DOCKET NO. 12-10882

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Respondent states the question presented in the following way:

> WHETHER THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW FLORIDA'S DEFINITION AND APPLICATION OF THE INTELLIGENCE (IQ) PRONG OF THE THREE-PART DEFINITION OF MENTAL RETARDATION WHICH DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT; WAS DECIDED CORRECTLY ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; AND THAT CANNOT BE RESOLVED WITHOUT EXTENSIVE FACTUAL DISCUSSION THAT HAS NO IMPACT ON ANY OTHER CASE?

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COMES NOW the State of Florida and responds as follows to Hall's petition for writ of certiorari to the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision at issue is reported as *Hall v. State*, 109 So. 3d 704 (Fla. 2012). That decision is attached as Appendix A. The underlying trial court order is attached as Appendix B.[1]

STATEMENT OF JURISDICTION

Hall says that this Court's jurisdiction is based on 28 U.S.C. §2254, which is reproduced at length in the petition. That statute sets out the jurisdiction of the federal courts to consider a petition for writ of habeas corpus filed by a state

[1] Hall has attached three (3) additional Florida Supreme Court decisions as appendices to his petition. Those decisions are not under review here.

inmate -- it has nothing to do with this Court's certiorari jurisdiction. This Court's discretionary jurisdiction is set out in 28 U.S.C. §1257.

Hall's petition, construed as a whole, does not appear to be an attempt to file an original application for writ of habeas corpus in this Court. The petition is styled as a petition for writ of certiorari, and is generally drafted in "certiorari terms." The exercise of this Court's jurisdiction is unjustified in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

Hall says that the Eighth Amendment to the Constitution of the United States is at issue in this proceeding. That Amendment is correctly reproduced in the petition. However, to the extent that Hall says that 28 U.S.C. §2254 is involved, that assertion is inaccurate.

RESPONSE TO PROCEDURAL HISTORY

In its 2012 decision affirming the denial of Hall's prior post-conviction relief motion, the Florida Supreme Court summarized the facts of the case and the procedural history in the following way:

> Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder of Karol Hurst. *Hall v. State* (*Hall I*), 403 So. 2d 1321, 1323 (Fla. 1981). We upheld Hall's conviction and sentence on direct appeal. *Id.* at 1325.
>
> On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1

through 8, 1982. *Hall v. State* (*Hall II*), 420 So. 2d 872, 873 (Fla. 1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. *Id.* Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. *Hall v. Wainwright* (*Hall III*), 733 F.2d 766, 769 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. *Id.* at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. *Hall v. Wainwright* (*Hall IV*), 805 F.2d 945, 946 (11th Cir. 1986), *cert. denied, Hall v. Dugger*, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). The Eleventh Circuit affirmed the denial. Id. at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that all mitigating factors, not just statutory mitigation, should be considered by the judge and jury). This Court held that any error in the sentencing was harmless. *Hall v. Dugger* (*Hall V*), 531 So. 2d 76, 77 (Fla. 1988).

The governor then signed a second death warrant on September 20, 1988. *Hall v. State* (*Hall VI*), 541 So. 2d 1125, 1126 (Fla. 1989). Hall filed his second 3.850 motion, alleging error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court found that this Court's ruling on the issue in *Hall V* was a procedural bar to Hall raising the claim again. *Hall VI,* 541 So. 2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. *Id.* Ultimately, we determined that a *Hitchcock* error occurred, and that such error could not be considered harmless. *Id.* at

1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. *Id.*

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. *Hall v. State* (*Hall VII*), 614 So. 2d 473, 479 (Fla. 1993). Hall sought postconviction relief, which was denied. *Hall v. State* (*Hall VIII*), 742 So. 2d 225, 230 (Fla. 1999). We affirmed the denial. *Id.* at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Id.* at 229.[2]

After *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was decided, Hall filed a motion to declare section 921.137, *Florida Statutes* (2004), [FN1] unconstitutional. While the motion was pending, we adopted *Florida Rule of Criminal Procedure* 3.203 as a mechanism to file *Atkins* claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

> [FN1] Section 921.137, *Florida Statutes* was enacted during a regular session of the Florida Legislature in 2001. *See* ch.2001-202, § 1, *Laws of Fla.* The statute has been amended once to transfer duties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. *See* ch.2006-195, § 23, *Laws of Fla.*

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[2] Lest there be any doubt, the "mental retardation" claim at issue in this proceeding was solely in the context of a competency claim, and was decided as such.

> At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revised was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.
>
> Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion *in limine* that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

Hall v. State, 109 So. 3d 704, 705-707 (Fla. 2012).[3]

[3] Hall's reliance on the dissenting opinion to the Florida Supreme Court's affirmance of the denial of relief on *Atkins* grounds is inappropriate. That opinion does not represent the law or the facts as found by the Florida Supreme Court.

THE RELEVANT FACTS

The factual recitation set out at pages 3-5 of the petition is argumentative, incomplete and inaccurate.

The Facts of the Murders.

In its direct appeal decision affirming Hall's conviction, the Florida Supreme Court summarized the facts in the following way:

> Hall and Mack Ruffin were indicted for the murders of Karol Hurst and Deputy Sheriff Lonnie Coburn. Hall was tried alone for the Hurst murder, which is the subject of this appeal.[FN1]
>
> > [FN1] Ruffin, tried separately for the Hurst murder, was convicted and received a death sentence. This Court affirmed. Ruffin v. State, 397 So.2d 277 (Fla.1980). Tried together, Hall and Ruffin were convicted of murdering Deputy Coburn. Ruffin received a sentence of life imprisonment while Hall received another death sentence. Hall v. State, 403 So.2d 1319 (Fla.1980). Of course, our review of the present case is limited to the record presented in the instant case.
>
> On February 21, 1978, Mrs. Hurst, a 21-year-old housewife who was seven months pregnant, left a Pantry Pride checkout counter in Leesburg, Florida, at 3:00 p.m. Her body was found at 3:00 p.m. on February 22, 1978, in Sumter County. She had been shot and sexually assaulted. In custody on the morning of February 22 for Deputy Coburn's death, Hall told a deputy sheriff how, on the previous day, he and Ruffin had sat in that Pantry Pride parking lot looking for a car to use in committing a robbery when he, Hall, accosted Mrs. Hurst and forced her into her car. Hall slid in behind the steering wheel and drove while Ruffin followed in his own car. They stopped in a wooded area where, according to Hall, Ruffin beat, sexually assaulted, and shot Mrs. Hurst.

> At trial the evidence established that, after leaving the wooded area, the pair was seen at a convenience store in Hernando County. Their conduct in the store aroused suspicions and the clerk called the sheriff's office. Before a deputy arrived, Hall and Ruffin left the store. Shortly after their departure the clerk heard a shot and found Deputy Coburn dead on the ground behind the store. Coburn's weapon was missing, but under his body lay the weapon later shown to have killed Mrs. Hurst. Hall and Ruffin fled in the Hurst vehicle, which they had driven to the store, but, after a chase, they abandoned the car and fled on foot. Both men were caught shortly thereafter. They left Coburn's pistol, Mrs. Hurst's handbag, and groceries which she had bought that afternoon in the car.
>
> Hall contends that the state has failed to prove him guilty of first-degree murder. The state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car. These circumstances were sufficient to convince the jury that the criminal acts were the result of a common scheme.

Hall v. State, 403 So. 2d 1321, 1322-1323 (Fla. 1981).

On resentencing, the Florida Supreme Court affirmed the finding of the following seven (7) aggravating factors:

> In sentencing Hall to death the court found that seven aggravators had been established: 1) previous conviction of violent felony (assault with intent to commit rape, second-degree murder, shooting at or into an occupied vehicle); 2) under sentence of imprisonment (on parole for the assault conviction); 3) committed during the commission of kidnapping and sexual battery; 4) committed for pecuniary gain (stealing the victim's car); 5) heinous, atrocious, or

> cruel; 6) cold, calculated, and premeditated; and 7) committed to avoid or prevent arrest.

Hall v. State, 614 So. 2d 473, 477 (Fla. 1993). With respect to the offered mitigation, the Florida Supreme Court said:

> The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, *i.e.*, mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.

Hall v. State, 614 So. 2d at 478.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW FLORIDA'S DEFINITION AND APPLICATION OF THE INTELLIGENCE (IQ) PRONG OF THE THREE-PART DEFINITION OF MENTAL RETARDATION WHICH DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT; WAS DECIDED CORRECTLY ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; AND THAT CANNOT BE RESOLVED WITHOUT EXTENSIVE FACTUAL DISCUSSION THAT HAS NO IMPACT ON ANY OTHER CASE.

There is more to being mentally retarded than scoring low on an intelligence test. *Atkins v. Virginia*, and the mental-retardation-as-a-bar-to-execution cases applying it, have recognized that basic fact. *Atkins* itself left the implementation of that constitutional requirement to the States,[4]

[4] Florida has done that (and in fact had already implemented that very rule prior to the release of *Atkins*), and there is no

and Florida, like the other states, implemented the three-part definition of mental retardation that was used by this Court in that decision. This Court did not undertake to prescribe any specific rules or procedures beyond the general constitutional rule found in the decision itself, but there is no argument possible that requiring a defendant to establish the three diagnostic criteria used in *Atkins* is in some way defective.

Hall says that Florida's definition of retardation conflicts with *Atkins* because it requires a score of 70 or below to establish the "significantly subaverage intellectual functioning" component of the three-part definition.[5] He does so based on the assertion that *Atkins* **requires** the states to adopt what Hall says is the "clinical definition" of retardation and to abdicate the State's legislative authority to implement

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constitutional infirmity with that procedure, which is not what Hall is challenging, anyway. Instead, Hall's petition challenges the determination *vel non* that he is not mentally retarded. That is a wholly factual issue that is wholly specific to this case.

[5] Florida is far from the only state to establish such a cut-off score:

> Indeed, another jurisdiction considering a similar claim noted that fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean. *Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74(Ky.) (upholding use of seventy IQ score cutoff), *cert. denied*, 546 U.S. 1017, 126 S.Ct. 652, 163 L.Ed.2d 528 (2005).

Cherry v. State, 959 So. 2d 702, 713-714 n. 8 (Fla. 2007).

Atkins to the developers of the Weschler intelligence test. No decision from this Court says that, and *Atkins* itself expressly left the task of defining retardation to the States. *Atkins*, 536 U.S. at 317. In fact, this Court expressly recognized that the definitions that had been adopted by various State statutes were not identical to the clinical definitions that this Court had mentioned in the opinion immediately after delegating the task of defining retardation to the states. *Id.* at 317 n.22. Thus, this Court clearly recognized that the clinical definitions had not been adopted by the states in the manner Petitioner suggests they must be under *Atkins*. Additionally, this Court itself has left no doubt that it left the the procedural and substantive task of defining retardation to the States. *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009).[6] Given these circumstances, Petitioner's assertion that Florida's definition of retardation conflicts with *Atkins* is meritless. Certiorari should be denied.

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[6] This Court was explicit:

> Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall [within *Atkins*' compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.*, at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

Bobby v. Bies, 556 U.S. 825, 831, 129 S.Ct. 2145, 2150 (2009).

The Florida Supreme Court affirmed the trial court's denial of relief on independently adequate state law grounds, which were decided correctly. The Court said:

> Hall asserts that he is mentally retarded pursuant to *Atkins*. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplies the Supreme Court's ruling in *Atkins* and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. *See Franqui v. State*, 59 So. 3d 82 (Fla. 2011). We again decline to adopt this line of reasoning. As we stated in *Franqui*:
>
> > Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize the higher cut-off IQ score of 75. *Nixon*, 2 So. 3d at 142. We disagreed, reasoning that *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon*, 2 So. 3d at 142.
>
> *Id.* at 94 (*citing Nixon v. State*, 2 So. 3d 137 (Fla. 2009)).
>
> Section 921.137, *Florida Statutes* (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule

define the elements of a mental retardation claim as discussed in *Atkins*: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age eighteen. *See Atkins*, 536 U.S. at 318, 122 S.Ct. 2242; § 921.137(1), *Fla. Stat.* (2012); *Fla. R. Crim. P.* 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), *Fla. Stat.* (2012). This statute was adopted prior to the Supreme Court's ruling in *Atkins*. *See* Ch.2001-202, § 1, *Laws of Fla.*

In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from

> the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70.... [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes....

Cherry, 959 So. 2d at 712-13.[7]

In *Nixon*, the appellant challenged our decision in Cherry, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed, reasoning that while *Atkins* recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation. *Nixon v. Florida*, 2 So. 3d 137, 143 (Fla. 2009) (*citing Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007)).

The cutoff was recently reaffirmed in *Franqui*. Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. *Franqui v. State*, 59 So. 3d 82, 106 (Fla. 2011) (*citing Franqui v. State*, 699 So. 2d 1312 (Fla. 1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. *Id.* at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an *Atkins* claim, which was summarily denied on February 21, 2008. *Id.* at 89-90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. *Id.* at 90 (*citing Franqui v. State*, 14 So. 3d 238 (Fla. 2009)).

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[7] The petition for certiorari filed by Cherry was denied. *Cherry v. Florida*, 552 U.S. 993, 128 S.Ct. 490, 169 L.Ed.2d 344 (2007). Nixon and Franqui apparently did not file a petition for writ of certiorari.

Testing revealed Franqui's IQ fell somewhere between 71 and 80. *Id.* at 91. The trial court, after considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. *Id.*

On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to *Atkins*. In *Franqui*, we found that (1) the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in *Atkins*; (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded *Atkins*; (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in *Thompson v. State*, 3 So. 3d 1237 (Fla. 2009), where we reversed the trial court's summary denial of Thompson's postconviction motion. Although Thompson's motion alleged an IQ of 74 or 75, [FN2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in *Cherry*. *Thompson*, 3 So. 3d at 1238-39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." *Thompson*, 3 So.3d at 1238.

> [FN2] *Thompson*, 3 So.3d at 1239 (Wells, J., dissenting).

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in *Foster v. State*, 929 So. 2d 524 (Fla. 2006). Hall

> mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retardation, [he] does not meet the second prong of the test set forth in *Atkins*...." *Id.* at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.
>
> Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins*. We have previously found this argument to be meritless. *See, e.g.*, *Cherry*, 959 So. 2d at 712-13; *Nixon*, 2 So. 3d at 142; *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *Brown v. State*, 959 So. 2d 146, 148-49 (Fla. 2007); *Burns v. State*, 944 So. 2d 234, 248 (Fla. 2006); *Rodgers v. State*, 948 So. 2d 655, 666-68 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045, 1049-50 (Fla. 2006); *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).[8]

Hall v. State, 109 So. 3d 704, 707-710 (Fla. 2012).

That disposition is based on the findings of the Florida trial court which, in its turn, had made extensive, and specific, findings of fact from the evidence presented at the evidentiary hearing. Among those factual findings, and dispositive of Hall's claims from an evidentiary standpoint, is

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[8] This Court denied Rodgers' petition for certiorari. *Rodgers v. Florida*, 552 U.S. 833, 128 S.Ct. 59, 169 L.Ed.2d 50 (2007). The other inmates (except for Cherry) did not seek review in this Court.

that Hall has scored as high as 80 on a version of the Wechsler intelligence test.[9] That order is attached hereto as Appendix B.

The Florida Supreme Court's affirmance of the denial of relief is the quintessential evidentiary ruling that is wholly inappropriate for certiorari review. Lest there be any doubt as to how far from appropriate for certiorari consideration the claim is, Hall's petition is filled with citations to the trial court record as if this proceeding was a direct appeal, and the entire transcript of the State Court evidentiary hearing is attached as an appendix to the petition. Hall would have this Court utilize its discretionary jurisdiction to review the **evidence** underlying the denial of his claim for relief under *Atkins*. This Court's precedent is well-settled that a writ of certiorari is not issued to review evidence and find facts. *United States v. Johnston*, 278 U.S. 220, 227 (1925); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). That such an intensive factual review is what Hall wants is made clear by the attachment of the transcript from the State Court hearing. Review of trial evidence for the purpose of second-guessing the Florida trial and appellate courts is not the purpose of certiorari review. And, because the issue Hall seeks to present is wholly dependent on intelligence testing procedures and

[9] Hall's petition includes a substantial discussion of the Wechsler series of intelligence tests. There is no claim that those test instruments are not appropriate.

results, the issue is so highly fact specific that it is of no significance beyond the boundaries of this case. Because the fact-specific issue contained in the petition is of extremely limited significance, it is unworthy of this Court's attention. *Rice*, 349 U.S. at 79.

The problem with Hall's claim, as the Florida Supreme Court held, is that the evidence does not support it:

> At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. **After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation -- an IQ below 70.** The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

Hall v. State, 109 So. 3d at 707. (emphasis added). Not only did the Florida Supreme Court hold that Hall has not produced an IQ score falling in the range of mental retardation, the true facts are that Hall has scored as high as 80 on intelligence testing,

and such a score is well outside any possible diagnosis of mental retardation.

This Court has long recognized that its jurisdiction does not lie to review decisions from state courts that rest on adequate and independent state law grounds, which this most certainly is. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). This lack of jurisdiction occurs when the state court decision contains a plain statement that the decision relies on a state law basis even if the state court alternatively reached the merits. *Sochor*, 504 U.S. at 533; *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *see also Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Florida's implementation of *Atkins* is a matter of State law. Certiorari should be denied.

Finally, Hall's petition does not involve an unsettled, important federal question -- a federal question with ramifications beyond the case presented -- nor is there conflict with a relevant decision by this Court. Cases that do not present such a decisional split or unresolved federal question do not merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). *See*

also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). If a case presents no federal question, certiorari review is inappropriate. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Zucht v. King*, 260 U.S. 174 (1922). Because the Petitioner's claim is, at best, a claim that the Florida Supreme Court erred in affirming the trial court's findings of fact, it cannot satisfy this Court's requirements under Rule 10. U.S. Sup. Ct. R. 10.

CONCLUSION

Hall's petition is no more than his request for this Court to interpret Florida law in a manner helpful to him. Hall's claim, when stripped of its pretensions, is that this Court should alter its *Atkins* holding to disallow the States from requiring that an intelligence score must fall below a specified level in order to establish the "subaverage intelligence" component of the three-part definition of mental retardation. That claim does not have a constitutional dimension. While the petition contains histrionic assertions that Florida has "significantly altered" the "clinical definition of mental retardation" of mental retardation, the true facts show nothing more than Florida's wholly proper implementation of this Court's decision in *Atkins*, which allowed the states to do exactly as

Florida has done. In a very real sense, Hall would have this Court abdicate the implementation of *Atkins* to the "creators of the standardized IQ tests." *Petition*, at 13. That is inappropriate, and demonstrates the inappropriateness of certiorari in this case. Based upon the foregoing, the Respondent submits that the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Eric Pinkard, pinkard@ccmr.state.fl.us, support@ccmr.state.fl.us on this 18th day of July, 2013.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL

APPENDIX A

109 So.3d 704, 37 Fla. L. Weekly S773
(Cite as: 109 So.3d 704)

Supreme Court of Florida.
Freddie Lee HALL, Appellant,
v.
STATE of Florida, Appellee.

No. SC10–1335.
Dec. 20, 2012.
Rehearing Denied March 8, 2013.

Background: Following affirmance of murder conviction, 403 So.2d 1321, death sentence, 614 So.2d 473, and denial of postconviction relief, 742 So.2d 225, defendant filed successive motion to vacate sentence. The Circuit Court, Sumter County, Richard Tombrink, Jr., J., denied motion and defendant appealed.

Holdings: The Supreme Court held that:
(1) cutoff intelligence-quotient (IQ) score of 70 or below to meet the test for mental retardation, as would preclude death penalty, is not improperly arbitrary;
(2) a defendant must establish all three elements to show that he or she is mentally retarded and thus ineligible for execution;
(3) defendant was not entitled to admission of report regarding his IQ score for which underlying data was unavailable; and
(4) trial court's finding that defendant was mentally retarded as mitigation did not estop relitigation of the issue of retardation under *Atkins v. Virginia*.

Affirmed.

Pariente, J., concurred and filed opinion.

Labarga, J., dissented and filed opinion, in which Perry, J., concurred.

Perry, J., dissented and filed opinion, in which Labarga, J., concurred.

West Headnotes

[1] Sentencing and Punishment 350H ⚿1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Cutoff intelligence-quotient (IQ) score of 70 or below to meet the test for mental retardation, as would preclude death penalty, is not improperly arbitrary. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137; West's F.S.A. RCrP Rule 3.203.

[2] Sentencing and Punishment 350H ⚿1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

To show that he or she is mentally retarded and thus ineligible for execution, the defendant must establish that he has significantly subaverage general intellectual functioning, that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior, and that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment 350H ⚿1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Because a defendant challenging death penalty on grounds of mental retardation must establish all three elements to show that he or she is mentally re-

tarded and thus ineligible for execution, the failure to establish any one element will end the inquiry. U.S.C.A. Const.Amend. 8.

[4] Sentencing and Punishment 350H ⚿1793

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1793 k. Evidence. Most Cited Cases

Defendant challenging death penalty on grounds of mental retardation in motion to vacate sentence was not entitled to admission of report finding defendant to have an intelligence quotient (IQ) of 69; underlying data to support the report were not available such that the State could not conduct a proper voir dire, and defendant could not otherwise establish the adequacy of the underlying data to support the report.

[5] Criminal Law 110 ⚿1433(1)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(1) k. In general. Most Cited Cases

Trial court's finding that defendant was mentally retarded as mitigation in death penalty case did not estop relitigation of the issue of mental retardation upon defendant's postconviction challenge to death penalty on grounds of mental retardation under the United States Supreme Court's intervening decision in *Atkins v. Virginia*; mental retardation as a mitigator and mental retardation under *Atkins* were discrete legal issues, and change in law substantially altered the State's incentive to contest defendant's mental capacity.

***705** Bill Jennings, Capital Collateral Regional Counsel, Raheela Ahmed and Carol C. Rodriguez, Assistant Capital Collateral Region Counsel, Middle Region, Tampa, Florida and Eric Calvin Pinkard of Anderson Pinkard, P.A., Clearwater, Florida, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, Florida and Kenneth Sloan Nunnelley, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

PER CURIAM.

This case is before the Court on appeal of an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.203. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons expressed herein, we affirm the order denying relief.

FACTS AND PROCEDURAL HISTORY

Freddie Lee Hall was tried and convicted in Putnam County for the 1978 murder ***706** of Karol Hurst. *Hall v. State (Hall I),* 403 So.2d 1321, 1323 (Fla.1981). We upheld Hall's conviction and sentence on direct appeal. *Id.* at 1325.

On September 9, 1982, the governor signed Hall's first death warrant, effective for the week of October 1 through 8, 1982. *Hall v. State (Hall II),* 420 So.2d 872, 873 (Fla.1982). Hall filed a motion to vacate, a petition for writ of habeas corpus, and an application for a stay of execution, all of which were denied. *Id.* Hall then sought habeas corpus relief in the federal court, which was denied without an evidentiary hearing. *Hall v. Wainwright (Hall III),* 733 F.2d 766, 769 (11th Cir.1984), *cert. denied,* 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). Hall appealed to the Eleventh Circuit Court of Appeals, which reversed in part and remanded for a hearing. *Id.* at 777 (finding that Hall was entitled to a hearing on the issues of his absence from the courtroom and whether he deliberately bypassed his ineffective assistance of counsel claim).

On remand, the district court again denied relief, finding that Hall's absences from trial occurred during non-critical stages and were therefore harmless, and that he deliberately bypassed the ineffective assistance of counsel claim. *Hall v. Wainwright (Hall IV),* 805 F.2d 945, 946 (11th Cir.1986), *cert. denied, Hall v. Dugger,* 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). The Eleventh Circuit affirmed the denial. *Id.* at 948. Hall then petitioned this Court for habeas corpus relief based on the United States Supreme Court's ruling in *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that all mitigating factors, not just statutory mitigation, should be considered by the judge and jury). This Court held that any error in the sentencing was harmless. *Hall v. Dugger (Hall V),* 531 So.2d 76, 77 (Fla.1988).

The governor then signed a second death warrant on September 20, 1988. *Hall v. State (Hall VI),* 541 So.2d 1125, 1126 (Fla.1989). Hall filed his second 3.850 motion, alleging error under *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court found that this Court's ruling on the issue in *Hall V* was a procedural bar to Hall raising the claim again. *Hall VI,* 541 So.2d at 1126. We disagreed, stating that the "case involves significant additional non-record facts" that had not been considered on habeas review. *Id.* Ultimately, we determined that a *Hitchcock* error occurred, and that such error could not be considered harmless. *Id.* at 1128. We then vacated Hall's death sentence and remanded for a new sentencing proceeding. *Id.*

During the resentencing, the trial court found Hall mentally retarded as a mitigating factor and gave it "unquantifiable" weight. The court again condemned Hall to death, and we affirmed. *Hall v. State (Hall VII),* 614 So.2d 473, 479 (Fla.1993). Hall sought postconviction relief, which was denied. *Hall v. State (Hall VIII),* 742 So.2d 225, 230 (Fla.1999). We affirmed the denial. *Id.* at 230. In finding that the trial court properly denied Hall's claim that the court erred in finding him competent to proceed at the resentencing, we stated "While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Id.* at 229.

After *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was decided, Hall filed a motion to declare ***707** section 921.137, Florida Statutes (2004),[FN1] unconstitutional. While the motion was pending, we adopted Florida Rule of Criminal Procedure 3.203 as a mechanism to file *Atkins* claims. Hall timely filed such a claim on November 30, 2004. No action was taken on the motion until, on March 27, 2008, Hall filed a motion to prohibit relitigation of the mental retardation issue, which was denied. The court then held an evidentiary hearing on Hall's successive motion to vacate his sentence.

> FN1. Section 921.137, Florida Statutes was enacted during a regular session of the Florida Legislature in 2001. *See* ch.2001–202, § 1, Laws of Fla. The statute has been amended once to transfer duties from the Developmental Disabilities Program Office within the Department of Children and Family Services to the Agency for Persons with Disabilities. *See* ch.2006–195, § 23, Laws of Fla.

At the evidentiary hearing held on December 7 and 8, 2009, Hall presented testimony from Dr. Valerie McClain, who testified that she did not obtain Hall's IQ; Lugene Ellis, Hall's half-brother, who testified about his recollection of Hall as a child; James Hall, Hall's brother, who testified regarding Hall's problems with reading, writing, and caring for himself; Dr. Harry Krop, who testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revises was 73 and that a prior result on the same test given by Marilyn Feldman resulted in a score of 80; and Dr. Gregory Prichard, who testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS–III). Hall

sought to introduce a report compiled by then-deceased Dr. Bill Mosman through Dr. Prichard, but the court denied it and only allowed Hall to proffer the report for the record. After reviewing the evidence presented, the court determined that Hall could not meet the first prong of the mental retardation standard to establish his mental retardation—an IQ below 70. The court denied relief in an order issued May 26, 2010, and entered an amended order on June 16, 2010.

Hall appeals the court's denial, raising four claims: (1) the trial court's finding that Hall is not mentally retarded is not supported by competent, substantial evidence; (2) the trial court erred in granting the State's motion in limine that limited the evidence Hall could present on his mental retardation claim; (3) the trial court erred by striking Dr. Mosman's report; and (4) the trial court should have imposed a life sentence based on the doctrine of collateral estoppel. Because we find that there is competent, substantial evidence to support the court's finding that Hall is not mentally retarded, we affirm.

DISCUSSION

Hall asserts that he is mentally retarded pursuant to *Atkins*. Further, Hall alleges that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplies the Supreme Court's ruling in *Atkins* and fails to reflect an understanding of IQ testing. Hall contends that the appropriate standard would (a) include the standard error measurement (SEM), and (b) provide for a score band or range of scores. We recently declined to adopt this "range of scores" argument. *See Franqui v. State,* 59 So.3d 82 (Fla.2011). We again decline to adopt this line of reasoning. As we stated in *Franqui:*

> Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize ***708** the higher cut-off IQ score of 75. *Nixon,* 2 So.3d at 142. We disagreed, reasoning that *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon,* 2 So.3d at 142.
>
> *Id.* at 94 (citing *Nixon v. State,* 2 So.3d 137 (Fla.2009)).

Section 921.137, Florida Statutes (2012), prohibits the trial court from sentencing to death a mentally retarded defendant who is convicted of a capital felony. Section 921.137 provides the governing legal standard for such claims, and rule 3.203 outlines the procedural requirements. Both the statute and rule define the elements of a mental retardation claim as discussed in *Atkins:* (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifested during the period from conception to age eighteen. *See Atkins,* 536 U.S. at 318, 122 S.Ct. 2242; § 921.137(1), Fla. Stat. (2012); Fla. R.Crim. P. 3.203(b). Subsection (1) of the statute defines mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities

shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

§ 921.137(1), Fla. Stat. (2012). This statute was adopted prior to the Supreme Court's ruling in *Atkins*. *See* Ch.2001–202, § 1, Laws of Fla.

In *Cherry v. State,* 959 So.2d 702 (2007), we determined the proper interpretation of section 921.137. Cherry argued that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete number because of the SEM. We held:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70.... [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes....
>
> *Cherry,* 959 So.2d at 712–13.

In *Nixon,* the appellant challenged our decision in *Cherry,* also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed, reasoning that while *Atkins* recognized a difference of opinion among various sources regarding who should be classified as mentally retarded, the Supreme Court left the determination to the individual states. Accordingly, we found that Florida's definition is consistent with the American Psychiatric Association's diagnostic***709** criteria for mental retardation. *Nixon v. Florida,* 2 So.3d 137, 143 (Fla.2009) (citing *Jones v. State,* 966 So.2d 319, 326 (Fla.2007)).

The cutoff was recently reaffirmed in *Franqui.* Franqui was convicted of the December 1991 murder of Raul Lopez and sentenced to death, which this Court affirmed. *Franqui v. State,* 59 So.3d 82, 106 (Fla.2011) (citing *Franqui v. State,* 699 So.2d 1312 (Fla.1997)). Franqui filed his initial rule 3.850 motion in January 1999, which he then amended in April 2000. *Id.* at 89. Prior to the evidentiary hearing granted on some of the claims he raised, Franqui supplemented his motion to raise an *Atkins* claim, which was summarily denied on February 21, 2008. *Id.* at 89–90. On review, we temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on the mental retardation claim. *Id.* at 90 (citing *Franqui v. State,* 14 So.3d 238 (Fla.2009)). Testing revealed Franqui's IQ fell somewhere between 71 and 80. *Id.* at 91. The trial court, after considering the stipulated evidence of the experts' reports, found that Franqui was not mentally retarded as a matter of law. *Id.*

[1] On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cutoff score of 70 or below to meet the first prong of the test for mental retardation is contrary to *Atkins.* In *Franqui,* we found that (1) the United States Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in *Atkins;* (2) Florida's statute prohibiting the execution of the mentally retarded, section 921.137, preceded *Atkins;* (3) proper interpretation of section 921.137 was under the plain language of the statute providing that "significantly subaverage general intellectual functioning" means performance that is "two or more standard deviations from the mean score on a standardized intelligence test" and does not require the Court to consider the standard error of measurement (SEM); and (4) one standard deviation on the test in question is fifteen points, thus 70 is the appropriate score based on the plain language of section 921.137 and not a range of scores.

Hall argues that we recognized a higher IQ as possible evidence of mental retardation in *Thompson v. State,* 3 So.3d 1237 (Fla.2009), where

we reversed the trial court's summary denial of Thompson's postconviction motion. Although Thompson's motion alleged an IQ of 74 or 75,[FN2] we reversed the trial court's summary denial and remanded for the court to hold an evidentiary hearing to determine whether Thompson met the requirements established in *Cherry. Thompson,* 3 So.3d at 1238–39. However, we specified, "[W]e express no opinion on the merits of [Thompson's] claim of mental retardation." *Thompson,* 3 So.3d at 1238.

> FN2. *Thompson,* 3 So.3d at 1239 (Wells, J., dissenting).

Hall additionally alleges that this Court recognized an IQ score of 75 as "evidence of mental retardation" in *Foster v. State,* 929 So.2d 524 (Fla.2006). Hall mischaracterizes our opinion. We quoted the postconviction court, which found that " 'even if the Defendant's IQ score of 75 is considered as evidence of mental retardation, [he] does not meet the second prong of the test set forth in *Atkins*...." *Id.* at 532. As such, neither this Court nor the lower court recognized 75 as evidence of mental retardation.

Like Franqui before him, Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins.* We ***710** have previously found this argument to be meritless. *See, e.g., Cherry,* 959 So.2d at 712–13; *Nixon,* 2 So.3d at 142; *Phillips v. State,* 984 So.2d 503, 510 (Fla.2008); *Jones v. State,* 966 So.2d 319, 329 (Fla.2007); *Brown v. State,* 959 So.2d 146, 148–49 (Fla.2007); *Burns v. State,* 944 So.2d 234, 248 (Fla.2006); *Rodgers v. State,* 948 So.2d 655, 666–68 (Fla.2006); *Trotter v. State,* 932 So.2d 1045, 1049–50 (Fla.2006); *Johnston v. State,* 960 So.2d 757, 761 (Fla.2006); *Zack v. State,* 911 So.2d 1190, 1201 (Fla.2005).

[2][3] Hall next contends that the lower court improperly limited his introduction of evidence of the second two elements to establish mental retardation. We have recognized that all three elements must be established for a defendant to show that he or she is mentally retarded and thus ineligible for execution.

> The defendant must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, the defendant must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Thompson, 3 So.3d at 1238 (quoting *Cherry,* 959 So.2d at 711) (internal brackets omitted). Thus, we have concluded that because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry. *See, e.g., Cherry,* 959 So.2d at 714 ("Because we find that [the defendant] does not meet this first prong of the section 921.137(1) criteria, we do not consider the other two prongs of the mental retardation determination."). Hall's argument that the lower court improperly limited his introduction of evidence after he failed to establish the requisite IQ is thus without merit. *See Jones v. State,* 966 So.2d 319, 325 (Fla.2007); *Burns v. State,* 944 So.2d 234, 249 (Fla.2006); § 921.137(4), Fla. Stat. (2012).

[4] Third, Hall complains that the trial court abused its discretion in refusing to admit the report prepared by Dr. Mosman through the testimony of Dr. Prichard. In its order, the court noted that Dr. Mosman's report "lacked critical detail and information indicating how he obtained [Hall's] intelligence quotient of sixty-nine (69)." The court determined that the report did not constitute competent evidence and that Hall's failure to comply with the court's order to compel was highly prejudicial to the State and excluded the report from evidence. Because the underlying data to support the report were not available, the State could not conduct a proper voir dire and Hall could not otherwise establish the adequacy of the underlying data to support

Dr. Mosman's report. Accordingly, we find that the trial court did not abuse its discretion in excluding the report.

[5] Finally, Hall alleges that the lower court should have been precluded from holding an evidentiary hearing on Hall's alleged mental retardation and should have entered a life sentence because the court previously found him to be mentally retarded. We disagree.

In *Bobby v. Bies,* 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), the United States Supreme Court addressed a similar issue. Michael Bies was tried and convicted in Ohio of the aggravated murder, kidnapping, and attempted rape of a ten-year-old boy nearly one decade prior to the Court's decision in *Atkins. Bies,* 129 S.Ct. at 2149. Bies' IQ fell in the 65 to 75 ***711** range, indicating that he is "mildly mentally retarded to borderline mentally retarded." *Id.* at 2149–50. On postconviction review, the trial court agreed that Bies was mildly mentally retarded, but concluded that he was still eligible for execution. *Id.* at 2150. After the Supreme Court issued *Atkins,* and the Ohio Supreme Court adopted it in *State v. Lott,* 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002), Bies presented his *Atkins* claim to the state's postconviction court. FN3 *Id.* Bies moved for summary judgment, arguing that the record established his mental retardation and that the State was precluded and estopped from disputing it. *Id.* The court denied summary judgment because Bies' mental retardation had not been established under the *Atkins-Lott* framework, and ordered a full hearing. *Id.* at 2151. Bies took his claim to the Federal District Court, arguing that the Fifth Amendment's Double Jeopardy Clause barred the State from relitigating the issue of his mental condition. The court agreed and ordered vacation of Bies' death sentence. The Court of Appeals affirmed. *Id.* The Supreme Court reversed, stating that "[t]he State did not 'twice put Bies in jeopardy.' " *Id.* Further, the court stated that no state-court determination of his mental retardation entitled him to a life sentence. *Id.* at 2152.

FN3. Unlike Florida, Ohio reviews mental retardation where the defendant's IQ is above 70 as a rebuttable presumption.

Here, Hall argues that the issue should be estopped because of the trial court's finding that Hall was mentally retarded as mitigation. As summarized by the Supreme Court in *Bies,*

> even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins.* Mental retardation as a mitigator and mental retardation under *Atkins* ... are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins,* had little incentive vigorously to contest evidence of retardation.... Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.

Bies, 129 S.Ct. at 2153. Accordingly, we deny relief on this claim.

For the foregoing reasons, we affirm the court's denial of Hall's 3.203 motion.

It is so ordered.

POLSTON, C.J., LEWIS, and CANADY, JJ., concur.
PARIENTE, J., concurs with an opinion.
LABARGA, J., dissents with an opinion, in which PERRY, J., concurs.
PERRY, J., dissents with an opinion, in which LABARGA, J., concurs.
QUINCE, J., recused.
PARIENTE, J., concurring.

In 1991, the trial judge who sentenced Freddie

Lee Hall to death found Hall to be mentally retarded. Yet, in 2010, the same trial judge found the same defendant not to be mentally retarded. What is the reason for this apparent anomaly? The answer ***712** lies in the fact that the trial court in 2010 was applying the statutory definition of mental retardation that acts as a bar to execution, which did not exist in 1991. Between 1991 and 2010, two developments in the law occurred: (1) the Legislature enacted section 921.137(1), Florida Statutes (2001); and (2) the United States Supreme Court decided the case of *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In *Atkins,* the United States Supreme Court dramatically changed the legal landscape pertaining to mental retardation and death penalty jurisprudence. The Supreme Court held that it was unconstitutional under the Eighth Amendment for a mentally retarded person to be executed, but the Court also left to the states "the task of developing appropriate ways to enforce the constitutional restriction" on the execution of such individuals. *Id.* at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright,* 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

In Florida, our jurisprudence on this issue is constrained by the Legislature's enactment, as long as the Legislature defines mental retardation within the constitutional parameters of *Atkins.* As set forth in *Cherry v. State,* 959 So.2d 702 (2007), the defendant must present evidence of a significant subaverage general intellectual functioning as a threshold for establishing mental retardation. This requirement derives from the language of section 921.137(1), Florida Statutes, which this Court in *Cherry* interpreted as providing a "strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning." *Cherry,* 959 So.2d at 712. Based on the legislative definition of mental retardation, the Court rejected the application of the standard error of measurement (SEM) to the IQ score—not because we considered it the better policy but because we were adhering to the plain language of the statute. *Id.* at 712–14.

Applying both the statutory definition and our precedent in this case, the trial court found that there was not competent, substantial evidence to support a finding of an IQ score at or below 70. An outlier test, which was performed by Dr. Mosman, could not be considered because Dr. Mosman's testimony had not been preserved prior to his death.

Nearly twenty years before, in 1991, the trial court resentenced Hall to death and found him to be mentally retarded as a mitigating factor with "unquantifiable" weight. Yet the circumstances in 1991 were different. In 1991, Hall's evidence went unchallenged, whereas in 2010, there was a true adversarial testing of whether Hall was mentally retarded under Florida's statutory definition of mental retardation. In contrast to the 2010 postconviction hearing, during Hall's 1991 resentencing, the State did not contest the evidence Hall presented, but instead relied on its own evidence to establish seven strong aggravators to outweigh the mitigators.

Although the State in 1991 did not contest whether Hall suffered from mental retardation, the trial court noted throughout the sentencing order that it was troubled as to whether the mental health experts presented by the defendant had exaggerated Hall's inabilities. The trial court made certain statements throughout the sentencing order that questioned whether Hall suffered from mental retardation, including an in-depth discussion as to whether his behavior and abilities were consistent with a person who had mental retardation. The court explained in relevant part as follows:

> [Hall's] behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he ***713** made previously ... would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store

> was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside.... Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial.... In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

When discussing mental retardation, the trial judge found as follows: "There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this fact are thus 'unquantifiable.' " In evaluating the mitigation in conjunction with the aggravation, the court again noted concerns as to whether the evidence showed that Hall was in fact mentally retarded, stating that "the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant."

In 1999, when Hall filed his initial motion for postconviction relief, the trial court again expressed reservations on the issue of mental retardation, stating that Hall "is *probably somewhat* retarded." *Hall v. State* (*Hall VIII*), 742 So.2d 225, 230 (Fla.1999)(emphasis added). At that time, I joined with Justice Anstead in relying on Justice Barkett's position that executing mentally retarded individuals is cruel and unusual punishment, a position that later became the holding of the United States Supreme Court in *Atkins*. *Hall VIII,* 742 So.2d at 231 (Anstead, J., specially concurring).

When those decisions were rendered in 1991 and 1999, *Atkins* had not yet established the prohibition on executing mentally retarded individuals as cruel and unusual punishment. A trial court could find that a defendant was mentally retarded without regard to any statutory definition of mental retardation and those findings would serve as mitigation in much the same way as mental illness or brain damage. Therefore, because mental retardation was not a bar to execution, the State would not have had the same interest in controverting the expert testimony if, as occurred here, there was such overwhelming evidence in aggravation. Thus, as it applies to this case, until this current postconviction proceeding, there was no true ***714** adversarial testing on the issue of whether Hall's mental deficits qualified as mental retardation under a statutory definition that was enacted only after Hall's direct appeal and prior postconviction proceedings.

I appreciate the views expressed in the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent: "[T]he imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded." Dissenting op. at 27 (Labarga, J.). Unquestionably, clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment. In fact, the American Psychiatric Association (APA) proposes a revision to the definition of mental retardation that will replace the use of a numerical score for mental

retardation and instead refer to an Intellectual Development Disorder (IDD). However, unless this Court were to recede from *Cherry,* 959 So.2d at 712–13, as reaffirmed in *Nixon v. State,* 2 So.3d 137, 142–43 (Fla.2009), and more recently in *Franqui v. State,* 59 So.3d 82, 92–94 (Fla.2011), a plain language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state.

Florida, while not unique in its use of a bright-line cutoff score of 70, is not in the majority, although there is no clear national consensus. Among the states around the nation that continue to have the death penalty, ten states have a statutory bright-line rule that do not apply the SEM, including Florida.[FN4] On the other hand, sixteen states do apply the SEM, including ten states without a statutory bright-line cutoff.[FN5] At least an additional two states through court decision do not apply the SEM.[FN6] The application of the SEM to IQ ***715** scores in the remaining four states is unclear.[FN7]

FN4. These states are the following: Arkansas (Ark.Code Ann. § 5–4–618(a)(2) (2012)); Delaware (Del.Code Ann. tit. 11, § 4209(d)(3) (2012)); Florida (§ 921.137(1), Fla. Stat. (2012)); Idaho (Idaho Code Ann. § 19–2515A(1)(b) (2012)); Kentucky (Ky.Rev.Stat.Ann. § 532.130(2) (2012)); Maryland (Md.Code Ann., Crim. Law § 2–202(b)(1)(i) (2012)); North Carolina (N.C.Gen.Stat.Ann. § 15A–2005(a)(1) (2012)); Tennessee (Tenn.Code Ann. § 39–13–203(a)(1) (2012)); Virginia (Va.Code Ann. § 19.2–264.3:1.1(A) (2012)); and Washington (Wash. Rev.Code Ann. § 10.95.030(2)(c) (2012)).

FN5. The states that apply the SEM without a statutory bright-line rule are as follows: California, *see In re Hawthorne,* 35 Cal.4th 40, 24 Cal.Rptr.3d 189, 105 P.3d 552, 557–58 (2005); Georgia, *see Stripling v. State,* 261 Ga. 1, 401 S.E.2d 500, 504 (1991); Indiana, *see Woods v. State,* 863 N.E.2d 301, 303–04 (Ind.2007); Mississippi, *see Chase v. State,* 873 So.2d 1013, 1028 n. 18 (Miss.2004); Missouri, *see State v. Johnson,* 244 S.W.3d 144, 153 (Mo.2008) (en banc); Nevada, *see Ybarra v. State,* 247 P.3d 269, 274–76 (Nev.2011), *cert. denied,* —— U.S. ——, 132 S.Ct. 1904, 182 L.Ed.2d 776 (2012); Ohio, *see State v. Were,* 118 Ohio St.3d 448, 890 N.E.2d 263, 293 (2008); Pennsylvania, *see Comm. v. Miller,* 585 Pa. 144, 153–54, 888 A.2d 624 (Pa.2005); Texas, *see Ex parte Hearn,* 310 S.W.3d 424, 430 (Tex.Crim.App.2010); and Utah, *see State v. Maestas,* No. 20080508, 299 P.3d 892, 947, 2012 WL 3176383, at *41 (Utah July 27, 2012).

The states that apply the SEM but include a statutory bright-line cut-off are as follows: Arizona, *see State v. Grell,* 212 Ariz. 516, 135 P.3d 696, 701 (2006); Louisiana, *see State v. Dunn,* 41 So.3d 454, 470 (La.2010); Nebraska, *see State v. Vela,* 279 Neb. 94, 777 N.W.2d 266, 304–05 (2010); Oklahoma, *see Smith v. State,* 245 P.3d 1233, 1237 (Okla.Crim.App.2010); Oregon, *see* Or.Rev.Stat. Ann. § 427.005(10)(b) (2012); and Tennessee, *see Coleman v. State,* 341 S.W.3d 221, 245–47 (Tenn.2011).

FN6. These states are: Alabama, *see Ex parte Perkins,* 851 So.2d 453, 455–56 (Ala.2002); and Kansas, *see State v. Backus,* 287 P.3d 894, 905 (Kan.2012).

FN7. These states are New Hampshire, South Carolina, South Dakota, and Wyoming.

This national survey of the states that have the death penalty illustrates that there is no clear consensus among the states regarding the use of the

SEM, but the use of a bright-line cut off in some states versus the use of the SEM in other states indicates that there will be some inconsistency in findings of mental retardation based on the exact same circumstances.

It is certainly of concern that in some states Hall would be mentally retarded by those states' definitions, while in others, like Florida, the bright-line cutoff requires a contrary finding. Unfortunately, mental retardation, unlike age, is not a fixed objective test, and therefore these variations appear to have been contemplated by the United States Supreme Court when *Atkins* was decided. For example, the State of Texas, which leads the nation in executions, declined to establish a bright-line IQ cut off for execution without "significantly greater assistance from the legislature." *Ex parte Hearn,* 310 S.W.3d 424, 430 (Tex.Crim.App.2010). The *Hearn* Court stated that any IQ score could actually represent an IQ that is either five points higher or five points lower than the person's actual IQ after factoring in the SEM. *Id.* at 428.

At some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137(i). *See Hayes v. State,* 750 So.2d 1, 4 (Fla.1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."). Without a change from the Legislature or further direction from the United States Supreme Court, I conclude that the statute adopted by the Legislature and the precedent set forth by this Court require that the trial court's order finding Hall not to be mentally retarded be affirmed.

LABARGA, J., dissenting.

I dissent from the holding of the majority that application of the statutory bright-line cutoff score of a full scale IQ of 70 for determining mental retardation as a bar to execution comports with the Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), under the facts and circumstances of this case. I write to express my deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins,* and even though evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *Atkins* under the definition of "mental retardation" set forth in section 921.137(1), Florida Statutes (2012). In 1993, on appeal from Hall's resentencing, Justice Barkett, joined by Justice Kogan, pointed out in her dissent that the trial judge in this case found that Hall "has been mentally retarded all of his life." *Hall VII,* 614 So.2d at 479 (Barkett, C.J., dissenting). At that time, mental retardation was not an absolute bar to execution, but was considered generally in mitigation. Subsequently, on postconviction appeal in 1999, Hall's claim that execution of mentally retarded persons violated the United States Constitution was found to be procedurally barred. *See Hall VIII,* 742 So.2d at 226. In his special concurrence in *Hall VIII,* Justice Anstead, joined by Justice Pariente, expressed the view that execution of mentally retarded persons such as Hall violated the Florida Constitution. *Id.* at ***716** 230–31 (Anstead, J., specially concurring). In 2001, Hall again attempted to obtain relief on his claim that he may not constitutionally be executed because he is mentally retarded. This Court denied relief, noting that the trial court had followed *Penry v. Lynaugh,* 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), in which the Supreme Court had held there is no constitutional bar to prevent execution of the mentally retarded. *See Hall v. Moore,* 792 So.2d 447, 449 (Fla.2001). One year later, the United States Supreme Court overruled *Penry* in *Atkins* and held that execution of the mentally retarded violates the constitutional prohibition against cruel and unusual punishment. *Atkins,* 536 U.S. at 321, 122 S.Ct. 2242. Thus, ever since the trial court found him to be retarded, Hall has urged this Court to hold that, because he is mentally retarded, he may not be executed. But for the vagary of the timing of the trial court's conclusion in relation to the timing of the

Supreme Court's decision in *Atkins,* Hall would not be on death row today.

The situation present in Florida, in which the Legislature has established a bright-line cutoff score that this Court has upheld, now creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed. I believe this result is not in accord with the rationale underlying the constitutional bar to execution of the mentally retarded, which the United States Supreme Court set forth in *Atkins.* A state's procedural safeguards must protect against an erroneous conclusion that the offender is *not* mentally retarded. In order to meet constitutional muster, I believe that Florida's statutory and rule provisions, which were put into place with the laudable goal of assuring that mentally retarded individuals are not executed, must be crafted—or at a minimum construed—so as to avoid the unwarranted risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

In its 2005 holding that the Constitution prohibits execution of defendants who were under the age of eighteen at the time of the murder, the Supreme Court in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), explained:

> The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* [FN8] that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford,* that " '*the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.*' " 536 U.S., at 312 [122 S.Ct. 2242] (quoting *Coker v. Georgia,* 433 U.S. 584, 597, 97 S.Ct. 2861 [53 L.Ed.2d 982] (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318 [122 S.Ct. 2242]. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.,* at 319–320 [122 S.Ct. 2242]. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment " 'places a ***717** substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.,* at 321 [122 S.Ct. 2242] (quoting *Ford v. Wainwright,* 477 U.S. 399, 405 [106 S.Ct. 2595, 91 L.Ed.2d 335] (1986)).
>
> FN8. *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Roper, 543 U.S. at 563–64, 125 S.Ct. 1183 (emphasis added). Similarly, I urge this Court to bring its own judgment to bear on the question of the constitutional acceptability of the execution of persons who, under all the facts and data reasonably relied upon by mental health experts, have been determined to be mentally retarded when the execution is permitted solely by the Legislature's inflexible definition of mental retardation. The Court in *Roper* reminds us that the prohibition against cruel and unusual punishment in the Eighth Amendment must be interpreted in part "with due regard for its purpose and function in the constitutional design." *Id.* at 560, 125 S.Ct. 1183. "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 560–61, 125 S.Ct. 1183. The Supreme Court noted that when it decided *Atkins,* "[w]e held that standards of decency have evolved since *Penry* and now demonstrate that execution of the mentally retarded is cruel and unusual punishment." *Roper,* 543 U.S. at 563, 125 S.Ct. 1183. The difficulty has

been in finding a reliable way in which to determine which capital defendants fall into this class of persons for whom execution is barred.

The *Atkins* Court noted that the accepted definitions for mental retardation refer in pertinent part to "significantly subaverage intellectual functioning." *Atkins,* 536 U.S. at 308 n. 3, 122 S.Ct. 2242. That Court did not prescribe any specific IQ score as a bright-line cutoff, although the Court noted that "mild" mental retardation is typically used to describe people with an IQ level range of 50 to 70. *Id.* However, this typical description was not given as a mandated cutoff score, and the Court later noted that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317, 122 S.Ct. 2242. This prediction certainly proved prescient in Florida, as Florida courts have continued to struggle with evaluation of the claims of mental retardation raised by capital defendants. I recognize that it is because of this very difficulty in determining which offenders are in fact mentally retarded that the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting *Ford v. Wainwright,* 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). We must focus, however, on the Supreme Court's mandate that the ways developed by the States must actually be "appropriate" to enforce the restriction. In my view, the imposition of an inflexible bright-line cutoff score of 70, even if recognized as often describing the upper range of mild mental retardation, is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded. This is true where, as here, ample evidence has been presented that the defendant has been mentally retarded from an early age despite the achievement of an IQ score over 70 on IQ testing. The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application*718 of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

In 2010, the United States Supreme Court decided *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), in which it held that sentencing juvenile offenders to life in prison without the possibility of parole for non-homicide offenses violates the Cruel and Unusual Punishment clause of the United States Constitution. *Id.* at 2034. In explaining its decision, the Court noted that in *Atkins* it barred execution of offenders "whose intellectual functioning is in a low range." *Id.* at 2022. Hall certainly meets that standard and has met that standard for his entire life.

The United States Supreme Court has not been unwilling to recede from or overrule its precedent when it concludes that execution of certain classes of persons violates the Eighth Amendment. Nor should this Court be unwilling to do the same. Where, as here, the evidence has long established that a defendant is functionally mentally retarded, I believe there is a justifiable concern of constitutional magnitude in putting such a defendant to death. That same concern should lead this Court to revisit its precedent that has heretofore bound this Court to the inflexible test set forth by the Legislature for identification of mentally retarded persons who are not constitutionally subject to execution. For all the foregoing reasons, I also encourage the Legislature to reexamine its definition of mental retardation set forth in section 921.137(4), in light of the principles set forth in the United States Supreme Court's decision in *Atkins.*

PERRY, J., concurs.

PERRY, J., dissenting.

If the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed. Hall "has been retarded his whole life." I do not disagree with my esteemed colleagues that section 921.137(1), Florida Statutes (2012), and our caselaw provide that a defendant

must establish an IQ below 70 to be ineligible to be executed, but that statute as applied here reaches an absurd result. Because this is my belief, I respectfully dissent.

The record before us is replete with indications of Hall's mental retardation. This Court has twice noted the evidence demonstrating Hall's mental retardation:

> The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense's four expert witnesses who testified regarding Hall's mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was "raised under the most horrible family circumstances imaginable."
>
> Indeed, the trial judge found that Hall had established substantial mitigation. The judge wrote that the evidence conclusively demonstrated that Hall "may have been suffering from mental and emotional disturbances and may have been, to some extent, unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Additionally, the judge found that Hall suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment***719** that adversely affected his development.
>
> Hall's mental deficiency as an adult is not surprising. The sixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by forcing him to stay underneath a bed for an entire day.
>
> Hall's school records reflect his mental deficiencies. His teachers in the fourth, sixth, seventh, and eighth grades described him as mentally retarded. His fifth grade teacher stated that he was mentally maladjusted, and still another teacher wrote that "his mental maturity is far below his chronological age."

Hall VIII, 742 So.2d at 231 (Anstead, J. specially concurring) (quoting *Hall VII,* 614 So.2d at 479–80 (Barkett, C.J. dissenting)). Hall is a poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded. The fact that our statutory standard does not agree only serves to illustrate a flaw in the statute.

As the United States Supreme Court articulated in *Atkins,* those with disabilities in areas of reasoning, judgment, and control of their impulses "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins,* 536 U.S. at 306, 122 S.Ct. 2242. Indeed, "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316, 122 S.Ct. 2242. Thus, while there is agreement about the execution of mentally retarded offenders, there remains disagreement, and difficulty, in determining which offenders are retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317, 122 S.Ct. 2242. *Atkins* thus left this determination to the states.

Prior to *Atkins,* this State adopted section 921.137, which provides in relevant part:

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.
>
> § 921.137(1), Fla. Stat. (2012)

As we observed in *Cherry,* mental health practitioners are expected to look at IQ as a range rather than an absolute.

> The concept of mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation. 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.
>
> And the Diagnostic and Statistical manual which is what we—meaning the mental health professionals—rely on when arriving at diagnostic hypotheses. That manual guides us to look at IQ scores as being a range rather than absolute. And the manual talks about a score from 65, a band, so to speak, from ***720** 65 to 75—and of course, lower than 65—comprising mental retardation.

Cherry, 959 So.2d at 711–12 (quoting Dr. Peter Bursten). Nevertheless, this Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary. *Id.* at 714.

Thus far, our interpretation of the statute and applicable rule has led us to a dogged adherence to a bright-line cutoff of a score of 70 on the IQ test.[FN9] Yet, even when a defendant is able to demonstrate a lower IQ, the rest of the statute allows the courts to reason that the defendant is not mentally retarded. *See, e.g., Dufour v. State,* 69 So.3d 235, 244–53 (Fla.2011) (finding that despite IQ scores of 62, 67, and 74, Dufour failed to establish deficits in adaptive functioning because he was able to complete his GED and live independently); *Hodges v. State,* 55 So.3d 515, 527, 535 (Fla.2010)(finding that although Hodges had IQ scores of 62, 66, and 69, he did not establish deficits in adaptive functioning because he was able to copy letters drafted by others and sign his own name and was able to support himself as a short-order cook, garbage collector, and dishwasher); *Rodgers v. State,* 948 So.2d 655, 661 (Fla.2006) (finding that the trial court did not err in finding that the defense expert's recitation of Rodgers' IQ of 69 was less credible evidence than court-appointed experts who found higher IQs); *Burns v. State,* 944 So.2d 234, 248 (Fla.2006) (finding that despite an IQ of 69, Burns was unable to establish deficits in adaptive functioning because he was able to support himself); *Rodriguez v. State,* 919 So.2d 1252, 1266 (Fla.2005) (finding that despite his low IQ, his behavior in trial proceedings indicated that he was not mentally retarded). We have interpreted the statute as requiring a threshold for the courts to even consider retardation, but then allow the same courts to subjectively reason away the bar to execution. Thus, under this interpretation of the statutory scheme, a defendant can be found mentally retarded but not have it serve as a bar to execution because his IQ is too high, and if his IQ is low enough, he can still be found not to be mentally retarded because he can hold a pen to paper. Thus, it appears there is no reasonable way to be declared mentally retarded for the purposes of proving ineligibility for execution in Florida. If the proscription against executing the mentally retarded is to mean anything, it cannot be wielded as this double-edged sword.

> FN9. This is so even despite subsection four of section 921.137, which provides, in part:
>
> > At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the find-

> ings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation.
>
> § 921.137(4), Fla. Stat. (2012); *see also* Fla. R. Admin. P. 65G–4.011(2) (2012).

The current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the statute was adopted. Once the statute is applied, Hall morphs from someone who has been "mentally retarded his entire life" to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation. Because this cannot be in the interest of justice, I dissent.

LABARGA, J., concurs.

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APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR HERNANDO COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

CASE NO.: 1978-CF-0052

FREDDIE LEE HALL,

Defendant.

_____/

***AMENDED[1] ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.851 AND 3.203, BARRING EXECUTION OF THE DEFENDANT DUE TO MENTAL RETARDATION**

In this Order, references to the Transcript of the December 7 and 8 Evidentiary Hearing will be denoted by the letter R, followed by the page number(s).

THIS CAUSE comes before this Court on Defendant's "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," and this Court, having conducted a full evidentiary hearing on the matter on December 7 and 8, 2009, and having reviewed the file, the Defendant's Motion, the State's Response to Defendant's Successive Motion, considered the transcript of the evidentiary hearing, conducted independent research and being fully advised in the premises hereby finds as follows:

1. On February 21, 1991, Defendant was sentenced to death for first degree murder. Defendant's sentence was affirmed by the Florida Supreme Court. *See Hall v. State,* 614 So.2d 473 (Fla. 1993).
2. On November 20, 2004, Defendant filed the instant motion, "Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation." Attached to Defendant's Motion was a Confidential Evaluation of Defendant conducted by Dr. Gregory A. Prichard. In support of its motion, Defendant relies on *Atkins v. Virginia*, 536 U.S. 304; 122 S.Ct. 2242 (U.S.

[1] *Amended Order pursuant to Attorney Tatti's correspondence dated May 27, 2010 in reference to Dr. Mosman's report stated in Paragraphs 18 and 19. In paragraphs 18 and 19 of the Circuit Court's original order dated May 21, 2010, the Court errantly states that the Defendant failed to provide the State with a copy of Dr. Mosman's report pursuant to the Court's February 1, 2005, *Order to Compel.* This order amends that language to state that the Defendant failed to provide the raw data and testing materials underlying Dr. Mosman's report, not the report itself.

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2002). In *Atkins*, the United States Supreme Court held that it was unconstitutional and in derogation of the Eighth Amendment of the United States Constitution, for a mentally retarded individual to be executed. *Atkins*, 536 U.S. at 321; 122 S.Ct. at 2252. However, the Supreme Court cautioned "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins,* at 405, 416-417; 106 S.Ct. 2595.

3. On December 15, 2004, the State of Florida filed its, "Response to Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203" and a "Motion to Compel and Motion for Appointment of Expert Witness."
4. On or about February 1, 2005, the Court granted the State's "Motion to Compel" and ordered Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any an all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report.
5. On or about December 2, 2009, the State of Florida filed a "Motion in Limine" in which the State sought to limit the Defendant's presentation of evidence in light of Florida Statute §921.137, subsection (1), and governing case law interpreting the Statute. In *Cherry v. State,* the Florida Supreme Court held that because "Cherry does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry v. State,* 959 So.2d 702, 713 (Fla. 2007). In light of *Cherry,* the State asked that the Court limit the Defendant's presentation of evidence by requiring Defendant to first prove the first component of his mental retardation claim, a significant subaverage general intellectual functioning.
6. On December 7, 2009, Defendant filed a response to the State of Florida's *Motion in Limine.*
7. On December 7 and 8, 2009, the Court held a two day evidentiary hearing on Defendant's motion, *Successive Motion Pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental*

Retardation.

8. Florida Statute §921.137, subsection (1) states: "the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age." In interpreting the Statute, the Florida Supreme Court established a three pronged, conjunctive test where a defendant must prove each prong by clear and convincing evidence in order to prevail on a claim of mental retardation. *Jones v. State,* 966 So.2d 319, 325 (Fla. 2007); *see also Burns v. State,* 944 So.2d 234, 245 (Fla. 2006).
9. In *Jones,* the Florida Supreme Court held that a diagnosis of mental retardation requires three findings: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of the condition before age 18. *Jones,* 966 So.2d at 325.
10. The Florida Supreme Court has interpreted the first component (*i.e.* a significant subaverage general intellectual functioning) of a mental retardation claim to mean that a defendant must show an IQ score of 70 or below in order to show a significantly subaverage general intellectual functioning. *Cherry v. State,* 959 So.2d at 713; *see also Zack v. State,* 911 So.2d at 1201(Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.)
11. In *Cherry,* the Florida Supreme Court affirmed the lower court's holding that denied Defendant's mental retardation claim under Fla. Stat. §921.137(1) when Defendant failed to submit an IQ score that was 70 or lower. In affirming the lower court, the Florida Supreme Court held that because Cherry "does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry v. State,* 959 So.2d at 713.
12. Upon considering the State's *Motion in Limine* and the Defendant's response to the State's Motion, and after considering Florida Statute §921.137, Florida Rule of Criminal Procedure Rule 3.203, and the governing case law applicable to the Statute and Rule, the Court granted the State's *Motion in Limine* at the outset of the evidentiary hearing of December 7, 2009 (R. 32).
13. In granting the State's *Motion in Limine,* the Court ordered the Defendant to first provide clear and convincing evidence in support of component (1) one (*i.e.* significant subaverage general intellectual functioning) of his mental retardation claim before

offering any evidence in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) components of his mental retardation claim. (R. 31-32). Under the guidance of *Cherry,* the Court reasoned that a determination of whether the Defendant has met the second and third components of his mental retardation claim would be legally insufficient if the Defendant has failed to meet the first component (*i.e.*significant subaverage general intellectual functioning) of his mental retardation claim, since each component of a mental retardation claim must be established by clear and convincing evidence. *Nixon v. Florida,* 2 So.3d 137, 143 (Fla. 2009); § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

14. During the course of the evidentiary hearing of December 7 and 8, 2009, the Defendant called a number of witnesses. Defendant's first witness was Dr. Valerie McClain. Dr. McClain testified that she did not obtain an I.Q. measurement from the Defendant, nor did she provide any testimony regarding the Defendant's I.Q. The Defendant's second witness was Lugene Ellis, a half-brother of the Defendant. Mr. Ellis testified regarding his recollection of the Defendant as a child but did not provide any quantitative testimony regarding the Defendant's I.Q. The Defendant's next witness was James Hall, a brother of the Defendant. Mr. Hall testified about the Defendant's problems with reading, writing, and caring for himself, but did not provide any quantitative testimony regarding the Defendant's I.Q.

15. On the second day of the evidentiary hearing, the Defendant called his final two witnesses. Defendant's first witness that day was Dr. Harry Krop. Dr. Krop testified that he conducted a confidential mental health evaluation of the Defendant in September of 1990, prior to the Defendant's resentencing proceeding. In preparation of the Defendant's September of 1990 evaluation, Dr. Krop testified that he reviewed multiple reports from a number of doctors, numerous witness affidavits, legal documents, police reports, school records, and prison reports all relating to the Defendant. (R. 110). In addition, Dr. Krop testified that he spoke with several members of the Defendant's family. In that same year, Dr. Krop testified that he administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of seventy-three (73). (R. 120). Furthermore, Dr. Krop testified on cross-examination that he examined a report generated by Marilyn Feldman that indicated Feldman administered the *Wechsler Adult Intelligence Scale Revised* to the Defendant and obtained an I.Q. score of eighty

(80), in 1986. (R. 128).

16. The Defendant's final witness was Dr. Gregory Prichard. Dr. Prichard evaluated the Defendant on August 14 and 15, 2002 for a determination of mental retardation. In compliance with Florida Rule of Criminal Procedure Rule 3.203(c)(2), Defendant attached Dr. Gregory Prichard's report, styled *Confidential Assessment*, to the subject motion. Dr. Prichard testified that on August 15, 2002, he administered the *Wechsler Adult Intelligence Scale Third Edition* to the Defendant and determined that the Defendant's I.Q. score was seventy-one (71). (R. 218). In addition to administering the *Wechsler Adult Intelligence Scale Third Edition*, Dr. Prichard also administered the *Vineland Adaptive Behavior Scales* and the *Wide Range Achievement Test*. (R. 215).

17. During the course of the Defendant's two-day evaluation, Dr. Prichard also reviewed a vast amount of information and reports relating to the Defendant. Dr. Prichard examined reports from a number of doctors and researchers of which one, a report generated by Dr. Bill E. Mosman, was of particular significance to the Defendant. The Defendant attempted to introduce a report generated by a Dr. Bill E. Mosman through the testimony of Dr. Prichard on direct examination. (R. 162). Dr. Mosman's November 19, 2001 report indicated that the Defendant obtained an I.Q. score of sixty-nine (69), using the *Wechsler Adult Intelligence Scale Third Edition.* Importantly, Dr. Mosman's report lacked critical detail and information indicating how he obtained Defendant's intelligence quotient of sixty-nine (69). In particular, Dr. Mosman's report lacked discussion as to the testing instrument he used and how he used it in evaluating the Defendant, lacked discussion regarding the raw data that Dr. Mosman may have complied and examined in evaluating the Defendant, and lacked discussion on any other notes that may have related to Dr. Mosman's evaluation of the Defendant. (R. 162).

18. Upon the State's objection of the Defendant's attempt to introduce Dr. Mosman's report through the testimony of Dr. Prichard, the Court determined that Dr. Mosman's report did not constitute competent evidence and therefore, was ruled as inadmissible evidence. In support of its determination, the Court found that the Defendant violated the Court's Feburary 1, 2005 *Order to Compel* by not providing the State with the testing materials and raw data underlying Dr. Mosman's report. (R. 162). Specifically, the Court's *Order to Compel* ordered the Defendant to provide the State with (1) copies of any and all raw data and notes associated with the psychological

evaluation/assessment of the Defendant by Dr. Gregory Prichard, including any and all psychological tests and answer sheets; (2) copies of any an all written or recorded material provided by the Defendant to Dr. Prichard or independently obtained by or on behalf of Dr. Prichard; and (3) copies of any and all psychological or psychiatric reports provided to Dr. Prichard, including testing material, raw data and notes associated with the said reports, and including any and all reports which are not specifically referenced in Dr. Prichard's report. (Order dated February 1, 2005).

19. The Court found that the Defendant's failure to furnish the State with the raw data and testing materials underlying Dr. Mosman's report pursuant to the Court's Order, was highly prejudicial and unfair to the State. (R.162). Moreover, the Court determined that the prejudice and unfairness to the State could not be cured by the Defendant because Dr. Mosman was unavailable for cross-examination (Dr. Mosman was deceased), and neither the Defendant nor Dr. Prichard had the raw material that Dr. Mosman may have used in his evaluation of the Defendant. Without access to the test instrument or raw material that Dr. Mosman may have used, the State could not test the validity of Dr. Mosman's results through the use of its own hired expert. (R. 162). For these reasons, and because the Defendant failed to comply with the Court's February 1, 2005 *Order to Compel,* the Court excluded Dr. Mosman's report from evidence. However, the Court allowed the Defendant to proffer Dr. Mosman's report on record through Dr. Prichard's testimony.

20. During the course of the hearing, it became apparent that the Defendant could not provide clear and convincing evidence that would satisfy the first prong (*i.e.* significant subaverage general intellectual functioning) of its mental retardation claim. In effect, the Defendant was unable to show substantial competent evidence that indicated an I.Q score of 70 or lower. Dr. Prichard's report indicated an I.Q. score of seventy-one (71). (R. at 180). Aside from Dr. Mosman's report, the other reports that Dr. Prichard examined all revealed I.Q. scores of 71 or greater. Dr. Prichard testified that he reviewed the following reports that made record of Defendant's I.Q.: Beta Test administered by Department of Corrections in December of 1968: 76 I.Q.; Kent Test administered by Department of Corrections in January of 1979: 79 I.Q.; WAIS-R administered by Marilyn Feldman on September 10, 1986: 80 I.Q.; WAIS-R administered by Dr. Krop in March 1990: 73 I.Q.; WAIS-IV administered by Dr. Sesta

on November 25, 2008: 72 I.Q.

21. Because the Defendant failed to provide clear and convincing evidence that would show a significant subaverage general intellectual functioning, the Defendant's claim of mental retardation under Florida Statute §921.137 and Florida Rule of Criminal Procedure 3.203, fails as a matter of law. Even if Dr. Mosman's report were to be admitted into evidence, it would be an aberration amid all the other I.Q. results that have a score of 71 or higher. One single I.Q. result that falls one point below 70, in contrast to all of the other I.Q. tests showing an I.Q. greater than 70, would not meet the clear and convincing evidence threshold that both the Statute and the Rule require.

22. The Florida Supreme Court has made clear that all three prongs of a mental retardation claim must be met with clear and convincing evidence. *See Burns v. State,* 944 So.2d 234, 249 (Fla. 2006); *Jones v. State,* 966 So.2d 319, 325 (Fla. 2007); Florida Statute §921.137(4). "Thus, lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. Florida,* 2 So.3d 137, 143 (Fla. 2009). At this point, the Defendant's mental retardation claim fails as a matter of law since the Defendant has failed to proffer evidence that would meet the first prong (*i.e.* significantly subaverage general intellectual functioning) of his mental retardation claim. However, in the abundance of caution, the Court will examine the Defendant's evidence proffered in support of the second (*i.e.* concurrent deficits in adaptive behavior) and third (*i.e.* onset of the condition before age 18) prongs of his mental retardation claim.

23. The Florida Supreme Court has held, "defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior." *Phillips v. State,* 984 So.2d 503, 510 (Fla. 2008), *citing Rodriguez v. State,* 919 So.2d at 1252, 1266 (Fla.2005). ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)). "Adaptive functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.' " *Rodriguez,* 919 So 2d at 1266 n. 8. Furthermore, the Florida Supreme Court has held retrospective diagnosis insufficient to satisfy the adaptive functioning component of the mental retardation definition. In

Philips, the Court stated, "the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently with* deficits in adaptive behavior. *Phillips,* 984 So.2d at 510, *citing Jones v. State,* 966 So.2d at 325-327,*citing* § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

24. In *Philips*, the Florida Supreme Court held that the Defendant failed to demonstrate deficits in adaptive functioning that exist concurrently with his significant subaverage general intellectual functioning. *Philips,* 984 So.2d at 511. The Florida Supreme Court stated that while Philips had an IQ of 70 in 2000, "his adaptive functioning was assessed by evaluating his behavior at or around age eighteen." *Id.* at 508. The Court determined this technique, conducted by Philips' only defense expert, Dr. Keyes, to be a retrospective diagnosis, and "insufficient to satisfy the second prong of mental retardation definition." *Id.* at 511, citing *Jones,* 966 So.2d at 325-27.

25. As in *Philips*, in the instant case the Defendant's expert witness, Dr. Prichard, also utilized a retrospective technique in ascertaining Hall's adaptive functioning. Dr. Prichard testified that he made no attempt to determine Hall's level of *present* adaptive functioning at the time he administered the WAIS-III in August of 2002. (emphasis added) (R. 260, 284). Dr. Prichard evaluated the Defendant's sister, Deana Rigsby, and the Defendant's brother, James Hall (R. 236, 239). Dr. Prichard also examined a number of past reports from doctors who have evaluated the Defendant in the past. (R. 241-246). While the Defendant's evidence may yield some support in showing deficits in Defendant's adaptive functioning prior to 2002, the Defendant fails to provide any evidence that shows a *concurrent,* that is, a present deficit in his adaptive functioning.

26. Since the Defendant has been incarcerated in the Department of Corrections since 1978, the logical and necessary inquiry to determine "concurrent" deficits in adaptive functioning would have been to interview correction officers or classification officers, or perhaps, to review records documenting the Defendant's existence and interactions while in the custody of the Department of Corrections. Dr. Prichard concedes as much, stating, "I have done adaptive behavior testing with prison guards before, current adaptive testing. I didn't do it in this case. I don't know why I didn't do it...But I did not interview a Department of Corrections person." (R. 280). In effect, Dr. Prichard engaged in a retrospective diagnosis in determining the Defendant's deficits in adaptive functioning, much like the approach employed by the expert witness in *Philips*. As the

Florida Supreme Court in *Philips* held, "a retrospective diagnosis is insufficient to satisfy the second prong of mental retardation definition." *Phillips,* 984 So.2d at 510, *citing Jones,* 966 So.2d at 325-327.

27. Florida Statute and Rule each make clear that a Defendant must prove each of the three components of a mental retardation claim by clear and convincing evidence. Fla. Stat. 921.137(1)(4); Fla. R.Crim. P. 3.203(b). Thus far, the Defendant has failed to provide any clear and convincing evidence that would meet either of the first two required components of his mental retardation claim. Therefore, as a matter of law, the Defendant's mental retardation claim fails. However, in the abundance of caution, this Court will proceed and consider whether the Defendant has proffered any evidence in support of the third prong of his mental retardation claim (*i.e.* the onset of the first two components occurring prior to the age of 18).

28. Specifically, the third component of a mental retardation claim requires that the onset of the Defendant's alleged significant subaverage intellectual functioning and deficits in concurrent adaptive functioning manifest prior to the age of 18. *See* Fla. Stat. 921.137(1); Fla. R.Crim. P. 3.203. In effect, the third component requires a retrospective assessment in order to determine whether the first two components have manifested prior to the Defendant reaching the age of 18. In support of the third component of his mental retardation claim, the Defendant proffered testimony from two of his siblings, Lugene Ellis and James Hall. While each of them testified to the Defendant's various problems of adaptive functioning as a child and young adult, neither of these witnesses testified specifically about the Defendant's I.Q. The Defendant also relied on Dr. Prichard's testimony to support the third prong of his mental retardation claim, but Dr. Prichard also did not have any quantitative evidence regarding the Defendant's I.Q prior to the age of 18. (R. 219). Dr. Prichard testified that the first I.Q. result of the Defendant was obtained in December of 1968, several years after the Defendant had turned 18 years of age. In that year, the Department of Corrections administered the Beta Test to the Defendant and obtained a score of 76. (R. at 268). In addition, Dr. Prichard testified that he took note of the Defendant's school reports from the years of 1952 to 1961 and testified that each school report indicated cognitive and learning deficiencies. (R.218-219). However, Dr. Prichard testified that none of these school reports indicated a specific I.Q. test result. (R. 218).

29. While the evidence from the Defendant's siblings and Dr. Prichard in support of the third component of the Defendant's mental retardation claim may yield some support towards the Defendant in showing deficits in adaptive behavior prior to the age of 18, this evidence does not necessarily meet the clear and convincing threshold stated within the Statute. *See* Fla. Stat. 921.137(1)(4) Irrespective of whether the Defendant's evidence shows deficits in adaptive behavior prior to the age of 18, the third component also requires that the Defendant provide clear and convincing evidence that his I.Q. score measured 70 or below prior to the age of 18. This the Defendant has not shown. The Defendant has failed to provide any clear and convincing evidence that his I.Q. score was measured at 70 or below prior to 18 years of age. Incidentally, even if the Court were to apply the more lenient preponderance of the evidence standard to the Defendant's evidence, the Defendant would still fail to meet either of the first two prongs of his mental retardation claim, based on the evidence.
30. Ultimately, the Defendant's mental retardation claim fails as a matter of law because the Defendant has failed to provide clear and convincing evidence that would meet any of the three components of a 3.851 mental retardation claim. As the Florida Supreme Court has made clear, "the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon v. State,* 2 So.3d at 142.

With these findings, it is hereby

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Florida Rules of Criminal Procedure 3.851 and 3.203, Barring Execution of the Defendant Due to Mental Retardation," is hereby **DENIED.**

Defendant shall have thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED in chambers, Hernando County, Florida, on this 8 day of June 2010.

RICHARD TOMBRINK Jr.,
Circuit Court Judg3

08v605

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by hand delivery and/or U.S. Mail/Courthouse box delivery this 8th day of June, 2010:

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