincing burden of proof set forth in the statute (PCR2. 929). Counsel argued, "[t]he Florida Supreme Court in one of their more recent pronouncements in the Victor Jones case, which is 966 [So. 2d] 319, deferred to another day addressing the clear and convincing standard versus the preponderance standard." (PCR2. 1390). The motion was denied.

At the hearing, three experts testified to the three prongs of the ID test. Defense expert Dr. Keyes measured Mr. Oats' IQ to be 54. The State's expert, Dr. McClaren, administered a WAIS-III and obtained a score of 62 (SPCR2. 26). Dr. McClaren testified: "I got a . . . full-scale IQ, which would be between -- 95-percent chance that it would fall in the range of 59 to 67" (PCR2. 1417). As to Mr. Oats' various test scores ranging from 54 to 62, Dr. McClaren acknowledged that "those test results, they are all pretty consistent" (PCR2. 1452) and stated, "I don't think there is any basis that forces one to reject them" (PCR2. 1514). There are

multiple IQ scores well within the ID range, including that presented by the State.

Dr. Keyes testified that Mr. Oats' "adaptive skills are defic[ient] in practical, social and conceptual ways" (SPCR2. 81), "in living skills, personal living [skills] and social interaction/communication, he is within the range of severe adaptive skills [deficits]" (SPCR2. 111, 192), and "Sonny's overall adaptive functioning is estimated to be about the level of a child between four and seven years of age" (SPCR2. 113). Dr. McClaren admitted deficits in Mr. Oats' adaptive behavior ("I'm sure he's got some deficits" (PCR2. 1616)) and that he did not apply the leading diagnostic manual relied on by this Court in *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007) (explaining that guidance for construing the statutory ID test could be found in the definition of mental retardation adopted by the American Psychiatric Association and quoting the DSM-IV and the U.S. Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014) (citing the DSM some twenty times throughout the opinion) (PCR2. 1701-02):[7]

> Q: . . . in terms of understanding what's meant by the statutory language, are you aware the Florida Supreme Court [in *Jones v. State*] pointed to the American Psychiatric Association's DSM?

[7] Dr. McClaren failed to base his opinion regarding deficits in adaptive functioning on the standards set forth in DSM-IV and discussed in this Court's opinion in *Jones v. State*. From his testimony, it was clear that he had abandoned the standards of the medical community as reflected in DSM-IV and substituted in their place the statutory language provided to him by the State and his construction of that statutory language despite this Court's opinion in *Jones*.

A: Okay.

Q: I mean -- and under that, the way that you measure adaptive functioning is to find deficits in two of ten areas; is that correct?

A: Right. And then to what degree must the deficits be, I guess that's the question.

Q: Well, I mean, the areas are communication, self-care, home living, ... And the deficits don't have to be in all ten, only two of the ten; is that correct?

A: That's right, the APA rule.

Q: And so did you assess it under that? I mean, did you look at those ten areas and assess were there deficits in two of the ten?

A: **No, I didn't look at it that way.**

PCR2. 1610-11) (emphasis added).

Dr. Keyes explained the early-onset prong using DSM-IV:

> When you're looking at the person's background data, you have to see whether or not the school records support the kinds of problems that they are having now. And for the diagnosis to be extended backwards prior to age 18 and upwards to today, you have to see how well that person has functioned over the time period.

(SPCR2. 44). Dr. Keyes explained that the school district "where he went to school should have realized as early as second grade, when he failed" that something was amiss, because "young children particularly, don't fail first and second grade. If they fail first and second grade, it's a huge red flag." (SPCR2. 44). Dr. Keyes said:

> I don't think there is any doubt when he was 13 years old and he had a Slosson, S-l-o-s-s-o-n, when he had a Slosson intelligence test at 13, and he came up with a 70 IQ, that should have been enough to at least

> get him a full-scale assessment, which he never had.
>
> Q: And is that a valid test?
>
> A: It's often used a screener.

(SPCR2. 45). In his written evaluation of Mr. Oats, Dr. Keyes wrote:

> As previously stated, Sonny obtained an IQ score of 70 on the Slosson Intelligence Test in November, 1970, at age 12. This test is inadequate as a precise indicator of Sonny's actual functioning, but can serve as a guideline to how he was functioning at the time. The general thought is that the Slosson tends to test a bit high, and as such, his actual intelligence score at the time was probably a bit lower.

(SPCR2. 189). Dr. Keyes testified that Mr. Oats' mental retardation was clearly manifested prior to the age of eighteen (SPCR2. 45).

There was a discussion during Dr. McClaren's testimony on cross in which the trial court and Dr. McClaren endeavored to explain to counsel Dr. McClaren's view as to what constitutes the standard for the early-onset prong under the statute:

> Q: The word "manifests," which is used in the statute, refers to an indication of mental retardation prior to the age of 18; correct?
>
> A: The way I interpret it, it means it shows itself.
>
> Q: Shows itself. But there is some evidence of it? I mean –
>
> A: This may be semantics. To me, it means –
>
> Q: It's not -- I don't mean to be semantic. I just want to understand, because given there's a statutory –
>
> THE COURT: **"Manifest" means made known, so I guess, you know, if you had some indication or some reason to suspect**.

> BY MR. McCLAIN:
>
> Q: I mean, isn't the purpose to have -- so it's not somebody making it up now, without any indication in childhood, that they were retarded?
>
> A: Right; **there is not zero evidence of it**.
>
> Q: And in this instance, there is some information that would be consistent with retardation, or not? I mean, this is not a case -- this is why you –
>
> THE COURT: Well, all the information is going to be consistent or it's not consistent. I mean, it's a factor.

(PCR2. 1493-94) (emphasis added). Only later did Dr. McClaren assert that the "not zero evidence" must not only exist, it must also be compelling.

Dr. McClaren acknowledged that Mr. Oats' had a pre-eighteen IQ score of 70 ("It is 70 in 1970 when he was 13" (PCR2. 1488-89)) and that the score was obtained the year Mr. Oats got the best grades he received in school (PCR2. 1492). Potential pre-eighteen causes of ID were discussed:

> Q: And in addition, in terms of the abuse that he was suffering and the malnourishment, don't those also cause damage to the brain, physical damage to the brain?
>
> A: Malnourishment might, depending on what kind it is. If the abuse was of the type that caused significance head injury, brain dysfunction, that could lower somebody's cognitive ability. But for lack of knowing what really happened, you see the grades and you don't know what the cause is.

(PCR2. 1492). Dr. McClaren at times suggested that the Slosson score of 70 and Mr. Oats' poor school performance could have been caused by severe child abuse

and malnourishment due to poverty (PCR2. 1469-71). He acknowledged numerous accounts of "head injuries" to Mr. Oats and noted that "there are scars on his head" (PCR2. 1716). Dr. McClaren then conceded that **if the subaverage intellect and deficits in adaptive behavior before eighteen were due to child abuse, head injuries and/or malnutrition, ID would be the diagnosis** (PCR2. 1468-69).

Ultimately, Dr. McClaren rested his inability to conclude Mr. Oats was ID within the meaning of the statute on the third prong of early onset:

> A: Before that, before 18, **there is not compelling evidence** that he had an IQ or intelligence [test result] more than two standard deviations below the mean, 70 or below.
>
> THE COURT: You didn't find credible evidence, I guess is what you're saying?
>
> THE WITNESS: That's a good way to put it.

(PCR2. 1511) (emphasis added). He later explained his conclusion as to the third prong and repeated his opinion that there was a want of "compelling evidence:"

> Q: Okay. So of the three elements, the first element, current test results, that's present. Your concern is you don't have test results that are satisfactory to you prior to the age of 18; is that correct?
>
> A: You don't have -- to me, you don't have **compelling evidence** that the onset of any mental retardation was before 18, or scores to indicate, that would be consistent with retardation had an onset before 18.

(PCR2. 1513) (emphasis added).[8] Dr. McClaren was asked what evidence he

[8] Nowhere in the DSM-IV is there any reference to "compelling evidence" of onset

required to satisfy the third prong of Florida's mental retardation definition:

> Q: What would be necessary to manifest the onset before the age of 18?
>
> A: That there be some indication before 18 that didn't seem to diminish as the person got older.
>
> Q: That didn't seem to diminish what?
>
> A: Diminish as the person got older, where you would have the two prongs, the test score, some of it as to that, as evidence for, in the vernacular, the poor adaptive behavior, but not really quantified, or deficits in adaptive behavior, and you didn't see evidence that the adaptive behavior improved later in life.
>
> Q: Are you suggesting then that that is a subjective evaluation of the onset then?
>
> A: I'm saying that in this case there is not good, strong evidence for the onset before 18. **And that's the unfortunate thing about this kind of case.**

(PCR2. 1580) (emphasis added).[9] While, Dr. McClaren admitted that this is a "close case" and that it is "debatable," he just could not find the evidence of the third prong sufficiently compelling (PCR2. 1458).[10]

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before the age of 18. Dr. McClaren's testimony made clear that he did not use the DSM-IV in reaching his conclusions. It seemed to be something he derived from statutory language and Rule 3.203, which the State had provided him.

[9] In addition to the experts, prison records revealed that prison mental health professionals had called for "a rule out diagnosis" for mental retardation (PCR2. 1621), which meant that the prison's mental health staff had concluded "there's a question about whether he's mentally retarded" (PCR2. 1621).

[10] Dr. McClaren's concern as to whether the evidence was sufficiently compelling

Thus, despite Dr. McClaren measuring Mr. Oats' IQ to be 95% certain to fall between 59 and 67, his conceding that there were deficits in adaptive functioning, his conceding that this is a debatable and close case, a pre-18 IQ score of 70, the pre-18 presence of common causes of ID, and numerous other experts unanimously agreeing that Mr. Oats is ID, and even explicit concerns from the prison that Mr. Oats was ID, Dr. McClaren refused to find ID for wanting more compelling evidence on the early-onset prong. Dr. McClaren opined that Mr. Oats' execution was not barred by *Atkins* because the evidence from over thirty years before, when Mr. Oats turned 18, was not in his opinion under the statute sufficiently "compelling" to meet the statutory burden of proof that onset occurred before the age of 18.

It was on the basis of Dr. McClaren's testimony as to the third prong of the statutory definition and the concerns that he expressed regarding the supporting evidence that Judge Stancil rested his finding, phrased nearly identically to Dr.

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seemingly flies in the face of Eighth Amendment jurisprudence. In *Johnson v. Mississippi*, **Error! Main Document Only.**486 U.S. 578, 584 (1988), the U.S. Supreme Court held: "**Error! Main Document Only.**The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." (citations omitted). *Johnson* stands for the proposition that the death sentence carries a special need for reliability, not the capital defendant's ID defense. Here, Dr. McClaren's testimony reversed the holding in *Johnson* by imposing on Mr. Oats a burden to prove that ID defense against execution had extra reliability.

McClaren's phrasing except for the substitution of the word "competent" in lieu of "compelling:"

> Having considered the history and record of this case together with the evidence presented the court finds the evidence insufficient to substantiate defendant's claim that he is mentally retarded under the current law of Florida. There is no **competent** evidence that the defendant suffered from any mental retardation prior to the age of 18.

(PCR2. 1280) (emphasis added). This finding also seems premised on the fact that when the State broke from the statutory test to ask Dr. McClaren to "give [] the top five reasons, if you will, that Sonny Boy Oats is not mentally retarded," (PCR2. 1435), Dr. McClaren's number one on his top-five countdown was "[l]ack of diagnosis before 18, even though there was some evidence that he had been identified with the screening tests with an IQ of 70" (PCR2. 1435-36).[11]

Ultimately, because Dr. McClaren—out of so many experts and so much corroboration from prison mental health professionals, school records and family history—was the only voice opposing the resounding conclusion that Mr. Oats has ID, and because he himself had tested Mr. Oats at a 62, conceded that he had not assessed adaptive functioning under the DSM, conceded that Mr. Oats had deficits

[11] Of course, the lack of a diagnosis of ID before 18 is something entirely different than whether the subaverage intellect was manifest before 18. Dr. McClaren's reliance on a lack of diagnosis or other compelling evidence simply means the impoverished, those most likely not to have been seen by an expert before the age of 18 or those whose families would not have created a compelling paper trail years before it became a life-and-death matter, would not benefit from *Atkins.*

in his adaptive behavior and even conceded that this is a close and debatable case, Judge Stancil's order denying Mr. Oats relief was not and could not be premised upon a want of proof of the first two prongs. The only shred of expert testimony that could support a finding against ID was Dr. McClaren's concern whether sufficiently compelling evidence of early onset had been created by Mr. Oats' impoverished family over 30 years earlier.

The trial court denied relief based only on the early-onset prong based on Dr. McClaren's desire for more "compelling" evidence than the pre-18 test score and pre-18, red-flag indicia of ID. Thus, before *Hall*, counsel argued that:

> this case is one of statutory construction. Specifically, what does the statutory language requiring a showing that "significantly subaverage general intellectual functioning" was "manifested during the period from conception to age 18" actually mean and what constitutes competent evidence that satisfies this particular element of statutory definition of mental retardation.

(Initial Brief at 6). In light of *Hall's* teaching that the statutory language is not all-controlling, this case is now not so much about statutory construction. Now the focus is on what the medical community standards require for finding early onset.

SUMMARY OF THE ARGUMENT

While not changing the correct outcome of this case, *Hall v. Florida* does shift the focus of the analysis this Court must conduct in all ID cases. The core holding of *Hall* was that at a minimum a defendant with IQ scores between 70 and 75 may qualify for *Atkins* relief if under the medical community standards the first

prong is nonetheless met. *See Hall*, 134 S. Ct. at 2000.[12] However, this specific holding was derived from a broader holding in *Hall* that is critically applicable to this case. *Hall* held that a statutory definition of ID that is more restrictive than the medical community's definition violates the Eighth Amendment and undermines *Atkins*. After Hall the focus must be on medical community standards for determining ID, and not statutory or court-imposed definitions that fail to capture nuances of the medical standards. Dr. McClaren improperly used the statutory standards in his testimony which became the basis of the trial court's decision. This case boils down to what quantum of evidence is necessary under medical community standards for establishing early onset. The medical community looks for indicia, or red flags, or merely some evidence that the condition existed or was caused before eighteen. The lower court's requirement of competent evidence[13]

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[12] That core holding is not necessary to this case, because Mr. Oats has numerous IQ scores, all below the 70 threshold.

[13] Competent evidence was the phrase the judge used. Compelling evidence was the phrase Dr. McClaren used. Neither was based on the standards of the scientific community, but on an effort to employ the statutory burden of proof. Certainly the judge was simply wrong in asserting that there was no competent evidence, as Mr. Oats explained in his earlier briefing. But, the judge's finding was a reference to Dr. McClaren's testimony regarding whether the evidence was sufficiently "compelling" of early onset. *Hall* makes Dr. McClaren's testimony problematic and inadmissible. It is not based upon the standards of the medical or scientific communities. The standards of science and the medical community must control for the reasons explained in *Hall*. The statutory language does not and cannot change the standards of the scientific community. As this Court noted *Jones v. State* when addressing adaptive functioning, the standards to be used are those in

was beyond what the scientific community required. The reliance on Dr. McClaren's testimony violated *Atkins* under *Hall*. It makes *Atkins* protection *less than* the medical and scientific reality of ID.

STANDARD OF REVIEW

Questions of statutory constructions are questions of law are reviewed by this Court *de novo*. *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007). "The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006). To the extent that the circuit court here ruled that there was "no competent evidence that the defendant suffered from any mental retardation prior to the age of 18," the question of whether such competent evidence exists in the record is a questions of law to which this Court applies a *de novo* standard of review. *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007). To the extent that Judge Stancil's statement that "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18" (PCR2. 1280), is treated as a fact question, this Court looks for whether competent, substantial evidence supports the finding that there was no competent evidence. *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006).

ARGUMENT

DSM-IV. Under *Hall*, the same is true as to the third prong.

The U.S. Supreme Court's decision in *Hall v. Florida* changes the focus of this Court's analysis of this case under Florida Statutes § 921.137 and Rule 3.203(b). While in some cases that may change the result, it does not change the correct result in Mr. Oats' cases—it reinforces Mr. Oats' argument that the trial court erred in denying the *Atkins* claim. It also provides a previously unknown basis for objecting to Dr. McClaren's opinion testimony that was premised upon the statutory language and not the medical community's standards.[14]

The dispositive issue in this case was and is the third prong, early onset.[15] The sole basis given by the trial court to deny the *Atkins* claim was its finding that there was "no competent evidence" to demonstrate onset before the age of 18.

This is particularly important in this case, because here there is evidence of early onset far more definitive and quantifiable, than what is usually available in

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[14] Prior to *Hall*, Mr. Oats' claim of ID precluding execution was supported by a body of evidence more extensive and definitive than is usually available or present in *Atkins* cases. After *Hall*, the support grew even stronger.

[15] The first prong of the ID test, requiring subaverage intellectual functioning indicated by an IQ below the ID threshold of 70, is a non-issue in this case, because Mr. Oats has numerous test scores (a WAIS-R of 57 in 1987, a WAIS-R of 61 in 1989, a WAIS III of 62 in 2005, a Stanford-Binet of 54 in 2005), all of which are well within the ID range. The lower court made no ruling on this prong. The second prong of deficits in adaptive functioning is likewise a non-issue in this case, because the State's own expert and the only voice opposing a diagnosis of ID out of numerous health professionals, including prison officials, conceded that he did not apply a diagnostic test as to this prong and, regardless, that he was sure Mr. Oats has deficits. The lower court made no ruling on this prong.

Atkins cases: an actual pre-18 IQ test score of 70, common causes of ID like malnourishment and head injuries occurring pre-18, and poor scholastic performance. This evidence is truly the best evidence of early onset one could ever hope for in an *Atkins* case, so that a circuit court's rejection of it as not competent despite its sufficiency to satisfy the medical community is more than problematic—under *Hall*, it is unconstitutional. Indeed, the problem in Mr. Oats' case that is revealed by the decision in *Hall* is really the testimony on which the circuit court clearly sought to rely—Dr. McClaren's testimony that he did not find the evidence was sufficiently compelling to demonstrate the third prong. This testimony was not based on DSM-IV or the standards employed by the scientific community. ID determinations made more than 30 years after an individual reached the age of 18 simply do not require "sufficiently compelling" evidence of onset before 18; they require simply some indication of pre-18 onset. Dr. McClaren's testimony was clearly premised upon the statutory language the State provided Dr. McClaren. He then tried to formulate an opinion, not on the scientific community standards, but instead on the statutory language and the burden of proof set forth therein. The burden of proof is not part of the medical community's standards. Dr. McClaren's testimony after *Hall* should be stricken as inadmissible.

Hall holds that the standards to be used are those of the scientific community. Indeed, statutes must give way to the scientific community's expertise,

and not the other way around.[16]

At the core of *Hall* protection are those *Atkins* claimants with IQ scores between 70 and 75 who had previously been categorically denied under *Cherry v. State* without an opportunity to present evidence and receive consideration of other factors that might suggest their actual IQ lies lower in the SEM from their test scores.[17] However, *Hall's* reasoning reaches immutably beyond that core holding, as clearly noted by the sharp dissent, which complained that the majority ruled that the statute must bow to the standards adopted by a professional association. *See Hall v. Florida*, 134 S. Ct. 1986, 2005 (2014) (Alito, J., dissenting).

The U.S. Supreme Court reasoned in *Hall* that "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. at 1993. "To determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies . . . ." *Id*. at 1993.

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[16] In *Hall*, the U.S. Supreme Court considered this Court's interpretation of Fla. Stat. § 921.137 and Rule 3.203(b) to preclude consideration of a standard error of measure ("SEM") in IQ testing, and rather to require a bright-line cutoff of 70 for *Atkins* protection. The U.S. Supreme Court, citing the DSM admonition that "'IQ test scores are approximations of conceptual functioning . . . ,'" held that "an individual with an IQ test score 'between 70 and 75 or lower,' . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S. Ct. at 2000.

[17] Due to the Flynn effect, Mr. Oats does not wish to suggest that an IQ score of 75 is the new bright line because according to those in the scientific community it isn't. The recognized Flynn effect may suggest that a particular IQ score may be inflated due to when the IQ test was given. Of course, that is not at issue here.

Observing that its reliance on medical consensus to determine the scope of Eighth Amendment protection under *Atkins* was significant, the Court assured that the fact

> [t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Id. at 1993. The U.S. Supreme Court conformed the Eighth Amendment standard to what ". . . the medical community accepts . . . ." *Id*. at 1994-95.

The *Hall* Court rejected the bright-line cutoff because it failed to comport with medical community standards and the scientifically recognized standard error of measure. Under *Hall*, statutes defining the *Atkins* bar cannot operate in a way as to trump science and/or the medical community's standards. Mr. Oats argues that, though he should win without any reference to *Hall* because contrary to the trial court's order competent evidence of early onset is plentiful in the record, *Hall* establishes that the medical community's standard regarding ID governs the third prong. A contrary ruling would ignore the reasoning behind the *Hall* decision.

Hall stands for the proposition that this Court's *Atkins* jurisprudence cannot be more restrictive than the medical and clinical reality of diagnosing mental health conditions, because then "*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id*. at

1999. The U.S. Supreme Court warned that a contrary view, giving states "complete autonomy to define intellectual disability as they wished," would "conflict[] with the logic of *Atkins* and the Eighth Amendment." *Id*. *Hall* precludes ID statutory definitions from being more restrictive than those used by the medical community. Indeed, *Hall* rejected *Cherry* because *Cherry* was more restrictive than the medical community in defining ID. Any legal standard that does the same is, of course, also unconstitutional under *Hall*. Moreover, it is not for experts, generally non-lawyers, to base their opinion on their non-expert understanding of statutory language. An expert's job is to employ the standards of his profession.

Experts called to testify are not to base their expert opinion on law and ignore the standards of their profession, as Dr. McClaren did here. An expert's testimony should and must be based on the standards of their medical and scientific communities. Dr. McClaren's failure to know and apply the DSM-IV instead of the statutory language given him by the State should render his testimony inadmissible under *Hall* and this Court should it make clear to be admissible expert testimony must address the community standards of experts in the same field.

Dr. McClaren, attempting to apply the statute rather than the DSM, rested his inability to find ID on a lack of "compelling evidence" of early onset ("THE COURT: You didn't find credible evidence, I guess is what you're saying? THE WITNESS: That's a good way to put it. (PCR2. 1511)). This was clearly an effort

to incorporate the statutory burden of proof into his expert testimony.

This Court in *Jones v. State* explained the third prong of the DSM ID definition in a way consistent with the views of Dr. Keyes and the experts from the 1990 hearing, as well as Judge Stancil's off-the-cuff statement during the hearing that there need only be some indication to suspect early onset. Even Dr. McClaren recognized for one fleeting moment that the professional standard was that there just need be more than zero evidence to establish early onset:

> The third prong . . . specifies that the present condition of 'significantly subaverage general intellectual functioning" and concurrent "deficits in adaptive behavior" **must have first become evident during childhood**.

Jones v. State, 966 So. 2d at 326 (emphasis added). This standard is simple and realistic. There need only be some evidence of ID pre-18 so that the subaverage intellect and deficient functioning can be recognized as developmental in nature.[18]

The *Hall* Court struck down this Court's first-prong standard because it "disregard[ed] established medical practice . . . ." 134 S. Ct. at 1995. Requiring "competent" or "compelling" evidence despite acknowledging that the medical standard is "some indication or some reason to suspect," or "not zero evidence" is

[18] This should particularly be enough in the *Atkins* context, where early onset truly has nothing to do with the constitutional protection. If anything, *Atkins* courts should care less about early onset than the medical community. It has nothing to do with the defendant understanding his post-eighteen crime, assisting his, or understanding his punishment, which are the justifications for *Atkins* protection.

unconstitutional under *Hall*. Expert testimony premised on the statute that may or may not comport with medical community standards should not be admissible.

The *Hall* Court ruled as it did because "[t]he SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id*. at 1995. This Court's third-prong standard must reflect the reality that evidence of early onset is usually thin, because it comes from a time when there was no known reason to preserve and record the defendant's intellectual level.[19] It must also reflect the reality that some indicia of early onset—some causes and evidence before eighteen—is enough for the medical community.

While the *Hall* Court was clear that the views of the medical community "do not **dictate** the Court's decision," it made clear that courts could not "disregard these informed assessments." *Id*. at 2000 (emphasis added). In other words, courts are not slave to any consensus of the medical community, but in circumstances as in *Hall* where the courts create a legal fiction more restrictive than the medical community's standard and contrary to the reality of a situation, the Eighth Amendment will be offended. There is no ID other than the medical reality of ID. Use of a legal standard for the third prong that prevents ID defendants from

[19] Because "[t]he death penalty is the gravest sentence our society may impose," *Hall* made clear that Florida law cannot "contravene[] our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id*. at 2001. It would offend that dignity and that commitment if capital defendants are held to an impossible standard of proof not imposed by the medical community.

receiving *Atkins* protection violates the principle underscoring *Hall*.

When the medical community's standards regarding the third prong as reflected in DSM-IV are properly understood and properly applied in Mr. Oats' case, it is clear that Mr. Oats is ID under Florida law. There was a wealth of evidence accepted by every other expert who employed the DSM standards as governing as showing that the third prong was met and indicating that Mr. Oats' undisputed intellectual dysfunction began before his 18th birthday. Only Dr. McClaren questioned the sufficiency of the evidence as to the third prong, haphazardly created during Mr. Oats' impoverished childhood, and he did so not on the basis of the standards set forth in DSM-IV, but on a statute enacted by non-experts. In light of *Hall*, Dr. McClaren's testimony should be stricken.

In any event, based upon reasons set forth in earlier briefing and upon *Hall*, Mr. Oats' sentence of death must be vacated as it violates the Eighth Amendment.

CONCLUSION

For reasons herein and in prior briefing, the trial court erred in finding "no competent evidence" of onset before the age of 18. Under the DSM-IV standards, Mr. Oats is ID, and his death sentence violates the Eighth Amendment. Rule 3.851 relief must issue. Mr. Oats renews his request for oral argument. The decision in *Hall* suggests that Mr. Oats should be given the opportunity through counsel to engage members of the Court and address their concerns as to the import of *Hall*.

Respectfully submitted:

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copies of the foregoing has been served by email to CapApp@MyFloridaLegal.com which is the primary email address given for opposing counsel this 17th day of July 2014.

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