No._____

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE HALL-PETITIONER

VS.

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENTS.

ON PETITION OF CERTIORARI TO
THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Whether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia.*

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida following appeal of judgment and sentence appears as Appendix A to the Petition and is reported at *Hall v. State*, 403 So.2d 1321 (Fla. 1981).

The Opinion of the Supreme Court of Florida following appeal after resentencing appears as Appendix B to the Petition and is reported at *Hall v. State*, 541 So.2d 1125 (Fla. 1989).

The Opinion of the Supreme Court of Florida following postconviction proceedings appears as Appendix C to the Petition and is reported as *Hall v. State*, 742 So.2d 225 (Fla. 1999).

The Opinion of the Supreme Court of Florida following postconviction proceedings on the issue of mental retardation appears as Appendix D to the Petition and is reported as *Hall v. State*, 109 So.3d 704 (Fla. 2012)

JURISDICTION

The date the Florida Supreme Court decided the case was March 8, 2013 on an Order denying a Motion for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254 (a)-(e) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (b)(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (b)(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under

the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The issue of whether Freddie Lee Hall is mentally retarded was first addressed by the Florida State Courts at his resentencing proceedings in 1992. *Hall v. State*, 614 So.2d 473 (Fla. 1993). At that time the resentencing state court judge and the Florida Supreme Court made factual

findings that Freddie Lee Hall had been "mentally retarded all of his life". *Id. at* 480. At that time this Court's opinion in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, L.Ed. 2d 335 (2002) had not been rendered and execution of mentally retarded persons was allowed. However, two dissenting Florida Justices viewed the execution of Freddie Lee Hall as cruel or unusual and a violation of the Florida State Constitution and the Eighth Amendment due to evolving standards of decency. *Hall* at 480. The Dissenters outlined the facts and circumstances that led to the finding that Freddie Lee Hall had been retarded all of his life as follows:

> 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 has a short term memory equivalent to that of a first grader. The defenses 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 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."

Id. Emphasis added.

After his death sentence was affirmed by the Florida Courts, Mr. Hall filed a motion for postconviction relief which was denied. *Hall v. State*, 742 So.2d 225 (Fla. 1999). In that opinion the Florida Court stated "there is no doubt that Hall has serious mental difficulties, and is **probably somewhat retarded**" *Id. at* 230 *Emphasis added.*

After this Court rendered its opinion in *Atkins* in 2002 Mr. Hall filed a motion in accordance with the Florida Rule of Criminal Procedure 3.203, which had been adopted by the Florida Supreme Court to provide a mechanism for Capital Defendants to file "Atkins" claims under Florida Statute 921.137. *Hall v. State,* 109 So.3d 704 (Fla. 2012). Over the objection of his counsel, in December of 2009, Mr. Hall was forced to prove he was mentally retarded again under an allegedly different standard for determining mental retardation than had been used in 1992 as set forth in Florida Statute 921.137. Another evidentiary hearing was conducted on the issue of whether Mr. Hall met the Florida Statutory criteria for mental retardation. *Id.* At 709. The trial judge found that Mr. Hall did not meet the standard for mental retardation, and that decision was affirmed by the Florida Supreme Court. *Id.* This Writ follows.

REASONS FOR GRANTING THE PETITION

THE FLORIDA COURTS DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH THIS COURTS DECISION IN *ATKINS* BY INVENTING A NEW DEFINITION OF MENTAL RETARDATION WHICH REQUIRES A NON-EXISTENT "BRIGHT LINE" STANDARDIZED IQ SCORE OF 70 OR BELOW WHICH IS

CONTRARY TO THE RECOMMENDATIONS OF THE INVENTORS AND DEVELOPERS OF THE VERY IQ TESTS THE FLORIDA RETARDATION STATUTE RELIES UPON BY IGNORING THE SCIENTIFICALLY ACCEPTED AND ESSENTIAL STANDARD ERROR OF MEASUREMENT AND USE OF CONFIDENCE INTERVALS. WITHOUT INTERVENTION BY THIS COURT FLORIDA WILL EXECUTE MR. HALL AND OTHER MENTALLY RETARDED PERSONS, IN VIOLATION OF THE EIGHTH AMENDMENT, BASED UPON A FUNDAMENTALLY FLAWED UNDERSTANDING OF LONGSTANDING PRINCIPLES CONCERNING THE INTERPRETATION AND USE OF STANDARDIZED INTELLIGENCE TESTS.

A review of the Florida Supreme Court's opinion holding that Mr. Hall became un-retarded between 1992 and 2009 reveals confusion and a call for help and guidance to this court from the majority, and outright disgust from the dissenters at the prospect of executing a clearly mentally retarded human being.

The cause of confusion by the Supreme Court of Florida as to the proper standard for determining mental retardation is Florida Statute 921.137 which was enacted just prior to this Court's opinion in *Atkins*. As for the standard for determining mental retardation the statute states:

> Mental retardation is significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting 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, culture group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in 921.137(1).

Fla. Stat. 921.137

The Florida Supreme Court held that Mr. Hall could not meet the first prong of the statutory mental retardation statute because his IQ was not measured at below 70. At the 2009 evidentiary hearing Dr. Gregory Prichard testified he administered the WAIS III, the latest version of the Weschler Adult Intelligence Scale, and the score was 71. *Hall* 109 So.3d at 709. The Florida Supreme Court addressed the issue of the interpretation of the "cut off" score requirement for a finding of mental retardation as follows:

> In *Cherry v. State*, 959 So.2d 702 (2007), we determined that 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 this case, is 15 points, so two standard deviations away from the mean of 100 is an IQ score of 70...The 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 the statues.....
>
> On appeal, Franqui raised essentially the same claim Hall raises here, namely: this Court's interpretation of mental retardation mandating a cut off score of 70 or below to met the first prong of the test for mental retardation is contrary to *Atkins*. We found that(1) in HN7 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 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 921.137 and not a range of scores.)

Hall 109 So.3d at 710-711.

In the concurring opinion one Florida Justice outlined the Division within the Court and the lack of certainty associated with the inflexible bright-line cut off score.

> I appreciate the views expressed by the dissents written by Justice Labarga and Justice Perry. I echo the sentiment that Justice Labarga highlights in his dissent:" 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." 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 Developmental 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.2d 3d 137 , 142-143 (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 will remain the rule of law of this state.
>
> ...
>
> At some point in the future, the United States Supreme Court may determine that a bright-line cutoff score 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 921.137(1). 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.

Hall 109 3d at 714-715.

The dissenting opinions in the Hall Florida Supreme Court opinion further illustrate the Division within that Court, and the need for this Court to intervene and provide the requested guidance.

> 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 determinating mental retardation as a bar to execution comports with the Supreme Court's decision in *Atkins v. Virginia,* 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).

...

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 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 unwarrented risk of an erroneous mental retardation determination that would allow those who are mentally retarded to be executed.

...

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

...

Hall is the 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.

...

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.

Hall at 109 So.3d 715-719 (Dissenting Opinion)

The Florida state court's interpretation of Florida Statue 921.137 as calling for a bright line IQ "obtained score" of 70 or below before a finding of mental retardation can't be made is an unreasonable interpretation of the Statute and contrary to the mandates of *Atkins*.

More specifically, the Florida court is interpreting the existence of a bright line score which does not exist. Florida Statute 192.137 provides that the Agency for Persons with Disabilities adopt rules to specify the standardized intelligence tests to be used. The Agency has selected the tests as follows:

> 65G-4.011 Determination of Mental Retardation in Capital Felony Cases: Intelligence; Tests to be Administered.
> (1) When a defendant convicted of a capital felony is suspected of having or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.
> (a) The Stanford-Binet Intelligence Scale.
> (b) Wechsler Intelligence Scale.

It is not surprising that the Agency selected the Weschler and the Stanford-Binet as they are the two most commonly used instruments in evaluating mental retardation. However, neither instrument is capable of giving a bright line score. Mr. Hall was not given the Stanford Binet, but he was given several Weschler IQ tests, as the opinion points out. However, the *WAIS IV Administrative and Scoring Manual Tables A.3-A.7* p. 220 -225 specifically recommend a confidence interval of 95% with a Standard Error of Measurement of + or - five points. This is because the inventors of the Weschler test acknowledge and understand that is does not provide a bright line Full Scale IQ score, and encourages a range that the persons IQ falls within.

It is contrary to a reasonable interpretation of the Statute that the Legislature would have intended that the Agency for Persons with Disabilities adopt the rules to specify standardized intelligence tests to be used for a mental retardation evaluation, and then ignore the Technical

Manual for the scoring and interpretation of the tests. Nowhere does the State of Florida provide any justification for ignoring the recommendations of the inventors of the IQ tests that are to be used for evaluating mental retardation. It is nonsensical.

The Weschler Aduilt Intelligence scale was first introduced in 1937, and has been revised four times since then. Many thousands of hours have been spent re-norming the test, adjusting the questions, and providing a technical manual for administering the test. In its current form the WAIS IV has 23 different sub-tests which are designed to provide as close a measure of IQ as is currently possible. Those subtests include Block Design, similarities, Digit span, Matrix Reasoning, Vocabulary, Arithmetic, Symbol Search, Visual Puzzles, Information, Coding, Letter-number Seq., Figure Weights, Comprehension, Cancellation, Picture completion, Word reading, Psuedoword decoding, Numerical Operations, Math Reasoning, Spelling. Listening Comprehension, and Oral Expression. The WAIS test, as administered to Mr. Hall, is a very precise instrument, much like a fine Swiss watch. However, for it to be effective, and the results to be properly interpreted, the makers must be listened to concerning the tolerances of the test - taking into account the SEM and confidence intervals. Unfortunately, the human race has not yet developed a test for mental retardation that is like a blood pressure machine, hooked up to a defendants arm with a gage that reads R for retarded, or N for not retarded. The State of Florida cannot invent out of whole clothe a bright line cutoff for determining mental retardation, where no instrument exists that can measure IQ with that level of precision. That is why the WAIS test gives a range of scores, not a specific score. The State of Florida cannot by decree make a cow a chicken, nor can it make standardized IQ results more precise than the inventors of those tests say is reasonable. Daivid Weschler and the WAIS-III technical manual states "The standard error of measurement is used to calculate the confidence interval, or the band of scores, around the observed score in which the individuals true score is likely to fall .. The examiner can use

confidence intervals to report an individuals score as an interval that is likely to contain the individuals true score. Confidence intervals also serve as a reminder that **measurement error is inherent in all test scores and that the observed test score is only a estimate of true ability.**" (*Davis Weschler, WAIS-R Manual; Weschler Adult Intelligence* Scale 0 Revised 31 (1981); *See The Psychological Corporation, WAIS-III - WMS-III Technical Manual53* (1997)(*emphasis added)*; (*See Also The American Psychiatric Association's Resource Documenton Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. AM.ACAD. PSYCHIATRY L. 304, 305-06 (2004) (stating that the American Psychiatric Association's Council on Psychiatry and Law takes the position that "incorporation of a specific cut off score is inappropriate, not only because different tests have different scoring norms, but also because designating a specific score ignores the standard error of measurement and attributes greater precision to these measures than they can support")(*See also* Alfred L. Brophy, *Confidence Intervals for True Scores and Retest Scores on Clinical Tests,* 42(6) J. OF CLINICAL PSYCHOL. 989 (1986); Robert G. Knight, *On Interpreting the Several Standard Errors of the WAIS-R: Some Further Tables,* 51(5) J. OF CONSULTING **AND** CLINICAL PSYCHOL. 671 (1983) (describing three methods of **SEM** for WAIS).

While this Court granted the states leeway in crafting appropriate methods to enforce the constitutional restriction against execution of the mentally retarded (*Atkins* at 342), it did not grant the authority for a state to create out of thin air a definition of mental retardation which undoubtably will fail to identify mentally retarded capital defendants. This Court stated that the then existing statutory definitions of mental retardation in those states that prohibited executing the mentally retarded "are not identical but generally conform to the clinical definitions." *Id* at FN 22. This Court also stated that "mild" mental retardation is typically used to describe people with an IQ level of 50-55 to **approximately** 70. *Id* at 312 FN 3 *emphasis added.* And this Court stated

that "it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff score for the intellectual function prong of the mental retardation definition. *Id* at FN 5. Clearly in the *Atkins* opinion, this Court relied upon the clinical definitions of mental retardation by stating "as discussed above, **clinical** definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communications, self-care, and self-direction that become manifest before age 18. *Id* at 314 *emphasis added.* Nowhere in *Atkins* does this Court state that a state can significantly alter the clinical definition of mental retardation by eliminating the use of the SEM and confidence intervals which the creators of the standardized IQ tests have repeatedly said are necessary for a proper administration and understanding of the test results.

CONCLUSION

The Florida Courts and statutory scheme creation, without justification, of a nonexistent and inflexible "bright-line" IQ score, and ignoring the instructions of the creators of the tests that are listed in the statutory scheme to be utilized, will lead to the execution of a mentally retarded defendant - Freddie Lee Hall. His execution would be cruel and unusual. This Court should grant the writ and vacate Mr. Hall's death sentence.

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Date: June 6, 2013

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PROOF OF SERVICE

I, Eric C. Pinkard, do swear or declare that on this date, the 6th day of June 2013, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Kenneth S. Nunnelley
Assistant Attorney General
444 Seabreeze Blvd.
5th Floor
Daytona Beach, Florida 32118

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of June 2013.

Eric C Pinkard
Assistant CCRC-M
Fla. Bar No.651443