IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-____

ROGER LEE CHERRY,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

On March 27, 2014, the U.S. Supreme Court rendered its decision in Hall v. Florida, 134 S.Ct. 1986 (2014), in which it determined that use of a rigid requirement that a capital defendant must have an IQ score of 70 or lower in order to argue intellectual disability precluded his or her execution was unconstitutional.[1] The U.S. Supreme Court explained that such a rigid rule deprived capital defendants in Florida with scores above 70 "a fair opportunity to show that the Constitution prohibits their execution." Hall, 134 S.Ct. at 2001.

Hall specifically overruled this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), in which this Court held:

> Given the language in the statute and our precedent, we conclude that competent, substantial

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[1]The Court in Atkins v. Virginia, 536 U.S. 304 (2002), used the term "mental retardation." In Hall, both the majority opinion and the dissent chose to adopt the term now used by most professionals in the field, "intellectual disability." Id. at 1990 ("This opinion uses the term 'intellectual disability' to describe the identical phenomenon."); See also id. at 2002 (Alito, J., dissenting); AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter AAIDD, DEFINITION MANUAL]; AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 72 (11th ed. 2012)[hereinafter AAIDD, USER'S GUIDE] ("The term intellectual disability covers the same population of individuals who were diagnosed previously with mental retardation . . . ."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter APA, DSM-5]. The terms mentally retarded and mental retardation that appear in this brief are from direct quotes from prior proceedings and records.

> evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.
>
> Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination. We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

Cherry, 959 So. 2d at 714. Thus, the recent decision by the U.S. Supreme Court in Hall establishes that the previous denial of Mr. Cherry's eighth amendment claim was erroneous. Mr. Cherry requests that this Court vacate its opinion denying relief and reconsider his claim of intellectual disability in light of Hall.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Cherry requests oral argument on this petition.

STATEMENT OF THE CASE[2]

Mr. Cherry was indicted on September 6, 1986, with two counts of first degree murder in the deaths of Leonard and Esther Wayne, one count of burglary with assault, and one count of grand theft (R. 1070-71). Mr. Cherry pled not guilty to the charges (R. 1072).

Mr. Cherry's trial commenced on September 22, 1987. Mr. Cherry was convicted as charged in the indictment. A penalty phase was conducted on September 25, 1987, after which the jury recommended, by a vote of 7 to 5, a sentence of death for the

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[2]Citations in this petition are as follows: References to the record on direct appeal are designated as "R. ___". References to the record on appeal from the summary denial of Mr. Cherry's first postconviction motion are designated as "PC-R. __ ". References to the record on appeal from the denial of relief after an evidentiary hearing as to Mr. Cherry's first postconviction motion are designated as "PC-R2. ___". References to the transcript of the evidentiary hearing as to the first postconviction motion are designated as "PC-T. ___". References to the supplemental record on appeal from the denial of relief after an evidentiary hearing as to the first postconviction motion are designated as "SPC-R. ___". References to the supplemental transcript of the evidentiary hearing as to the first postconviction motion are designated as "SPC-T. ___". References to the record on appeal from the denial of relief on newly discovered evidence are designated as "PC-R3. ___". References to the supplemental record on appeal from the relinquishment on Mr. Cherry's motion concerning intellectual disability are designated as "SPC-R3. ___". References to the supplemental exhibits from relinquishment on Mr. Cherry's motion concerning intellectual disability are designated as "Ex. ___". References to the record on appeal from the denial of relief as to newly discovered evidence of intellectual disability are designated as "PC-R4. ___." References to the exhibits from the evidentiary hearing as to newly discovered evidence of intellectual disability are designated as "PC-R4. Ex. ___".

first-degree murder of Leonard Wayne, and by a vote of 9 to 3, a sentence of death for the first-degree murder of Esther Wayne (R. 1060). Mr. Cherry was sentenced to death by the circuit court on both murder counts on September 26, 1987 (R. 1067).

On direct appeal, this Court affirmed the convictions and the death sentence imposed for the murder of Esther Wayne. Cherry v. State, 544 So. 2d 184 (Fla. 1989). However, this Court vacated the death sentence imposed for the murder of Leonard Wayne and remanded the case to the circuit court for the imposition of a life sentence without eligibility for parole for 25 years. This Court also vacated the sentences for the two noncapital felony counts and remanded for resentencing on those counts. Id. Thereafter, on April 16, 1990, the U.S. Supreme Court denied Mr. Cherry's petition for writ of certiorari. Cherry v. Florida, 110 S.Ct. 1835 (1990).

On April 12, 1992, Mr. Cherry filed a postconviction motion pursuant to Fla. R. Crim. P. 3.850. On March 12, 1993, the circuit court summarily denied Mr. Cherry's motion. Mr. Cherry appealed and on August 31, 1995, this Court remanded for an evidentiary hearing to determine whether Mr. Cherry's trial counsel had been ineffective during the penalty phase. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

Pursuant to this Court's order, the circuit court held an evidentiary hearing on December 16, 17 and 18, 1996. Thereafter,

on January 27, 1997, the circuit court entered an order denying relief (PC-R2. 1724-36). Mr. Cherry appealed, and on September 28, 2000, this Court affirmed the denial of postconviction relief. Cherry v. State, 781 So. 2d 1040 (Fla. 2000). On October 1, 2001, the U.S. Supreme Court denied Mr. Cherry's petition for writ of certiorari. Cherry v. Florida, 122 S.Ct. 179 (2001).

Meanwhile, on August 7, 1997, Mr. Cherry had also filed a successive Rule 3.850 motion based upon newly discovered evidence. Following an evidentiary hearing held on June 10, 2002, the circuit court denied relief on August 12, 2002 (PC-R3. 486-89).

While an appeal of the circuit court's decision was pending before this Court, Mr. Cherry filed another successive Rule 3.850 motion, based on the United States Supreme Court's decisions in Atkins v. Virginia, 536 U.S. 304 (2002), and Ring v. Arizona, 536 U.S. 584 (2002).

On November 19, 2004, this Court relinquished jurisdiction to the circuit court for a determination of intellectual disability pursuant to Rule 3.203. Subsequent to an evidentiary hearing as to this issue, on October 14, 2005, the circuit court denied relief, finding that Mr. Cherry did not meet the statutory definition for intellectual disability.

On November 5, 2005, this Court granted leave to both parties to supplement their briefs that had already been

submitted in order to address the circuit court's determination that Mr. Cherry is not intellectually disabled. Thereafter, on April 12, 2007, this Court issued an opinion denying all relief. Cherry v. State, 959 So. 2d 702 (Fla. 2007). Mr. Cherry's petition for writ of certiorari was denied by the U.S. Supreme Court on October 29, 2007. Cherry v. Florida, 128 S.Ct. 490 (2007).

On October 7, 2010, Mr. Cherry filed a successive Rule 3.851 motion based on newly discovered evidence of intellectual disability (PC-R4. 716-736). An evidentiary hearing was conducted by the circuit court on September 15-16, and December 20, 2011. On March 22, 2012, the circuit court issued an order denying relief. Mr. Cherry appealed, and on March 8, 2013, this Court affirmed by issuing an order. See Cherry v. State, Florida Supreme Court Case No. SC12-772 (March 8, 2013). On October 7, 2013, the U.S. Supreme Court denied Mr. Cherry's petition for writ of certiorari. Cherry v. Florida, 134 S.Ct. 140 (2013).

Currently, Mr. Cherry's petition for writ of habeas corpus is pending before the Federal District Court for the Middle District of Florida.

STATEMENT OF THE FACTS

A. The 2005 Evidentiary Hearing

At the 2005 postconviction evidentiary hearing, two court-appointed experts testified regarding the issue of whether Mr. Cherry met the criteria for intellectual disability. Peter Bursten, who had been recommended by the Defense, determined that Mr. Cherry is intellectually disabled. Dr. Gregory Prichard, who had been recommended by the State, likewise determined that Mr. Cherry is intellectually disabled (SPC-R3. 875, 976; D-Exs. 4, 6). In forming their opinions, both experts reviewed extensive background materials, including mental health reports, testing data, testimony, affidavits, reports relating to the crime with which Mr. Cherry was convicted and Mr. Cherry's Department of Corrections (DOC) file (SPC-R3. 873, 947-49).[3]

Dr. Bursten conducted the intelligence testing, using the Wechsler Adult Intelligence Scale – III (WAIS-III), one of the two acceptable instruments to measure IQ (D-Ex. 4). Dr. Prichard reviewed Dr. Bursten's raw data, found no problems with it, and found it "extremely helpful" in forming his conclusions (SPC-R3. 951). The experts testified that Mr. Cherry achieved a full scale IQ score of 72, placing him in the range of intellectual disability (SPC-R3. 874, 876-77, 955). Indeed, Dr. Bursten

[3]Dr. Bursten characterized the background materials as an "excellent group of materials" (SPC-R3. 873).

explained that in reviewing Mr. Cherry's scores on the various subtests, the full scale IQ score achieved by Mr. Cherry was likely inflated. This inflation was due to Mr. Cherry's performance on the digit span subtest (D-Ex. 4). On this test, Mr. Cherry performed well, but the particular subtest did not rely on verbal or non-verbal higher order reasoning or judgment skills (D-Ex. 4). Thus, Dr. Bursten opined that Mr. Cherry's full scale IQ was likely lower than the 72 he achieved (D-Ex. 4).[4]

As to other testing of Mr. Cherry, Dr. Bursten administered the Test of Memory Malingering (TOMM) (SPC-R3. 874). Mr. Cherry achieved a perfect score, which demonstrated to both doctors that Mr. Cherry was putting forth his best effort in the testing (SPC-R3. 882-84, 977-78). Additionally, Dr. Prichard administered the Wide Range Achievement Test-III (WRAT-III), to determine Mr. Cherry's academic skill levels (SPC-R3. 949-50). Mr. Cherry produced a grade equivalence score of fourth grade on reading,

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[4]Both experts testified that sub-average intellectual functioning is considered to be a "range or band of scores" (SPC-R3. 877, 954-55). Dr. Bursten explained: "The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in." (Id.). Thus, a score between 65 to 75, and lower than 65 fall within that band and "comprise[s] mental retardation" (Id.).

Dr. Prichard explained that an IQ score is "really just an estimate" and that "as behavioral scientists, we psychologists have to consider the standard error of measurement that is inherent in an IQ measure." (SPC-R3. 954-55).

third grade on spelling and third grade on arithmetic (SPC-R3. 952). Dr. Prichard found that the results of the testing were consistent (SPC-R3. 953).

In terms of previous intellectual testing, the doctors agreed that the testing conducted by Brad Fisher in 1992 was consistent with the test results received by Dr. Bursten.[5] As to the intellectual testing conducted prior to 1992, the doctors agreed that there was little or no value to the test results because the testing instruments were not established as useful, accurate testing measures (D-Ex. 6).[6] The doctors testified that Mr. Cherry did in fact meet the first criteria in diagnosing intellectual disability, i.e., sub-average intellectual functioning (SPC-R3. 924, 959).

As to the second and third factors, deficits in adaptive skills and the onset before age 18, the doctors evaluated Mr. Cherry's adaptive skills both currently and as a child. The doctors reviewed background materials including affidavits from individuals who knew Mr. Cherry as a child, adolescent and young adult, and observations and information that were obtained by various Department of Corrections' staff over the years Mr.

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[5]Mr. Cherry had a full scale IQ score of 72 on the WAIS-R in 1992 (D-Ex. 6).

[6]None of the instruments measuring IQ that were administered to Mr. Cherry prior to 1992 are accepted under Rule 3.203 as specified by the Department of Children and Families.

Cherry was incarcerated. Dr. Bursten also spoke to Mr. Cherry's fifth grade elementary teacher; a social worker who was assigned to work with Mr. Cherry's family when he was a child; Mr. Cherry's estranged wife; and Mr. Cherry himself (SPC-R3. 879-80; D-Ex. 4). Further, Dr. Bursten administered the Scales of Independent Behavior - Revised Edition (SIB-R) with Mr. Cherry.

The description of Mr. Cherry as a child, adolescent and young adult were largely consistent: When Mr. Cherry was a very young child, his aunt, Daisy Gandy, who lived with Mr. Cherry and his family, noticed that "something was wrong with Roger. He was very slow for his age and seemed much younger than he really was." (D-Ex. 2, tab 4, para. 8). Likewise, Mr. Cherry's aunt, Annie Mayfield, agreed that Mr. Cherry was "slow and hard to understand."(D-Ex. 2, tab 5, para. 7).[7] Dr. Prichard noted that all of the testimony and affidavits he reviewed of people who knew Mr. Cherry as a child and young adult described him as slow and intellectually disabled and that Mr. Cherry had been placed in special education classes while in school (SPC-R3. 965).

Dr. Bursten, who spoke to Mr. Livingston, Mr. Cherry's fifth grade teacher, indicated that he had described Mr. Cherry as meeting the category for special education, if any had been

[7]Several others, too, described Mr. Cherry as "slow" (See D-Exs. 2 and 3, tab 7, para 6; tab 8, para 6; tab 9, para 4-5; tab 11, para 4; tab 13, para 2; tab 14, para 5; tab 18, para 8-9; tab 19, para 2; tab 20, para 3; tab 22, para 3).

available (D-Ex. 4, at 8). Mr. Livingston also described Mr. Cherry as having difficulties following instructions, difficulties with social skills and difficulties with motor skills. On a scale of 1 to 10 as to independence, 1 being the lowest, Mr. Livingston rated Mr. Cherry as a 2.

George Williams, a counselor from Mr. Cherry's middle school, told Department of Corrections officials, and later attested, that Mr. Cherry was placed in special education classes. Mr. Williams knew Mr. Cherry when he was 11 years old. He soon learned that Mr. Cherry had problems communicating. Rather than press Mr. Cherry academically, he asked Mr. Cherry to make sure the erasers and black boards were clean. "Clapping erasers was something Roger could do, and I always liked giving my disabled children a sense of accomplishment." (See D-Ex. 2, tab 10, para 4-5).

Even Mr. Cherry's peers knew that something was wrong with him intellectually: "he was so slow", "he didn't comprehend things very well" (D-Ex. 2, tab 17, para 4). Because of Mr. Cherry's limitations, he became a follower (D-Ex. 2, tab 19, para 5).

Additionally, Mr. Cherry's DOC records are littered with descriptions of him that support the doctors' diagnosis and finding that Mr. Cherry had deficits in his adaptive skills. At 17, upon entry into DOC, Mr. Cherry was described as "having

difficulty manipulating the moderately complex factors of his environment" and "he does seem to be very inadequate in almost all areas and seems to have difficulty reasoning through to logical conclusions, problems of everyday living." (See D-Ex. 2, tab 26).[8] Several years later, in another DOC psychological screening report, Mr. Cherry was described in the following way: "He seems to be easily led by the dictates of his peers and allows his peers to make a pawn of him." (D-Ex. 2, tab 26).[9]

Dr. Prichard testified that in addition to Mr. Cherry's IQ score, the background materials supported the notion that Mr. Cherry's intellectual functioning is substandard (SPC-R3. 965). Dr. Prichard also administered the SIB-R to Officer Paxson, who was employed by the Florida Department of Corrections as a correctional officer (SPC-R3. 949-50). Dr. Prichard chose Officer Paxson because "he seemed to be very knowledgeable of the individuals [on death row]" and he seemed to take "an objective approach to answering the questions" (SPC-R3. 957-58).[10] The

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[8]Dr. Prichard testified that the vignette demonstrates information about Mr. Cherry's functioning (SPC-R3. 964).

[9]Dr. Prichard testified that the description of Mr. Cherry, at the age of twenty, "would be very consistent with the kind of commentary people generally make about individuals who are mentally retarded." (Id.).

[10]In his report, Dr. Prichard described Officer Gary Paxson as having "known Mr. Cherry for about a year and a half, and [having] interacted with him frequently, almost daily." (D-Ex. 6, at 7).

score of the test was well within the range of demonstrating significant deficits in adaptive functioning (SPC-R3. 972). Dr. Prichard characterized this part of his evaluation as the "most compelling result" in diagnosing Mr. Cherry's intellectual disability (SPC-R3. 974-75).

Additionally, Dr. Prichard remarked that the "**[a]necdotal data also strongly and almost exclusively suggest the presence of intellectual and adaptive limitations recognized consistently over the course of Mr. Cherry's life.**" (D-Ex. 6)(emphasis added). And, Dr. Bursten indicated that "at least fifteen [informants] independently referred to Mr. Cherry as being "'slow', 'retarded', etc., during preadolescent/developmental years." (D-Ex. 4). Mr. Cherry was described as not functioning at a normal level (Id.). Both doctors agreed that Mr. Cherry met the criteria of deficits in adaptive skills and onset before the age of 18 (SPC-R3. 933, 975; D-Ex. 6). In conclusion, Drs. Bursten and Prichard agreed that Mr. Cherry met the diagnosis for intellectual disability (SPC-R3. 875, 976; D-Exs. 4, 6).

B. The 2011 Evidentiary Hearing

At Mr. Cherry's 2011 evidentiary hearing, the circuit court considered Mr. Cherry's claim of newly discovered evidence of intellectual disability.

At the hearing, Dr. Harry Krop testified that he administered to Mr. Cherry the WAIS-IV and the test of memory

malingering (PC-R4. 66-67).[11] Dr. Krop testified that with regard to Mr. Cherry's testing, the conditions were "optimal" (PC-R4. 75), and he carefully observed Mr. Cherry's attitude and effort throughout the testing (PC-R4. 76). Dr. Krop observed Mr. Cherry giving his full effort throughout the testing (PC-R4. 76-77). And, Mr. Cherry scored very well on the TOMM (PC-R4. 79).[12]

Mr. Cherry's full scale IQ score on the WAIS-IV was a 64 (PC-R4. 81).[13] Breaking it down, Mr. Cherry's perceptional reasoning index was a 67, working memory index a 63, and processing speed a 65 (PC-R4. 81). Dr. Krop stated that those subtest scores were consistent with the idea that Mr. Cherry was putting forward a full effort on the tests (PC-R4. 82). Dr. Krop's opinion was that the score was reliable and accurate (PC-R4. 94-95). And, as the score was more than two standard deviations below the mean, Dr. Krop concluded that this would be considered significantly subaverage intellectual functioning (PC-

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[11]Dr. Krop explained that the test of memory malingering, or TOMM, is primarily a test to measure a person's effort with regard to the psychological evaluation that is being done at that time (PC-R4. 67).

[12]In his report, Dr. Krop stated that on the TOMM, "Mr. Cherry obtained a score of 49/50 on Trial one and perfect scores on Trial two and the Retention Trial. These results are consistent with the observed effort by Mr. Cherry during the testing." (PC-R4. D-Ex. 1).

[13]When Dr. Krop originally added the subtest scores he made a mathematical error and reported Mr. Cherry's full scale IQ score as a 65 (PC-R4. D-Ex. 1). However, Dr. Krop re-added the score and corrected it at the evidentiary hearing (PC-R4. 81).

R4. 82).

Several witnesses, including Drs. Gordon Taub and Lawrence Weiss, as well as Dr. Krop testified to the numerous theoretical and substantive changes between the prior WAIS tests and the WAIS-IV: the WAIS-IV includes the four-factor scoring method (PC-R4. 152, 449-50). As Dr. Taub explained, "It was a significant change, a technological advancement between the WAIS-III and the WAIS-IV ... [i]t really cannot be under emphasized the importance of measuring more factors, more areas of intelligence when we're looking at obtaining one's full scale IQ score." (PC-R4. 155, 158).

In addition, the WAIS-IV includes two composite factors being eliminated, four composite factors being added, and seven individual tests added or deleted (PC-R4. 154). Indeed, Dr. Weiss testified that there was a six and a half percent reduction in the verbal component's contribution to the full scale, thus the verbal becomes six percent less important in the full scale's final score (PC-R4. 444). Dr. Weiss acknowledged that this reduction could more likely cause a change in the score of somebody who had a better verbal score on the WAIS-III, like Mr. Cherry, when translated into the WAIS-IV (PC-R4. 445, 455-6, 471).

Further, IQ scores would be more accurate in both the gifted and the severe ranges of intellectual disability (PC-R4. 168,

467). As the WAIS-IV is more comprehensive, it is providing a more comprehensive measure of intelligence (PC-R4. 93, 171, 456, 466, 594, 654).

Dr. Gregory Prichard testified on behalf of the State as to his concerns with the validity of Dr. Krop's administration of the WAIS-IV. First, Dr. Prichard pointed out that in the symbol search subtest of the WAIS-IV, Dr. Krop erroneously instructed Mr. Cherry to make and "X" instead of a "/" (PC-R4. 489-90). Dr. Prichard was of the opinion that this can be a very significant issue (PC-R4. 490), though neither Dr. Krop or Taub believed it to have affected Mr. Cherry's score (PC-R4. 90, 106, 229).[14]

Dr. Prichard also compared the raw data from the WAIS-IV to the WAIS-III (PC-R4. 492). On the digit symbol coding subtest, Mr. Cherry's score went down significantly (PC-R4. 493). However, it appeared that Dr. Prichard did not understand Dr. Weiss' testimony that made it clear that the digit span subtests on the WAIS-III and WAIS-IV were different (PC-R4. 459-60; see also PC-R4. 561). The digit span on the WAIS-IV has an additional component, making it more difficult (PC-R4. 460).

Dr. Prichard further testified that he heard Dr. Weiss'

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[14]Dr. Krop testified in rebuttal that, in an abundance of caution, he removed the subtest from the scoring, which is permitted by the technical manual (PC-R4. 549-50). When he did so: "Mr. Cherry would have come out with an IQ of 65, which would have been one point higher than - - than using that particular subtest in the overall IQ." (PC-R4. 549-50).

testimony that the verbal component was percentage wise contributing less to the full scale IQ score (PC-R4. 521). Dr. Prichard was aware that the verbal component was an area of strength for Mr. Cherry (PC-R4. 521). Dr. Prichard acknowledged that this could possibly contribute to a reduction in Mr. Cherry's score (PC-R4. 522).

Further, under proffer, Dr. Prichard stated that his opinion that Mr. Cherry is intellectually disabled has not changed:

> Clinically, I said what I said in 2005 based on what I felt was a valid administration of the WAIS-III, based on the other data point that was the 1992 WAIS-R. I considered, clinically, standard error of measurement. My position was rejected by the court. There was a different legal decision. **But I stand by what I said in 2005.**

(PC-R4. 503)(emphasis added).

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM

THIS COURT'S DECISION IN CHERRY v. STATE, 959 So. 2d 702 (Fla. 2007), RELATING TO MR. CHERRY'S ARGUMENT THAT HE IS INELIGIBLE FOR EXECUTION MUST BE VACATED AND RECONSIDERED IN LIGHT OF HALL v. FLORIDA, 134 S.Ct. 1986 (2014). MR. CHERRY IS INTELLECTUALLY DISABLED AND HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Hall v. Florida, 134 S.Ct. 1986 (2014)

In Hall v. Florida, 134 S.Ct. 1986, 1992 (2014), the United States Supreme Court reaffirmed that "[n]o legitimate penological purpose is served by executing a person with intellectual disability." citing Atkins v. Virginia, 536 U.S. 304, 317, 320 (2002). Further, Hall makes clear that a statutory definition of intellectual disability or decision that is more restrictive than the medical community's definition violates the Eighth Amendment and undermines Atkins. The U.S. Supreme Court stated:

> As the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period. See id., at 308, n. 3, 122 S.Ct. 2242; DSM–5, at 33 ...

Hall, 134 S.Ct. at 1994. Additionally, the U.S. Supreme Court again reiterated that "those persons who meet the 'clinical definitions' of intellectual disability "by definition ... have diminished capacities to understand and process information, to

communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. *Id.*, at 318" Hall, 134 S.Ct. at 1999. Thus, it is clear that the clinical definition and determination of intellectual disability must govern the legal analysis in cases like Mr. Cherry's.

B. Mr. Cherry's Case

In Mr. Cherry's case, both Dr. Peter Bursten and Dr. Gregory Prichard agreed that intellectual disability encompassed three prongs: 1) subaverage intellectual functioning; 2) deficits in adaptive functioning; and 3) onset prior to the age of 18 (SPC-R3. 871, Ex. 6). After completing their evaluations and considering the prongs, both experts diagnosed Mr. Cherry as suffering from intellectual disability. The State presented no expert or other evidence to counter their opinions.

1. Subaverage Intellectual Functioning.

In Hall v. Florida, the U.S. Supreme Court abrogated this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), when it determined that use of a rigid requirement that a capital defendant must have an IQ score of 70 or lower in order to argue intellectual disability precluded his or her execution was unconstitutional. The U.S. Supreme Court explained that such a rigid rule deprived capital defendants in Florida with scores above 70 "a fair opportunity to show that the Constitution

prohibits their execution." Hall, 134 S.Ct. at 2001.

In this Court's 2007 decision, the sole basis for affirming the circuit court's determination that Mr. Cherry was not intellectually disabled was based on that fact that his IQ score of 72 exceeded the strict cut-off of 70 that this Court imposed. See Cherry, 959 So. 2d at 714. Thus, in light of Hall, this Court must reconsider its 2007 decision.

Mr. Cherry's IQ scores fall into the range of significantly subaverage intellectual functioning. Indeed, in 2005, evidence was introduced that established that Mr. Cherry obtained a full scale IQ score of 72 when Dr. Bursten administered the WAIS-III (SPC-R3. 876).[15] However, based, on Mr. Cherry's performance on

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[15]At the time of the testing, the WAIS-III was one of the two tests identified by the Department of Children and Families to be used in testing for intellectual disability. On the other hand, the Beta and Kent IQ tests that were conducted while Mr. Cherry was incarcerated in DOC are not tests that are designated to produce reliable results about the issue of intellectual disability. In fact, both experts agreed that test scores produced by the Kent and Beta had little value (SPC-R3. 896, 925, 961). The Beta IQ test is simply not a comprehensive measure of intellectual functioning (SPC-R3. 896). The State's expert further explained the Beta was "developed to assess individuals in settings like institutions where you're doing group testing." and "It's also for non-readers" (SPC-R3. 961). "So, its utility in terms of saying whether a person is mentally retarded or not is extremely limited. It's not accepted as a measure in the scientific community for determining retardation." (Id.).

As to Dr. Crown's previous testimony that Mr. Cherry scored a 78 on the WAIS-III, the State's expert could not place much value on the previous testimony because so little was known of the test results (SPC-R3. 971). And, he explained that if the score were legitimate then he must consider the phenomenon that occurs as a intelligence test ages: "[T]he fact that the test was given to Mr. Cherry when it was 15 years old suggests the

the various subtests, his full scale IQ score was inflated.[16] On the WRAT-3, administered by Dr. Prichard, Mr. Cherry produced a grade equivalence score of fourth grade on reading, third grade on spelling and third grade on arithmetic (SPC-R3. 952). The results of the testing was consistent (SPC-R3. 953).

Both experts explained that sub-average intellectual functioning is considered to be a "range or band of scores" (SPC-R3. 877). Dr. Bursten explained: "The idea behind that is there's recognition that no one IQ score is exact or succinct, that there's always some variability and some error built in." (Id.). Thus, a score between 65 to 75, and lower than 65 fall within that band and "comprise[s] mental retardation" (Id.). Dr.

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possibility – and only the possibility – but that that was representative of an inflated score." (Id.). In addition, Dr. Prichard testified that the medical phenomenon of "practice effect" may have caused the score to be inflated (SPC-R3. 972). Dr. Bursten concurred with these opinions (SPC-R3. 926). And, Dr. Crown's testimony was found to be not credible by the lower court in 1997. This Court accepted the lower court's finding. See Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

[16]Dr. Bursten explained that:

> Mr. Cherry's greatest strength, which approximated average limits, was demonstrated on the Digit Span subtest. This particular test is a measure of auditory attention/ concentration. . . . [I]t is important to point out that the Digit Span subtest does not rely on either verbal or nonverbal higher order reasoning/judgment skills. . . . [B]ecause Mr. Cherry earned a relative elevation on the Digit Span subtest, that isolated score served to somewhat inflate or skew the overall/Full Scale IQ score.

(Ex. 4).

Prichard concurred Mr. Cherry's IQ score fell within the range that constitutes intellectual disability (SPC-R3. 955).[17]

Dr. Prichard testified that in addition to his IQ score, the background materials supported the notion that Mr. Cherry's intellectual functioning was substandard (SPC-R3. 965). He noted that all of the testimony and affidavits he reviewed of people who knew Mr. Cherry as a child and young adult described him as slow and intellectually disabled and that Mr. Cherry had been placed in special education classes while in school (Id.). Indeed, one of the sources of information was a DOC record that indicated an investigation into Mr. Cherry's background had been conducted in 1972 (SPC-R3. 967). In that report, George Williams, a counselor from Mr. Cherry's middle school, who knew Mr. Cherry when he was 11 years old, told DOC officials, that Mr. Cherry was placed in special education classes. He also knew that Mr. Cherry had problems communicating. Rather than press Mr. Cherry academically he asked Mr. Cherry to make sure the erasers and black boards were clean. "Clapping erasers was something Roger could do, and **I always liked giving my disabled children a sense of accomplishment.**" (Ex. 2)(emphasis added).

Mr. Cherry's DOC records contained other comments various

[17]The State's expert also testified that Dr. Barnard's testimony in 1996 that Mr. Cherry was not intellectually disabled because his IQ was a 72, was inaccurate. "[T]here's more to the picture than what [Dr. Barnard] communicated." (SPC-R3. 969).

correctional officials had made about his intellectual functioning. In 1968, when Mr. Cherry was 17 years of age, a DOC official, remarked, "[Mr. Cherry] seems to be a very inadequate, borderline defective, having difficulty manipulating the moderately complex factors of his environment" and "he does seem to be very inadequate in almost all areas and seems to have difficulty reasoning through to logical conclusions, problems of everyday living." (Ex. 2). Dr. Prichard testified that the vignette demonstrates information about Mr. Cherry's functioning (SPC-R3. 964).[18]

Both experts determined that Mr. Cherry's IQ score and intellectual capabilities over time placed him in the range of substandard intellectual functioning (SPC-R3. 924, 959).[19]

In 2010, Dr. Harry Krop administered the WAIS-IV to Mr. Cherry. Dr. Krop testified that with regard to Mr. Cherry's testing, the conditions were "optimal" (PC-R4. 75), and he carefully observed Mr. Cherry's attitude and effort throughout the testing (PC-R4. 76). Dr. Krop observed Mr. Cherry giving his full effort throughout the testing (PC-R4. 76-77). And, Mr.

[18]The remark made in 1968 also reflects Mr. Cherry's adaptive skills, as well as his intellectual functioning.

[19]Dr. Prichard specifically stated that "[A]n obtained score of 72 can and often does equate to a score consistent with mental retardation." (Ex. 6).

Cherry scored very well on the TOMM (PC-R4. 79).[20]

Mr. Cherry's full scale IQ score on the WAIS-IV was a 64 (PC-R4. 81).[21] Dr. Krop's opinion was that the score was reliable and accurate (PC-R4. 94-95). And, as the score was more than two standard deviations below the mean, Dr. Krop concluded that this would establish the first prong of the definition of intellectual disability: Mr. Cherry suffered from significantly subaverage intellectual functioning (PC-R4. 82).

Though Dr. Prichard had some reservations about the validity of Mr. Cherry's WAIS-IV score, the experts who testified on behalf of Mr. Cherry, as well as the State's witness, Dr. Weiss, countered his concerns with well documented medical information concerning the changes that were made to the WAIS-IV which explained the decrease in Mr. Cherry's score.[22]

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[20]In his report, Dr. Krop stated that on the TOMM, "Mr. Cherry obtained a score of 49/50 on Trial one and perfect scores on Trial two and the Retention Trial. These results are consistent with the observed effort by Mr. Cherry during the testing." (PC-R4. D-Ex. 1).

[21]When Dr. Krop originally added the subtest scores he made a mathematical error and reported Mr. Cherry's full scale IQ score as a 65 (PC-R4. D-Ex. 1). However, Dr. Krop re-added the score and corrected it at the evidentiary hearing (PC-R4. 81).

[22]Dr. Prichard compared the raw data from the WAIS-IV to the WAIS-III (PC-R4. 492). On the digit symbol coding subtest, Mr. Cherry's score went down significantly which concerned Dr. Prichard (PC-R4. 493). However, it appeared that Dr. Prichard did not understand Dr. Weiss' testimony that made it clear that the digit span subtests on the WAIS-III and WAIS-IV were different (PC-R4. 459-60; see also PC-R4. 561). The digit span on the WAIS-IV has an additional component, making it more

Moreover, under proffer, Dr. Prichard stated that his opinion that Mr. Cherry is intellectually disabled was not changed:

> Clinically, I said what I said in 2005 based on what I felt was a valid administration of the WAIS-III, based on the other data point that was the 1992 WAIS-R. I considered, clinically, standard error of measurement. My position was rejected by the court. There was a different legal decision. **But I stand by what I said in 2005.**

(PC-R4. 503)(emphasis added).

Mr. Cherry conclusively established through reliable expert testimony that he meets the first prong for intellectual disability, i.e., he suffered from significantly subaverage intellectual functioning. See Hall, 134 S.Ct. at 1993 ("Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.").

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difficult (PC-R4. 460). Thus, it was not unusual to see Mr. Cherry's performance decline. In addition, Dr. Weiss' testified that the verbal component of the test was contributing less to the full scale IQ score (PC-R4. 521). The verbal component was an area of strength for Mr. Cherry and Dr. Prichard acknowledged that this could possibly contribute to a reduction in Mr. Cherry's score (PC-R4. 521-2).

Also, Dr. Prichard pointed out that in the symbol search subtest of the WAIS-IV, Dr. Krop erroneously instructed Mr. Cherry to make and "X" instead of a "/" (PC-R4. 489-90). Dr. Prichard was of the opinion that this can be a very significant issue (PC-R4. 490), though neither Dr. Krop or Taub believed it to have affected Mr. Cherry's score (PC-R4. 90, 106, 229). However, in an abundance of caution, Dr. Krop testified that he removed the subtest from the scoring, which is permitted by the technical manual (PC-R4. 549-50). When he did so: "Mr. Cherry would have come out with an IQ of 65, which would have been one point higher than - - than using that particular subtest in the overall IQ." (PC-R4. 549-50).

2. Mr. Cherry's Adaptive Skills.

As to the second prong, both experts agreed that Mr. Cherry's adaptive skills were impaired (SPC-R3 882, Exs. 4, and 6). The experts relied on a variety of sources of information, including the descriptions of Mr. Cherry when he was a child and young adult found in sworn testimony and affidavits, by his fifth grade teacher,[23] and middle school guidance counselor, by various prison officials who encountered Mr. Cherry over the years, including most recently, Ofc. Paxson, Mr. Cherry's self-report, and DOC records (SPC-R3. Id.).

Impairment in adaptive skills requires an examiner to determine "how an individual has functioned in his environment" and "aspects of independent behavior". (SPC-R3. 878).

Dr. Bursten testified that the background materials were consistent regarding Mr. Cherry's adaptive functioning (SCP-R3. 930).

In administering the SIB-R to Ofc. Paxson, Dr. Prichard obtained a result that was consistent with the other data and was "suggestive of adaptive deficits in a variety of domains." (SPC-R3. 972). Dr. Prichard testified that the results of the SIB-R from Ofc. Paxson was the most compelling piece of information and

[23]Mr. Cherry's fifth grade teacher described him as being intellectually disabled (Ex. 4). In terms of "general independence", Mr. Cherry's fifth grade teacher rated him a 2 on a scale of 1 to 10, with 1 being the lowest (Ex. 4).

"conclusively for me, it answered the question" of Mr. Cherry's intellectual disability (SPC-R3. 974-5):

> I'm also viewing [the SIB-R results from Officer Paxson] in terms of internal norms, assessing these individuals this way with corrections officers historically, and comparing what I receive on each test in the same manner with prior testing occasions. And seeing these kind of limitations with Mr. Cherry, you know is significant to me given that I have not seen that much when doing adaptive testing with a corrections officer.

(SPC-R3. 974).

Again, Mr. Cherry established the significantly subaverage deficits in his adaptive functioning by relying upon "medical and professional expertise to define and explain how to diagnose the mental condition at issue." Hall. 134 S.Ct. at 1993.

3. Onset Before 18.

As to the third prong, both experts agreed that all of the information consistently demonstrated that Mr. Cherry was "slow" and "challenged intellectually" as a child and adolescent (SPC-R3. 933, 975).

Dr. Bursten indicated that "at least fifteen [informants] independently referred to Mr. Cherry as being "'slow', 'retarded', etc., during preadolescent/developmental years." (Ex. 4). Mr. Cherry was described as not functioning at a normal level. (Id.).

Dr. Prichard remarked that the "**[a]necdotal data also strongly and almost exclusively suggest the presence of**

intellectual and adaptive limitations recognized consistently over the course of Mr. Cherry's life." (Ex. 6)(emphasis added).

Mr. Cherry established that his intellectual disability has been present throughout his life.

C. THE LOWER COURT ERRED IN ANALYZING MR. CHERRY'S CLAIM

> That 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. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. **In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.**

Hall, 134 S.Ct. at 1993 (emphasis added).

At his evidentiary hearing in 2005, Mr. Cherry presented the testimony of two mental health experts that he was intellectually disabled. However, the circuit court disregarded that medical and professional expertise and determined Mr. Cherry was not intellectually disabled based on considerations that are not acceptable to the medical community. Contrary to Hall, the circuit court abandoned the "diagnostic criteria employed by psychiatric professionals" and refused to rely on the "expertise of the medical profession in analyzing Mr. Cherry's claim. See

Id. at 2000.

Indeed, even the State recognized the value of the experts opinions, characterizing it as the "best possible information" regarding Mr. Cherry's intellectual disability (SPC-R3. 779-80).

In addition to erroneously adopting a strict cut-off score for the IQ, the circuit court considered IQ scores from tests, specifically the Beta and Kent tests, which are not accepted in the scientific community and are not designated by DCF to be used in determining if a defendant is intellectually disabled (SPC-R3. 973).[24] Indeed, both Dr. Bursten and Dr. Prichard agreed that test scores produced by the Kent and Beta had little value (SPC-R3. 896, 925, 961). The Beta IQ test is simply not a comprehensive measure of intellectual functioning (SPC-R3. 896).[25] The State's expert further explained the Beta was "developed to assess individuals in settings like institutions

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[24]Oddly enough, the circuit court also relied on Dr. Crown's testimony from 1996 in which he mentioned that Mr. Cherry had scored a 78 on a WAIS-R without knowing anything about the reliability of the score or hearing any testimony about the standard error of measurement, Flynn effect, or whether all of the subtests had been given. Dr. Prichard testified that as an professional, the score had little value to the determination of intellectual disability because of the limited information about the test.

[25]Indeed, as directed by the Florida Legislature and this Court the Department of Children and Families, in identifying the appropriate tests to be used to determine IQ have selected only the current version of the WAIS or the Stanford-Binet. Both experts agreed that the WAIS is the most comprehensive intelligence test.

where you're doing group testing." and "It's also for non-readers" (SPC-R3. 961). "So, its utility in terms of saying whether a person is mentally retarded or not is extremely limited. **It's not accepted as a measure in the scientific community for determining retardation.**" (Id.)(emphasis added).[26]

Thus, the circuit court's reliance on such tests violates the dictate of Hall which requires courts to examine and rely upon what "experts in the field would consider" when diagnosing intellectual disability. Hall, 134 S.Ct at 1995.[27]

The circuit court also relied on external factors to suggest that Mr. Cherry IQ was "depressed" (SPC-R3. 535), all of which both experts considered when they evaluated Mr. Cherry and found

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[26]At Mr. Cherry's subsequent evidentiary hearing concerning the WAIS-IV, Dr. Prichard again addressed the Kent and the Beta, commenting that it's really comparing apples and oranges, and the Kent and Beta would not be relevant to the intellectual disability evaluation (PC-R4. 518-19).

Further, Dr. Frank Gresham also testified at the hearing concerning the WAIS-IV. He stated that he had never heard of the Kent prior to this hearing (PC-R4. 582). He did some research and found that it is a screening test developed essentially on the battlefield to screen people for basic cognitive ability (PC-R4. 583). He stated that he wouldn't interpret it as an IQ score (PC-R4. 583).

With regard to the Beta, Dr. Gresham testified that it was normed on Canadian children, not adults (PC-R4. 583). He wouldn't call it an intelligence test (PC-R4. 583). Rather, it is a nonverbal test of cognitive ability (PC-R4. 583). And, he wouldn't interpret it as an IQ score (PC-R4. 584). The Kent and the Beta are not valid measures of intelligence (PC-R4. 584).

[27]The court also relied on the fact that Mr. Cherry was found competent to proceed at trial – an issue that has no bearing on whether or not he is intellectually disabled.

him intellectually disabled.[28]

Likewise, the circuit court ignored the substantial and consistent evidence of Mr. Cherry's impaired adaptive skills. According to Hall, in assessing the second prong, a fact-finder must consider substantial and weighty evidence of intellectual disability as measured and made manifest by... medical histories, behavioral records, school tests, and reports, and the testimony regarding past behavior and family circumstances. Hall, 134 S.Ct at 1996 (emphasis added). This is so because "the medical community accepts that all of this evidence can be probative of intellectual disability." Id. Here, the circuit court ignored the evidence and speculated that Mr. Cherry's deficits with adaptive skills were simply due to his antisocial personality disorder (ASPD).[29] And, while ignoring medical standards, the circuit court also ignored Mr. Cherry's impeccable confinement record which demonstrates that he can and does follow rules in a structured environment.[30] This would not be so if his behavior

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[28]The circuit court ignored Mr. Cherry's perfect score on the TOMM which reflected that his other test scores were accurate and he was giving his best effort. Also, the fact that Mr. Cherry's full scale IQ scores from 1992 and 2005 were identical suggests that they were not influenced by any external factors.

[29]It is axiomatic that in forming such a conclusion, the circuit court has acknowledged that Mr. Cherry has established that he suffers from significantly subaverage deficits in his adaptive functioning.

[30]Dr. Prichard testified that intellectual disability and ASPD are not mutually exclusive. And, the DSM-IV-TR, directs

were driven by ASPD rather than intellectual disability. In addition the APA has explained:

> The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.

DSM-IV-TR, 47.

The circuit court also concluded that Mr. Cherry's self report on the SIB-R and during his evaluations is "problematic". However, the court relied entirely on Mr. Cherry's self report about his previous employment history to deny his claim. But, in fact, much of the information Mr. Cherry provided about his employment history is refuted by the records.[31]

Indeed, the reason that Ofc. Paxson's SIB-R result was so compelling to the experts and specifically, the State's expert, was that he had never received such information regarding a death row inmate from a DOC official, despite the fact that he always

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experts in diagnosing patients to rule out intellectual disability and brain damage **before** diagnosing ASPD. Thus, the circuit court again violated Hall's dictate that "Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.". 134 S.Ct. at 1993.

[31]There are no records in Mr. Cherry's DOC file regarding any work assignments in the forestry industry. However, there are records which show he worked menial jobs, like kitchen staff. Also, Elmo Washington, a former employer of Mr. Cherry attested that he hauled wood and that Mr. Cherry was a good helper because "there wasn't anything complicated about the work." Certainly, this cannot be characterized as forestry work.

conducted such testing in similar circumstances.[32]

The experts who evaluated Mr. Cherry, considered all of the information cited by the court, yet still found that Mr. Cherry was intellectually disabled.

The circuit court's order is inconsistent with the teachings of Hall and not supported by the evidence.

D. Florida's Procedures for Determining Intellectual Disability do not comply with Hall.

Mr. Cherry submits that the determination of whether a capital defendant is intellectually disabled within the meaning of the Eighth Amendment is a factual question. Under the United States Constitution, a criminal defendant's right to a fair opportunity to defend carries with it the right to have a jury decide questions of fact. Recently, the United States Supreme Court granted a writ of certiorari in Hurst v. Florida, 135 S.Ct. 1531 (March 9, 2015), to decide whether a capital defendant is entitled to a jury hear his claim under Atkins v. Virginia. Mr. Cherry must be provided "a fair opportunity to show that the Constitutions prohibits [his] execution" which includes having his claim considered by a jury. See Hall, 134 S.Ct. at 2001.

Likewise, the clear and convincing evidence standard also

[32]Indeed, Dr. Prichard has served as the State's expert numerous times in the past and conducted nearly identical evaluations of other inmates, including conducting testing with DOC officials. Counsel knows of no other case where the test results with the DOC official have been discounted.

denies Mr. Cherry constitutional protections. Indeed, Hall's dictate that Mr. Cherry must be provided a fair opportunity in which to litigate his claim requires that the State bear the burden of proof and that the State prove beyond a reasonable doubt that the defendant is not intellectually disabled.

Under Ring v. Arizona, 536 U.S. 584 (2002), the Sixth Amendment requires any finding of fact which makes a defendant eligible for the death penalty must be unanimously found beyond a reasonable doubt by a jury. Ring, 536 U.S. at 602. While Ring dealt specifically with statutory aggravating circumstances, its holding applies to "factfinding[s] necessary to . . . put [a defendant] to death." Id. at 609. Thus, the State bears the burden of proving eligibility facts and of proving those facts beyond a reasonable doubt. As Ring held, an eligibility fact is an element of capital murder. Aggravating factors "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Limiting constructions are "elements" of the aggravators. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 211, 224 (Fla. 1988). Since "[t]he aggravating circumstances . . . actually define those crimes . . . to which the death penalty is applicable . . . they must be proved beyond a reasonable doubt." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). This same reasoning applies to eligibility factors which originate in decisional law

rather than in statutes. Ring.

In Atkins, the Supreme Court held that the execution of a intellectually disabled person "is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321 (citation omitted). Atkins describes this holding as "a categorical rule making [intellectually disabled] offenders ineligible for the death penalty." Id. at 320. Therefore, whether or not a person is intellectually disabled is an eligibility issue, and the fact that a person is not mentally retarded is an eligibility fact. Under Ring, this fact must be found by a unanimous jury based upon proof beyond a reasonable doubt.

E. Conclusion.

Accepting the circuit court's rejection of Drs. Bursten and Prichard's opinions that Mr. Cherry is intellectually disabled "conflicts with the logic of *Atkins* and the Eighth Amendment. If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." Hall, 134 S.Ct. at 1999.

Mr. Cherry's death sentence violates the eighth amendment. This Court should vacate that death sentence.

CONCLUSION AND RELIEF REQUESTED

Mr. Cherry, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus and vacate his unconstitutional sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Habeas Corpus has been furnished by electronic service to James Riecks, Assistant Attorney General, on May 25, 2015.

/s/. Linda McDermott
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This petition is typed in Courier 12 point not proportionately spaced.

/s/. Linda McDermott
LINDA McDERMOTT