Filing # 33594776 E-Filed 10/23/2015 09:40:19 AM

RECEIVED, 10/23/2015 09:43:33 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: **SC15-1449**

L.T. No. 1987-CF-856
*** CAPITAL CASE ***

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, OKALOOSA COUNTY, FLORIDA,
HON. WILLIAM F. STONE, CIRCUIT JUDGE

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

This is a capital collateral appeal from the Circuit Court's summary denial of Appellant's successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The Appellant, Frank Walls, was the defendant in the lower court and is referred to herein as "Appellant" or "Defendant." The Appellee, the State of Florida, was the plaintiff in the lower court and is referred to herein as "the State."

References to the record on appeal are designated "R" followed by the volume and page number. References to the supplemental record on appeal are designated "Supp. R." followed by the page number.

Statement Regarding Oral Argument

Oral argument is not requested.

Statement of the Case and Facts

The facts and procedural history of the case, as set forth in this Court's prior opinion in the case, are as follows:

> Frank A. Walls was convicted of felony murder in the death of Edward Alger and premeditated and felony murder in the death of Ann Peterson in Okaloosa County in July 1987.
>
> * * *
>
> During a pretrial hearing to determine Walls' competency to stand trial, three experts testified that Walls was incompetent. Two other experts testified that Walls was competent to stand trial. The two experts who found Walls competent to stand trial had relied on Beck's notes in making their evaluations. The trial judge found Walls competent to stand trial and he was subsequently found guilty on all charges. The jury recommended a life sentence for Alger's murder and a death sentence for Peterson's murder. The trial court followed the jury's recommendations.
>
> On appeal, Walls argued that Officer Beck's activities during his pretrial detention violated his constitutional right to due process. This Court determined that the State's tactics involved subterfuge and trickery and the information obtained by Officer Beck should have been excluded from all aspects of Walls' trial, including the competency determination. We also concluded that the police conduct constituted an illegal interference with Walls' attorney-client relationship. Thus, we reversed Walls' judgments and sentences and remanded for a new trial on all issues. We also ordered that any further mental health evaluations not be conducted by the experts who had received the information obtained through police subterfuge. *See Walls v. State,* 580 So. 2d 131, 132-135 (Fla. 1991).

At Walls' retrial, venue was moved to Jackson County because of pretrial publicity. The State's guilt phase evidence consisted of physical evidence, testimony by the investigating officers, testimony by a pathologist, and Walls' taped confession, which was played for the jury. Walls presented no guilt phase case. The jury found Walls guilty of all charges – two counts of first-degree murder, burglary of a structure, armed burglary of a dwelling, and two counts of kidnapping and petit theft.

During the penalty phase, Walls presented evidence of his long history of violent and threatening behavior, his various emotional problems, and his extensive treatment for emotional problems, including placement in a class for emotionally handicapped students in elementary school and a stay in a residential youth camp for children with emotional and behavioral problems at age fifteen. A psychiatrist who had treated Walls when he was sixteen years old stated that he had placed Walls on lithium in order to control his bipolar mood disorder. However, the psychiatrist also testified that at some point Walls ceased taking the drug. A psychologist testified that Walls' IQ had declined substantially in the years prior to trial and that Walls was impaired during the time the murder was committed.

The jury recommended the death penalty for Peterson's murder by a unanimous vote. Because of the prior jury's recommendation of life, double jeopardy precluded the possibility of a death penalty for Alger's murder on retrial. *See Walls v. State,* 641 So. 2d 381, 386 n.1 (Fla. 1994); see also art. I, § 9, Fla. Const. The judge sentenced Walls to death for Peterson's murder, to a life sentence for Alger's murder, to five years in prison for the burglary of a structure, to twenty years for the armed burglary of a dwelling, to twenty years for each of the kidnapping counts, and to two months for petit theft. The judge found six aggravating factors: Walls was previously convicted of a violent felony based on the

contemporaneous murder of Alger; the murder was committed during the course of a burglary or kidnapping; the murder was committed for pecuniary gain; the murder was especially heinous, atrocious, or cruel (HAC); and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). *Walls,* 641 So. 2d at 386. The judge also found nine mitigating factors: Walls had no significant criminal history, was nineteen years old at the time of the crime, is emotionally handicapped, suffers from brain dysfunction and brain damage, functions at the level of a twelve year old because of his low IQ, confessed to the crimes and cooperated with the police, has a loving relationship with his parents and his disabled sibling, is a good worker, and has exhibited kindness toward helpless people and animals. *Id.* The judge specifically rejected the existence of the statutory mental mitigators. *Id.*

On appeal, Walls raised nine issues as error. He claimed: (1) the trial court should have excused a potential juror for cause or granted the defense an additional peremptory challenge to excuse the juror; (2) the State improperly exercised peremptory challenges to dismiss two black jurors based on their race; (3) the jurors were kept in session for overtaxing hours during trial; (4) the trial court gave the jury erroneous penalty phase instructions on the mitigating factors of mental disturbance, impairment, or duress and on the aggravating factors of HAC and CCP; (5) the trial court refused to provide the jury with a detailed interpretation of emotional disturbance as a mitigating factor; (6) the trial court made errors in its findings on the aggravating factors because HAC and CCP were not proven beyond a reasonable doubt, the evidence did not support the conclusion that the murder occurred during a kidnapping, the commission during a burglary aggravator impermissibly doubled the pecuniary gain factor, and the avoid arrest aggravator was improper; (7) the trial court required Walls to prove the mitigating factors by a preponderance

> of the evidence; (8) the trial court improperly rejected expert testimony that Walls was suffering from extreme emotional disturbance and substantial impairment; and (9) the death sentence was not proportionate in his case. This Court found no error and affirmed the judgment and sentences. *Id.* at 391. The United States Supreme Court subsequently denied Walls' petition for certiorari. *See Walls v. Florida,* 513 U.S. 1130, 115 S. Ct. 943, 130 L.Ed.2d 887 (1995).

Walls v. State, 926 So. 2d 1156, 1161-63 (Fla. 2006).

Appellant filed a motion for postconviction relief in 1997, which he twice amended. *Id* at 1163. The motion raised nine claims for relief:

> (1) he was denied a fair guilt phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error; (2) counsel conceded guilt and eligibility for the death penalty without Walls' consent; (3) he was denied a fair penalty phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error; (4) counsel failed to obtain an adequate mental health evaluation in violation of *Ake v. Oklahoma,* 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 54 (1985); (5) his death sentence is unconstitutional because he is mentally retarded; (6) the trial court did not independently weigh the aggravating and mitigating circumstances; (7) the trial court considered inadmissible victim impact evidence; (8) the jury was improperly instructed on the aggravating factors; and (9) the cumulative effect of these procedural and substantive errors deprived him of a fair trial.

Id at 1163 n.1.

The trial court conducted a Huff hearing and an evidentiary hearing on several claims. The trial court denied relief on all claims. *Id* at 1164. Appellant

appealed and filed a petition for writ of habeas corpus. *Id*. This Court affirmed the denial of postconviction relief and denied the petition for habeas corpus, but affirmed the mental retardation claim without prejudice to file a motion in the trial court under Fla. R. Crim. P. 3.203. *Id* at 1181.

Appellant filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court, Middle District of Florida, on May 26, 2006. The petition raised twelve claims for relief and requested an evidentiary hearing. The district court summarily denied the petition on September 30, 2009. *Walls v. McNeil,* 2009 WL 3187066 (N.D. Fla. 2009). On November 16, 2009, the district court issued a certificate of appealability on the issue of whether trial counsel was ineffective for failing to move to redact from Appellant's confession a reference to a possible sexual battery on the victim. *Walls v. McNeil,* 2009 WL 3822951 (N.D. Fla. 2009).

Appellant appealed to the Eleventh Circuit Court of Appeals. On September 28, 2011, the Eleventh Circuit affirmed the district court's decision. *Walls v. Buss,* 658 F. 3d 1274 (11th Cir. 2011). The U.S. Supreme Court denied an application for certiorari on April 30, 2012. *Walls v. Tucker,* 132 S. Ct. 2121 (Mem.) (2012).

During the pendency of the federal habeas proceedings, Appellant filed a motion for determination of intellectual disability as a bar to execution under Fla. R. Crim. P. 3.203, and the circuit court held an evidentiary hearing on the motion

on July 10, 2007 (Supp. R. 146). Appellant presented the testimony of Dr. Jethro Toomer (Supp. R. 154). The State stipulated to Dr. Toomer's qualifications as a forensic psychologist, and the Court declared him an expert (Supp. R. 156).

At the 2007 hearing, Dr. Toomer testified that he was retained to do an assessment of Appellant's adaptive functioning and render an opinion as to whether he meets the criteria for mental retardation (Supp. R. 157). His opinion was that Appellant did not meet the standard for retardation (Supp. R. 158). He administered a series of tests for adaptive functioning, and reviewed voluminous documents on Appellant's educational, psychiatric and psychological history (Supp. R. 158).

Appellant's IQ was 102 at age 12 in 1980, and 101 at age 14 in 1982. In 1991 he scored 72 (Supp. R. 159-60). Appellant's birthday is October 12, 1967 (Supp. R. 160). Dr. Toomer did not administer an IQ test personally, and has no opinion as to his present IQ (Supp. R. 160). A diagnosis of mental retardation is a three-part test. There must be significantly sub-average intellectual functioning, which Dr. Toomer defined as an IQ of 70 or below +/- 5 points standard of error, deficits in adaptive functioning, and onset prior to age 18 (Supp. R. 159).

However, he can render an opinion based on the chronology, which shows a progressive downward pattern in intellectual functioning. One significant reason for the decline was Appellant's extensive history of organically based impairment

of brain function since birth, which has persisted over time and manifested itself in terms of education, vocational training, interpersonal interactions, all of which have existed for “quite some time.” (Supp. R. 161).

Dr. Toomer found that Appellant meets the criteria for adaptive functioning deficits (Supp. R. 161). The State objected to the testimony about adaptive functioning on the ground that Appellant refused to cooperate with the State’s expert during the adaptive functioning test. The court took the matter under advisement and allowed the witness to continue (Supp. R. 162).

Dr. Toomer went on to say that Appellant manifests significant limitations in adaptive functioning, and that he suffered from these deficits prior to age 18 (Supp. R. 164). Because of the five-point standard of error in measurement in IQ tests, Appellant’s most recent IQ score of 74 could mean an actual IQ as low as 69 (Supp. R. 165). Likewise the IQ score of 72 from 1991 could be off by 5 points in either direction as well (Supp. R. 166). However, Dr. Toomer did not make an IQ determination or an intellectual functioning assessment (Supp. R. 166).

Dr. Toomer prepared a report of his findings on adaptive functioning, which was entered into evidence (Supp. R. 166-67). The findings were that Appellant has deficits in processing information, communication and cognition, and scattered thought processes that were poorly organized. He also had a lot of anxiety and

mood swings that showed a poor response to stress and an inability to control his behavior in stressful situations (Supp. R. 168).

Appellant's condition was life-long. He experienced oxygen deprivation to the brain during birth, which caused the brain damage and the impaired functioning (Supp. R. 169-70). Appellant also had deficits in executive functioning, which involved higher reasoning, weighing alternatives and consequences, and impulse control, which is a pattern that has also existed throughout Appellant's life (Supp. R. 170). Appellant had to be redirected and refocused during the evaluation, but he was otherwise cooperative (Supp. R. 171-72).

In all, Dr. Toomer found deficits in 13 areas of adaptive functioning, and that Appellant met the criteria for this prong of the test for mental retardation overall (Supp. R. 174-75). His overall adaptive functioning was at the level of a seven year-old child (Supp. R. 178). His intellectual functioning shows a progressive downward spiral, which accounts for the change in IQ over time (Supp. R. 182). There is no record of an intelligence test showing what Appellant's IQ was at age 18 (Supp. R. 182).

On cross-examination, Dr. Toomer stated that he was aware of Appellant's 74 IQ score obtained in 2007 (Supp. R. 183). Appellant's IQ was 101 in 1982, he turned 18 in 1985, and his IQ was 72 in 1991 (Supp. R. 185). For this reason, Appellant does not meet the intellectual functioning prong of the test for mental

retardation because he did not have an IQ score under 70 prior to age 18 (Supp. R. 185-86). Therefore, Appellant does not meet the statutory criteria (Supp. R. 187).

The State called Dr. Harry McClaren (Supp. R. 188). Dr. McClaren was also qualified as a forensic psychologist (Supp. R. 188-89). He evaluated Appellant on two separate days in November of 2006 (Supp. R. 189). He also reviewed the trial testimony of several doctors in this case and Appellant's school and employment records (Supp. R. 190). He administered a Wexler Adult Intelligence Scale, Third Edition (Supp. R. 192-93). He also did tests for malingering and for independent behavior (Supp. R. 193). Appellant became highly agitated and argumentative during the behavior test, so Dr. McClaren stopped the test (Supp. R. 193-94). Instead, he questioned a correctional officer about Appellant (Supp. R. 195).

Appellant's present IQ in 2007 was 74 (Supp. R. 195). Appellant did not meet the criteria for significantly sub-average intellectual functioning (Supp. R. 195). Appellant's adaptive functioning, as rated by the correctional officer, was low average. Appellant clearly has adaptive functioning deficits, but not at the level of mental retardation (Supp. R. 196).

Dr. McClaren was unable to say whether Appellant's deficits manifested before age 18. No one did any standardized testing. Appellant clearly had very poor performance in school, work, community and at home as a child but it didn't appear to be related to an IQ of approximately 70 or below. The last IQ test

happened after Appellant had a bout of meningitis (Supp. R. 196). In his opinion, Appellant does not meet the criteria for mental retardation (Supp. R. 196).

On cross-examination, Dr. McClaren conceded that the correctional officers observations of Appellant relate to his present adaptive functioning in a prison setting, not his level of functioning prior to age 18 (Supp. R. 206). He did not find that Appellant was malingering or deliberately performing poorly on the tests he administered (Supp. R. 207-08). At the conclusion of the hearing, the court took the matter under advisement (Supp. R. 211).

On July 16, 2007, the circuit court entered an order denying the Rule 3.203 motion, finding that Appellant did not meet the intellectual functioning prong because his IQ scores were too high. The order states:

> The Defendant's IQ, Dr. Toomer noted, had been assessed in 1980 and 1982 and he had scored a 101 and 102 respectively. These scores were in the "average range" according to Dr. Toomer. Another IQ test taken in 1991, after the murders, revealed an IQ score of 72. Although this score would indicate that the Defendant was of low intelligence, *it would not demonstrate mental retardation*[1].
>
> ***
>
> The main barrier with respect to the Defendant's claim is the fact that there is no evidence that he has ever exhibited significantly subaverage general intellectual

[1] In a footnote, the circuit court cited the DSM definition of "significantly subaverage intellectual functioning" to mean an IQ of 70. (R. 1/67). This was the prevailing legal standard at the time, and an IQ above 70 was an absolute bar to relief. *See Cherry v. State,* 959 So. 2d 702, 714 (Fla. 2007) (holding that an "IQ score of 72 does not fall within the statutory range for mental retardation...).

> functioning. The Defendant's own expert could not testify that the Defendant was retarded as that term is defined under Florida law due to the fact that he did not have a significantly subaverage intellect. As a result, the Defendant has failed to demonstrate that he is mentally retarded and his claim is without merit.

(R. 1/67-68).

Appellant appealed to this Court, which affirmed the circuit court's decision on October 31, 2008. *Walls v. State,* 3 So. 3d 1248 (Table) (Fla. 2008). The basis for the decision was that "[t]here is no evidence that Walls has ever had an IQ of 70 or below." *Id.*

On May 26, 2015, Appellant filed a successive motion to vacate his death sentence under Fla. R. Crim. P. 3.851 based on intellectual disability (R. 1/15). Appellant filed an amended motion on May 27, 2015 (R. 1/29). Citing the U.S. Supreme Court's decision in *Hall v. Florida,* 134 S. Ct. 1986 (2014), Appellant alleged that his prior motion was denied based on the IQ cap of 70 that was held invalid in *Hall,* and that under the new standard his IQ is within the range of intellectual disability depending on the other evidence in the case (R. 1/6). Appellant further alleged that the previous hearing was directed to the then-existing legal standard for intellectual disability, and requested a new hearing (R. 1/7).

The State filed an answer to the amended motion on June 12, 2015 (R. 1/55). On June 18, 2015, Judge Brown recused himself from the case and the case was

reassigned to the Hon. William Stone, Circuit Judge (R. 1/56). Court-appointed registry counsel filed a motion to withdraw on July 8, 2015 (R. 1/57-58).

On July 10, 2015, the circuit court entered an order summarily denying the amended motion. The court ruled on the merits of the claim as follows:

> Even if Hall is applied retroactively, Defendant is not entitled to relief. As stated above, the relevant rule requires that significantly subaverage general intellectual functioning must be manifested *prior to age 18.* Although Defendant's motion and the record indicate that Defendant received an IQ score of 72 in 1991, and an IQ score of 74 in 2007, those assessments were made *after* Defendant attained age 18. Prior to attaining age 18, as stated in Defendant's motion, he received a full scale IQ assessment of 102 in 1980, and 101 in 1982. Those IQ scores, which were achieved when Defendant was approximately 12 and 14 years of age, do not place him in the range of concern contemplated in Hall, nor do they suggest significantly subaverage general intellectual functioning.
>
> Moreover, Defendant has already received a hearing at which he presented evidence regarding each prong of the relevant test for intellectual disability. Notably, at that hearing, Defendant's own witness, Dr. Jethro Toomer, testified on cross examination that Defendant did not meet the significantly subaverage general intellectual functioning prong of the test, prior to age 18. Following the hearing, the Court found that "there is no evidence" supporting a finding that defendant is intellectually disabled.
>
> Ruling
>
> Because Defendant's IQ scores prior to age 18 do not place him within the range of concern contemplated in Hall, and because Defendant has already received a

> hearing at which he presented evidence regarding each prong of the relevant test for intellectual disability, Hall, even if applied retroactively, does not entitle Defendant to the relief he seeks.

(R. 1/63-64). The court attached to its order two pages from the 2007 evidentiary hearing on Appellant's prior motion to determine intellectual disability (R. 1/70-1).

The circuit court conducted a hearing on registry counsel's motion to withdraw on August 24, 2015 (R. 1/127). On August 25, the court entered an order permitting registry counsel to withdraw and appointing the Office of Capital Collateral Regional Counsel, Northern Region ("CCRC-North") (R. 1/96). CCRC-North subsequently conflicted off the case, and CCRC-Middle was appointed. CCRC-Middle then contracted with the undersigned counsel to represent Appellant in this appeal.

The undersigned filed a motion to supplement the record on October 5, 2015, seeking to add the entire transcript from the 2007 evidentiary hearing to the record on appeal. On October 7, this Court entered an order granting the motion to supplement the record. The undersigned received the transcript from the circuit court clerk on October 12.

This initial brief follows.

Summary of the Argument

The circuit court erred in denying Appellant an evidentiary hearing on his claim. Registry counsel admitted at the status conference that he was unprepared to argue a Huff hearing. Counsel had closed his office and been retired for several years. He had no staff support and no ability to file pleadings, stated his inability to effectively represent Appellant, and announced his intention to withdraw from the case. Counsel expressed several times his belief that a hearing was necessary and that he had additional evidence to present to establish intellectual disability under the new legal standard, but was unprepared to make a proffer and admitted that with additional time to prepare he could make a better showing. As a result, Appellant was denied a full and fair Huff hearing with adequate counsel and was unable to make his case for an evidentiary hearing.

In addition, the transcript of the prior hearing is insufficient to conclusively refute Appellant's instant motion. The experts were rendering opinions based on a different legal standard. The defense expert testified that he was only retained to evaluate Appellant for adaptive functioning deficits, not for intellectual functioning, and did not even express an opinion on Appellant's IQ. Age of onset, the basis for the court's ruling in this proceeding, was not fully developed at the prior hearing because it was rendered moot by the IQ scores all being over 70.

The circuit court also erred in its merits determination. The court made a finding that Appellant's disability did not manifest before age 18 based solely on his IQ tests, without considering any other evidence. Supreme Court precedent holds that a rigid approach based solely on IQ numbers is insufficient, and that IQ is only one factor among many to be considered in making a determination of intellectual disability. This is particularly true where, as here, Appellant's most recent two IQ scores were 72 and 74, within the margin of error of the test.

There is substantial evidence in the record that Appellant's intellectual disability manifested during childhood. First, Appellant suffered oxygen deprivation during birth, which caused brain damage and dysfunction and was linked to other problems later in life. Second, Appellant showed very poor academic performance in school. Third, although Appellant's low IQ scores were obtained after age 18, there was evidence of a progressive downward spiral in Appellant's intellectual functioning that began sometime earlier. Fourth, Appellant shows adaptive functioning deficits in thirteen separate areas, and these deficits manifested in childhood and have been lifelong problems.

Under the totality of the circumstances, there is evidence showing that Appellant's low intellectual and adaptive functioning began during childhood and manifested prior to age 18. The circuit court's finding to the contrary is based on an erroneous legal standard and should be reversed.

Argument

I. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING INTELLECTUAL DISABILITY CLAIM

The Circuit Court erred in summarily denying Appellant's Rule 3.851 motion alleging that he is ineligible for execution due to intellectual disability. "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Mann v. State,* 112 So. 3d 1158, 1162 (Fla. 2013). A facially sufficient claim may only be denied summarily if it is "positively refuted by the record." *Id* at 1161.

a. Inadequate Huff hearing

First, the circuit court conducted an inadequate Huff[2] hearing to determine whether an evidentiary hearing should be held on the motion. Counsel repeatedly stated during the status conference that he was not prepared to make a *Huff* hearing argument for an evidentiary hearing, and that his practice had been closed for several years and he needed to withdraw from the case:

> I wasn't clear – I'm not totally prepared to argue the Huff motion at this time. I thought this was more of a status conference as to who's who sort of thing and where we are. And I would ask the Court – I have a couple of things I would like to advise the Court of. My office has been closed since 2009. I've been finishing up these cases and I'm in my sixth year of that. At this time I'm

[2] *Huff v. State,* 622 So. 2d 982 (Fla. 1993).

> actually getting social security and retired. I – I cannot – I'm going to be filing a motion – I was hoping that perhaps the Supreme Court would – the ruling would take care of this problem but it – but it – think it will, but I'm going to have to file a motion to withdraw as counsel. Further, I believe I will be a witness in the further hearing that we have. I've represented Mr. Walls for a long time and believe I'll have evidence very pertinent to the issue the Court is going to have to decide. I just – I don't have – I'm not equipped – my secretary just left for Georgia. Her husband died. I don't have an office. I'm just not equipped to continue with these cases any longer. I've gone as far as I possibly could. Mr. Walls, I have to speak with him and tell him. We have talked about this a few times, but I do have to withdraw if the Court will permit me. I just – I don't know how I can do a case of this magnitude at this point. I use a typewriter. I can't even turn on a computer. With my secretary bowing out for health reasons, I'm just lost. I can't even – you know, I can't turn the thing on, let alone file anything.

(R. 1/115-116). This shows that counsel was clearly unprepared to represent Appellant at the status conference to the extent the circuit court wanted to also conduct a Huff hearing and determine whether to hold an evidentiary hearing on Appellant's *Hall v. Florida* claim. In fact, the circuit court then conducted a second hearing specifically to entertain counsel's motion to withdraw, and entered an order permitting him to do so (R. 1/96-98).

Counsel further stated that he did not believe he was competent to represent Appellant effectively in these proceedings:

> Yeah, I intend to file a motion – to talk to Mr. Walls – and I can be involved or whatever, but I don't believe I can be the lead attorney and do a sufficient job.

(R. 1/117). Counsel further stated that he needed to re-interview Appellant and go over the *Hall* case with him, and asked to continue the Huff hearing until he was prepared (R. 1/118). The State objected and argued that the motion should be summarily decided right away as a matter of law because Appellant has no IQ test scores prior to age 18 that scored under 75 (R. 1/118-121).

In response, counsel argued that *Hall* does not merely change the IQ limit from 70 to 75, but also expands what the court needs to look at beyond any brightline test based solely on IQ scores. Counsel argued that there are other ways to prove intellectual disability, and this was recognized in *Hall* (R. 1/121). Both experts agreed during the prior hearing that Appellant's present IQ was around 70, and that there were other factors to consider under the new standard that were not considered before (R. 1/122). Counsel said that a hearing was needed to get all the facts out and hear additional testimony bearing on intellectual functioning apart from the IQ scores, stating:

> I do think we need to have another hearing on this. We were operating from a law that had been struck and changed and Mr. Walls is entitled to present evidence based on what the law is now.

(R. 1/122).

The court then asked counsel if he was prepared to argue the *Huff* hearing before moving to withdraw, so that new counsel would take over if a hearing was granted. Counsel responded as follows:

> I thought this was a status conference to figure out where we were, you know, a schedule sort of type hearing. I wasn't prepared to formally argue the Huff hearing at this time, to be honest, although I think we have argued the gist of what we're going to end up saying anyway. But we could certainly do a much better job down the road a bit.

(R. 1/124).

The record shows that counsel clearly informed the court that he had been retired from the practice of law for several years, was unable to provide effective assistance, was unprepared to argue Appellant's motion, and intended to withdraw from the case. Despite counsel's candid admissions regarding his inability to function as counsel in a capital case, the court insisted on going forward and proceeded to hear argument from the State on why an evidentiary hearing should not be granted, and ultimately entering an order summarily denying the motion without an evidentiary hearing.

Under Fla. R. Crim. P. 3.851, the court is required to conduct a Huff hearing with counsel prior to ruling on any motion for postconviction relief filed by a prisoner sentenced to death. *Groover v. State,* 703 So. 2d 1035, 1038 n.2 (Fla. 1997). The failure to hold a Huff hearing is subject to harmless error analysis if the

motion is legally insufficient on its face. *Marek v. State,* 14 So. 3d 985, 999 (Fla. 2009).

In this case, the court failed to conduct an adequate Huff hearing and afford Appellant the opportunity to show, through competent counsel, why he is entitled to an evidentiary hearing on his intellectual disability claim. Furthermore, Appellant's motion was legally sufficient and the court ruled on its merits.

b. Motion is legally sufficient and not conclusively refuted by the record

The circuit court also erred in refusing to grant an evidentiary hearing, even with counsel's limited argument. Counsel repeatedly stated that a hearing was necessary and that he had additional evidence to present in light of the Supreme Court's holding in *Hall* that IQ scores alone are not the sole determinant of significantly subaverage intellectual functioning. The court ruled that Appellant "has already received a hearing at which he presented evidence regarding each prong of the relevant test for intellectual disability." (R. 1/63). However, the record from that hearing is insufficient to conclusively refute Appellant's claim under *Hall v. Florida* in several respects.

First, the "relevant test for intellectual disability" was different in 2007 than it is today after *Hall.* As stated above, an IQ score over 70 was an absolute bar to relief in Florida in 2007. *See Cherry v. State,* 959 So. 2d 702 (Fla. 2007). Both experts concluded that Appellant did not meet the criteria for mental retardation

specifically because even his lowest IQ scores were over 70 (Supp. R. 185-87, 195). This was also the basis for the court's denial of the prior motion:

> Another IQ test taken in 1991, after the murders, revealed an IQ score of 72. Although this score would indicate that the Defendant was of low intelligence, it would not demonstrate mental retardation.

(R. 1/67). In light of the other evidence of poor intellectual functioning discussed at the 2007 hearing, it is not conclusively shown that the expert's opinions would be the same after *Hall.*

Furthermore, as registry counsel stated at the *Huff* hearing, in light of the recent holding in *Hall* that defendants can prove intellectual disability through other evidence in cases involving an IQ score between 70 and 75, Appellant was requesting another opportunity to present evidence that would not have changed the doctors' opinions or the court's ruling in 2007, but which could potentially do so under the new standard. Appellant should not be summarily denied based on his failure to present evidence in an earlier proceeding when that evidence would not have had any effect on the outcome and such presentation would have been futile.

Second, Dr. Toomer was not even retained for the purpose of assessing Appellant's intellectual functioning during the 2007 proceeding. He testified that he was only hired to do an adaptive functioning assessment (Supp. R. 157). He did not do an intellectual functioning assessment and had no opinion as to Appellant's IQ (Supp. R. 160, 166). Presumably, the decision not to assess Appellant for

intellectual functioning is because the record was devoid of any IQ score below the hard cap of 70 in effect at that time. Thus, Dr. Toomer's testimony is not conclusive as to the intellectual functioning prong under the current standard.

Third, the instant order is based on the "age of onset" prong of the intellectual disability test, which was not the basis for the experts' opinions or the court's ruling in the 2007 proceeding. There was no emphasis on the age of onset for Appellant's low intelligence at the 2007 hearing because all of the IQ scores were over the hard cap of 70, and thus were an absolute bar to proving intellectual disability under the legal standard then in effect. Age of onset was a non-issue.

Now that an IQ test score between 70 and 75 is no longer a bar to proving intellectual disability after *Hall,* the question of when Appellant's IQ began to decline has become a more important issue that was not thoroughly developed at the prior evidentiary hearing. Both experts recognized that there was a "progressive downward trend" in Appellant's general intellectual functioning over time, but they were not asked to render an opinion on what Appellant's IQ might have been on his eighteenth birthday, or whether a downward trend culminating in an adult IQ of 72 establishes intellectual disability if the trend began during childhood. With the 1991 IQ score falling within the range that requires further inquiry under *Hall,* the 2007 proceeding is not sufficient to conclusively resolve the age of onset question.

Finally, the circuit court cannot rely on the IQ scores obtained at ages 12 and 14 to say that Appellant's intellectual functioning is too high. This is so because the summary record does not establish that these tests were "valid and reliable" within the meaning of Ch. 65G-4.011, Fla. Admin. Code, which prescribes the intelligence tests to be used in determining intellectual disability. The State's expert, Dr. McClaren, testified that Appellant received IQ tests at ages 12 and 14 and a "Wechsler scale for young children" at age 6 (Supp. R. 195-96). This is not sufficiently clear.

The Wechsler test is an accepted test under Rule 65G-4.011. However, there are separate versions of the Wechsler test for children and adults, and it is clear from the case law that a 12 year-old should only be tested using the WISC (Wechsler Intelligence Scale for Children) rather than the WAIS (Wechsler Adult Intelligence Scale). *See e.g. Hodges v. State,* 55 So. 3d 515, 527 (Fla. 2010) (affirming denial of intellectual disability claim where defendant was given WISC IQ test at age 12); *Johnston v. State,* 960 So. 2d 757, 759 (Fla. 2006) (same); *Mata ex rel. J.G. v. Astrue,* 2012 WL 6109891 (M.D. Fla. 2012) (stating that 11 year-old SSI applicant was given WISC-IV IQ test but achieved unreliable score because he refused to finish the test); *Accord Strawder v. Astrue,* 2011 WL 5057201 (N.D. Fla. 2011) (holding that retesting of child using WISC IQ test was not necessary

where child was tested with Kaufman Assessment Battery of Children, which was also recognized by the DSM-IV manual as acceptable test for children).

The summary record does not establish that the IQ scores relied upon by the circuit court are valid, as they may have resulted from the adult version of the test or another unapproved test. Dr. McClaren did not specify whether the tests administered to Appellant at ages 12 and 14 were the WAIS or the WISC. At the time, it did not affect the outcome of the 2007 proceeding because the court relied on the results of the WAIS-III test administered in 1991 when Appellant was 23 to find that his IQ was over the hard cap of 70. However, the court is now relying on the earlier tests to conclude that there was no onset before age 18.

By referring to the test given at age 6 as the “Wechsler scale for young children,” and in the same sentence referring to the tests at ages 12 and 14 only in general terms, Dr. McClaren suggested by his testimony that the ages 12 and 14 tests may have been the adult version of the test, and therefore unreliable for use in determining Appellant’s intellectual functioning as a child (Supp. R. 195-96). Further proceedings are necessary to answer this question.

For the foregoing reasons, the summary record is insufficient to conclusively show that Appellant is not intellectually disabled under the standard established in *Hall v. Florida.* Appellant requests that the Court remand this cause for further proceedings.

II. THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT'S INTELLECTUAL DISABILITY DID NOT MANIFEST BEFORE AGE 18

The Circuit Court erred in its merits determination of Appellant's successive Rule 3.851 motion alleging intellectual disability as a bar to execution. In reviewing determinations of intellectual disability, the Court examines the record for whether competent, substantial evidence supports the determination of the trial court, but questions of law are reviewed de novo. *State v. Herring,* 76 So. 3d 891, 895 (Fla. 2011).

To establish intellectual disability as a bar to execution, a defendant must establish "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla. R. Crim. P. 3.203(b); § 921.137, Fla. Stat. (2014); *Thompson v. State,* 3 So. 3d 1237, 1238 (Fla. 2009). The term "significantly subaverage general intellectual functioning" means an IQ of 70 or below; however, due to the margin of error inherent in IQ testing, a defendant with an IQ test score between 70 and 75 may be intellectually disabled and is entitled to prove such disability through the presentation of other evidence. *Hall v. Florida,* 134 S. Ct. 1986 (2014).

The circuit court ruled that "[b]ecause Defendant's IQ scores prior to age 18 do not place him within the range of concern contemplated in Hall," he is not intellectually disabled (R. 1/64). In other words, the court ruled that the only

evidence that can be considered in determining age of onset is an IQ score. *Hall* expressly rejected such a rigid standard when determining intellectual disability claims. *Hall,* 134 S. Ct. at 1994-95. In *Hall,* the Court reasoned that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Id* at 2001. IQ scores are only one of "many factors that need to be considered, [but] they alone are not sufficient to make a final determination [of retardation]." *Bobby v. Bies,* 556 U.S. 825, 831, 129 S. Ct. 2145 (2009) (quoting *State v. Lott,* 97 Ohio St. 3d 303, 2002-Ohio-6625, 779 N.E.2d 1011.

Courts have recognized that a defendant can establish intellectual disability with evidence other than low IQ test scores. For example, in *Conner v. GDCP Warden,* 784 F. 3d 752 (11th Cir. 2015), the court noted that three experts found that Conner had significantly sub-average intellectual functioning based on academic achievement, intelligence testing, and neuropsychological testing, even though his IQ scores were 87 and 80. *Id* at 762-63. Even after a Flynn effect adjustment reduced Conner's IQ score to 78, these experts concluded that he was intellectually disabled based on the other evidence. *Id.* The court ultimately found that Conner was not intellectually disabled because his adjusted IQ was still closer to 80 than 70. *Id* at 765. However, the court afforded Conner the opportunity to make his case and present other evidence. On appeal, the Eleventh Circuit

recognized that this is now required under *Hall,* and that the district court was correct in foreseeing that "intellectual disability is not just a number." *Id* at 765.

In other cases, courts have disregarded the IQ test score entirely if it was contradicted by other evidence in the case. *See Henderson ex rel. Thompson v. Astrue,* 2010 WL 916439 (N.D. Fla. 2010) (relying in part on good record of school achievement to uphold ALJ's finding that IQ score of 67 was unreliable and failed to prove SSI disability claim); *Lowery v. Sullivan,* 979 F. 2d 835 (11th Cir. 1992). The DSM-V statistical manual has stopped using IQ scores entirely during the diagnostic process for intellectual disability, shifting the focus more to the assessment of adaptive functioning deficits.

In this case, there is evidence in the record that Appellant's low intellectual and adaptive functioning began in childhood, establishing onset before age 18. First, Dr. Toomer testified that Appellant suffered brain damage at birth due to oxygen deprivation, and that this brain damage was a cause of Appellant's poor functioning later in life (Supp. R. 169, 173). This establishes a childhood point of origin for Appellant's low intelligence and adaptive functioning.

Second, both Dr. Toomer and Dr. McClaren testified that they reviewed Appellant's school records and found that he clearly had very poor academic performance in school (Supp. R. 158, 191, 196). This Court has recognized that poor academic performance in school as a child is potentially evidence of

intellectual disability. *See Phillips v. State,* 984 So. 2d 503 (Fla. 2008). In *Phillips,* this Court rejected the intellectual disability claim in part because the poor school performance could be attributed to the defendant's truancy, suspensions, and criminal delinquency, and there was no evidence linking the poor performance at school to onset of mental disability before age 18. *Id* at 512. In this case, Dr. Toomer's testimony establishes a link between the organic brain damage suffered as an infant and the later problems, making the school history relevant to the intellectual disability determination.

Third, Dr. Toomer expressed an opinion that the decline in IQ scores over time showed a progressive downward spiral in intellectual and overall functioning sometime between 1982 and 1991 (Supp. R. 160, 182). Thus, while the IQ tests at ages 12 and 14 suggest average intelligence, assuming they are valid[3], that level of intellectual functioning did not last to adulthood. And while the 72 IQ score obtained in 1991 does not, standing alone, prove onset before age 18, it is more consistent with the other evidence than the earlier scores.

Fourth, there was extensive testimony at the 2007 hearing about adaptive functioning deficits manifesting in childhood. Dr. Toomer testified that deficits in at least two categories are required for a diagnosis of intellectual disability, and

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[3] As argued above in Issue I, the record does not indicate whether the tests given at ages 12 and 14 were the Wechsler Intelligence Scale for Children or the adult test. Only WISC IQ scores would be valid evidence of a 12 year-old's intelligence.

Appellant showed deficits in *thirteen different categories* of adaptive functioning (Supp. R. 159, 175). Dr. Toomer also testified that these deficits manifested during Appellant's childhood years, were lifelong, and rose to the level of intellectual disability (Supp. R. 170, 174)[4]. Appellant's functional independence was that of a 7 year-old child (Supp. R. 177).

Hall holds that adaptive functioning deficits can establish significantly subaverage intellectual functioning in a borderline case. *See Hall,* 134 S. Ct. at 2001 ("This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"). Logically, evidence that those adaptive functioning deficits manifested during childhood would also be relevant to prove onset of low intellectual functioning prior to age 18.

The totality of the evidence demonstrates that Appellant's intellectual disability did manifest prior to age 18. The trial court's basis for denial is based on an incorrect legal standard and is not supported by competent and substantial evidence. The order of the circuit court should be reversed.

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[4] Dr. McClaren testified that he was unable to complete the adaptive behavior test with Appellant and could not determine whether there was onset prior to age 18 (Supp. R. 193-94, 196). He also admitted that the information he obtained from corrections officers concerned Appellant's current (adult) level of adaptive functioning, and not the level of functioning in childhood (Supp. R. 206).

Conclusion

Based on the foregoing, the order of the circuit court should be reversed, and this cause remanded for further proceedings.

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Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to Charmaine Millsaps, Esq., Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399, on this ___ day of October, 2015.

/s/ Baya Harrison, III
Baya Harrison, III, Esq.

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

/s/ Baya Harrison, III
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