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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

REPLY BRIEF OF APPELLANT

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Reply Argument

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

a. Retroactivity

The State's first argument is that *Hall v. Florida*[1] is not retroactive (AB 17-18). However, the lower court ruled that *Hall* is retroactive and is the law applicable to Appellant's claim, and the State took no cross-appeal from that ruling. Furthermore, the trial court correctly found that the procedural history of the *Haliburton* case demonstrates that this Court is applying *Hall* retroactively in Florida.

In *Haliburton,* this Court affirmed the trial court's denial of Haliburton's postconviction intellectual disability claim that was filed in 2006 and denied in 2012. *Haliburton v. State,* 123 So. 3d 1146 (Fla. 2013). *Hall* was then decided in 2014.[2] Also in 2014, the United States Supreme Court remanded *Haliburton* for reconsideration under *Hall. Haliburton v. Florida,* 135 S. Ct. 178 (2014). This Court then remanded for an evidentiary hearing. *Haliburton v. State,* 163 So. 3d

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[1] 134 S. Ct. 1986 (2014).

[2] Haliburton's conviction and sentence were affirmed on direct appeal in 1990. The intellectual disability claim was presented in postconviction proceedings. Thus, the case was final and not in the appellate pipeline when *Hall* was decided.

509 (Fla. 2015). In doing so, this Court clearly, if inferentially, ruled that *Hall* applied retroactively to Haliburton's 2006 claim and the 2012 ruling thereon.

Furthermore, contrary to the State's position, *Hall* does create a new substantive right: the right of condemned prisoners with IQ scores between 70 and 75 to demonstrate intellectual disability through other evidence, thereby establishing that they are ineligible for the death penalty under the Eighth Amendment. Prior to *Hall,* the Supreme Court left to the states the responsibility of establishing the parameters of intellectual disability and the manner in which they may be proved. Under Florida's previous standard, Appellant had no right to claim intellectual disability because his IQ scores were no lower than 72.

The purpose of the Supreme Court's ruling in *Hall* is to guarantee that intellectually disabled persons are not executed based solely on a misplaced reliance on IQ scores, which are not sufficiently precise to be the sole determinant of intellectual functioning in borderline cases. Applying that rule prospectively but not retroactively would defeat the purpose of ensuring that intellectually disabled people are not executed.

b. Law of the Case

The State's second argument is that Appellant's instant claim is barred by the law of the case based on the trial court's ruling on Appellant's prior intellectual

disability claim (AB 19-21). However, there are several reasons why the law of the case doctrine does not apply to bar the instant claim.

First, the prior motion was decided under a different legal standard. During the 2007 evidentiary hearing, both the State's expert and the defense expert relied upon Appellant's most recent IQ test scores of 72 and 74 to conclude that he did not meet the "significantly below average general intellectual functioning" prong of the three-part test for intellectual disability. Under Florida law as it existed in 2007, a person with an IQ over 70 was per se not intellectually disabled as a matter of law. *Cherry v. State,* 781 So. 2d 1040 (Fla. 2000).

Dr. Harry McClaren, the State's expert, testified as follows in 2007:

> Q: Now, on the Wexler [sic] Adult Intelligence Scale, were you able to determine an IQ for him, a present IQ for him?
>
> A: Yes.
>
> Q: And what was that?
>
> A: I got a full scale IQ of 74.
>
> Q: Okay. And you have reviewed the records, have you not, as to his IQ back around the time he was 18 or a few years – just a few years before?
>
> A: Yes, well, when he was 14 years old was the last IQ that I know of and I think the first IQ test that he was given was at approximately age six.

> Q: As far as prong one of the mental retardation statute his significant [sic] subaverage general intellectual functioning, did he meet that criteria?
>
> A: No.

(Supp. R. p. 50). Dr. McClaren's opinion as to the intellectual functioning prong was clearly based in whole or in part on the present IQ test score that he obtained.

Dr. Jethro Toomer, the defense expert, did not make an IQ determination or an intellectual functioning assessment (Supp. R. p. 166). However, he acknowledged that the applicable legal standard that governed an expert's opinion as to the intellectual functioning prong at that time was an IQ of 70 or below:

> Q: And what are the prongs, as you understand it, what are the prongs you're supposed to meet in Florida?
>
> A: Basically there are three. When we talk about this process of rendering an opinion with regard to mental retardation we are talking about significantly subaverage intellectual functioning defined as an IQ of about 70 or below given that there is a standard error of measurement of plus or minus five points.

(Supp. R. 159).

In the order denying the prior claim, the trial court ruled that an IQ of 72 "would not demonstrate mental retardation" based on the fact that "significantly subaverage intellectual functioning is characterized by an IQ of 70." (R. 1/67).

Thus, it is clear from the record that the bases for the experts' opinions and the court's ruling on the prior claim were based on the fact that Appellant's IQ

score was over the hard cap of 70 in effect at that time. Now that the 70 IQ cap has been deemed unconstitutional, the basis for the trial court's prior ruling has been undercut and one can only speculate as to what the experts' opinions would have been under the new standard. As a result, the prior ruling is not law of the case as to a claim under *Hall v. Florida.*

Second, age of onset, which is the third prong of the intellectual disability test and the basis for the trial court's denial of the instant claim, was not a disputed issue in the 2007 proceeding and was not the basis for denial of the prior claim. The prior order was clearly based on the fact that all of Appellant's IQ test scores, both before and after 18, were over 70. The court made no findings of fact or conclusions of law with respect to the age of onset prong of the test. As a result, the age of onset part of the test was not actually litigated in 2007 and there is no law of the case as to age of onset. The law of the case doctrine only applies to questions of law "actually decided" in the prior proceeding. *State v. McBride,* 848 So. 2d 287, 289 (Fla. 2003).

Third, counsel stated during the *Huff* hearing that he had additional evidence to present now that an IQ over 70 is not an absolute bar to proving intellectual disability[3]. Prior to *Hall,* IQ scores were the primary means of establishing low

[3] The State's answer brief does not address Appellant's argument that counsel was unprepared for the Huff hearing and failed to proffer his evidence, and that he was

intellectual functioning. After *Hall,* a condemned prisoner with a borderline IQ in the 70-75 range is permitted to introduce other evidence to establish low intellectual functioning. Such evidence would have had no effect on the outcome of the 2007 proceeding, but could change the outcome now.

The State makes repeated use of the term "full hearing" to characterize the 2007 proceedings as sufficient to resolve the instant claim (AB at 20, 21). This phrase appears to be borrowed from old federal habeas corpus cases addressing when a petitioner was entitled to a second evidentiary hearing prior to passage of the AEDPA. *See e.g. Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745 (1963) (holding that state fact finding procedure must ensure "full and fair hearing"). However, the question of whether the 2007 hearing was an adequate opportunity to develop the facts must be viewed through the lens of the law that applied at that time compared to now.

In 2007, Florida courts did not recognize that a condemned prisoner with an IQ over 70 might be intellectually disabled, nor that he could resort to adaptive functioning deficits and other evidence to prove that disability. Thus, presenting extensive evidence of low intellectual functioning (other than IQ scores) at the 2007 hearing would have been an exercise in futility based on the experts' opinions that Appellant was not intellectually disabled because his IQ scores were over 70.

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not competent to represent Appellant in these proceedings. Therefore, no additional argument is offered on that point.

To deny Appellant an opportunity to present additional evidence as contemplated in *Hall* is to ignore the fact that the law has changed and evidence that would have been irrelevant in 2007 or, at best, marginally relevant, is now probative of intellectual disability. Furthermore, even if all of the available information about Appellant is already on hand, Appellant still needs to present the testimony of an expert who has analyzed that evidence under the new law and rendered an opinion based on the current DSM-V definition of intellectual disability[4].

c. Merits

In its argument on the merits of the claim, the State says that "the only relevant I.Q. scores are the 101 and the 102, because those were his IQ scores before his eighteenth birthday," and the scores of 72 in 1991 and 74 in 2007 are totally irrelevant (AB 22).[5] However, the State was more than willing to rely on the 72 and 74 IQ scores during the 2007 proceeding, when they were a bar to relief. Only now that those scores do not preclude relief does the State assert that they are irrelevant. It is true that the 72 and 74 were obtained after Appellant turned 18. However, that does not make them irrelevant. The State undercuts its own position by citing that portion of the opinion in *Hall* that mentioned the prisoner's "various

[4] As stated in the initial brief, the current version of the DSM manual does not even use IQ scores in the diagnostic process.

[5] The State represents that Appellant's IQ was 74 in 1991 (AB 22). This is incorrect. The 1991 test produced an IQ score of 72, and Dr. McClaren's test in 2007 produced the 74 (Supp. R. 160, 183). These are Appellant's two most-recent IQ test scores.

IQ scores over 40 years." (AB 22). Some of those tests were obviously conducted after Hall turned 18, but were considered by the court.

The State's next argument is that this Court's decision in *Henry v. State,* 141 So. 3d 557 (Fla. 2014), is on point and supports an affirmance of the trial court's order. Henry's IQ was 78, higher than the expanded range of 70-75 announced in *Hall,* and this Court held that Henry was not entitled to a hearing on his claim. *Id.* In an attempt to compare the instant case with *Henry,* the State makes the following factual statements:

> Here, as in *Henry,* the defendant's I.Q. is above 75. And, here, as in *Henry,* there is no evidence of deficits in adaptive functioning.

(AB 23). Both statements are clearly incorrect and refuted by the record.

First, Appellant's most recent IQ test, administered by the State's own expert in 2007, produced a full scale IQ score of 74 (Supp. R. p. 195). The next most recent test before that was in 1991, and produced a score of 72 (Supp. R. p. 159-160). Not since age 14 has Appellant tested over 75. To say that his IQ *is* above 75 is simply wrong.

Second, even with the trial court denying Appellant an evidentiary hearing, there is still considerable evidence of adaptive functioning deficits in the record. Dr. Toomer gave extensive testimony at the 2007 hearing about Appellant's adaptive functioning deficits (Supp. R. p. 167-170, 174-178). Dr. Toomer

concluded that Appellant had "significant limitations in adaptive functioning" prior to the age of 18 (Supp. R. p. 163-64). Dr. Toomer acknowledged the adaptive functioning deficits as lifelong and linked to oxygen deprivation he experienced at birth (Supp. R. p. 169). Dr. Toomer also enumerated the specific adaptive functioning deficits he identified as being present:

> Q: So you found the limitations in 13 adaptive skill areas?
>
> A: Yes, according to the testing he had limitations in 13 adaptive skill areas.
>
> Q: What are those?
>
> A: In fine motor skills, social interaction, language comprehension, language expression, eating, meal preparation, toileting, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, home and community orientation. His greatest strength in terms of adaptive functioning was in the area of motor skills. That was the highest level in terms of his adaptive functioning. He was at deficit levels in – varying deficit levels in the other areas.

(Supp. R. p. 175). Thus, the State's assertion that there is "no evidence of deficits in adaptive functioning" is clearly without merit and refuted by the record.

Finally, the State argues that Appellant is "seeking to expand *Atkins,*[6] not to apply *Hall.* He wants *Atkins* to include other types of intellectual impairments rather than being limited to intellectual disability." (AB 23-24). This is a mis-

[6] *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242 (2002).

characterization of Appellant's claim based on an isolated quote from Dr. Toomer's testimony. He described Appellant's "diagnostic history of cerebral dysfunction and organically based brain impairment" as one of the causes affecting his deficit functioning (Supp. R. 173). The claim is that those impairments rise to the level of intellectual disability because they meet the three-part test in § 921.137, Florida Statutes. At no time has Appellant alleged anything other than intellectual disability or argued that *Atkins* should be extended to other disorders.

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

The State argues in its answer to Issue II that "[a]n IQ score below 75 prior to the defendant's eighteenth birthday is a prerequisite to a determination of onset but it is not the exclusive requirement." (AB 26). The State cites no authority for this legal conclusion.

The State's position is also contrary to the reasoning in *Hall,* which rejected a rigid adherence to IQ scores as the sole measure of intellectual disability, and the current medical standard for diagnosing intellectual disability, which is also moving away from IQ scores and relying more on adaptive functioning. Quoting the DSM-5 manual in *Hall,* the Court stated, "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." *Hall,* 134 S. Ct. at 2000. "An IQ score is

an approximation, not a final and infallible assessment of intellectual functioning.... Intellectual disability is a condition, not a number." *Id* at 2000-2001.

There is evidence in the record that Appellant's deficit functioning began to manifest during childhood, and that the IQ scores obtained at ages 12 and 14 did not remain an accurate measure of Appellant's intellectual functioning into adulthood (Supp. R. p. 164, 181-2). The State's rigid adherence to childhood IQ scores to the exclusion of all other evidence is inconsistent with *Hall* and should be rejected as the sole measure of the onset prong for intellectual disability.

Conclusion

Based on the foregoing, the July 10, 2015 order of the circuit court should be reversed, and this cause remanded for further proceedings.

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<u>Certificate of Service</u>

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 24th day of November, 2015.

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

<u>Certificate of Compliance</u>

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*
Baya Harrison, III, Esq.