

>> All rise.

Hear ye, hear ye, hear ye.

The Florida Supreme Court is now  
in session.

All who have cause to plea, draw  
near and you shall be heard.

Ladies and gentlemen, the  
Florida Supreme Court.

God save these United States,  
the state of Florida and this  
honorable court.

>> Ladies and gentlemen, the  
Supreme Court of Florida.

Please be seated.

>> Good morning and welcome to  
the Florida Supreme Court.

The first case on our docket  
today is Hall versus the state  
of Florida.

>> Good morning.

I'm here on behalf of Mr. Hall.

There is substantial evidence in  
the record that Freddie Lee Hall  
has been mentally retarded his  
entire life.

That was the judgment of the  
Circuit Court rendered on  
February 21, 1991

For us to find that Freddie Lee  
Hall is mentally retarded under  
our case law under Adkins and  
under the statute that we would  
have to reseed from cherry and a  
whole line of cases.

>> Our briefing discusses that  
obviously, but I am not here, I  
understand what Cherry says in  
the cases after Cherry.

In this case within Cherry.

>> So where did the judge go  
wrong then?

This is the same judge that did  
find him to be mentally retarded  
his whole life as of 1991, and  
now 20 years later we are saying  
he is not mentally retarded.

>> That's correct and I believe  
and we believe that the circuit  
court's orders is fundamentally  
unfair in the way that the

proceedings took place and also in the findings that are within this order.

>> I understand your argument that there should be a look at this functioning because you cannot -- the IQ in a vacuum. Sounds like in real life Freddie Lee Hall, everyone thought of him as mentally retarded, but we still have case law that says you still have to get to that first prong, and so tell me how the judge went wrong in looking at the finality of the IQ scores.

What I said to you was the scores we now have show a consistent pattern of over 70 and you said no so in Ellis --

>> We have to keep in mind there is a statute in place and within the statute, I believe the cherry decision has to be, says it has to be strictly followed

and when the statute talks about which IQ test in which kind of instruments can be utilized to make that determination in that first prong and basically what the statute says is it leaves it up to the department of persons with disabilities to implement which tests and instruments can be utilized and which ones can't be utilized for that purpose.

>> Are you saying that the IQ test that was performed was not administered correctly?

>> I'm saying many of the IQ test relied upon by the circuit courts in this case do not comply with the statute.

>> Which one do you feel they should have relied on?

>> I believe first and foremost Dr. Mosman 69 IQ which is more than two standard deviations below the mean, he did that report and he did that test and

that was part of a report that

3

he submitted in court.

The court would not allow

Dr. Mosman's 69 IQ to be

considered.

>> Well he is deceased and you

did not establish the predicate?

What was the evidentiary reason

for that?

>> Well there are two reasons

that the judge put in his order

about Dr. Mosman's report.

First is that he came to the

conclusion without any evidence

from any experts to state this

because there was no expert

called by the state in this

case.

The only expert they called was

Dr. Prichard but the circuit

court judge said that

Dr. Mosman's report lacks the

critical detail and information

indicating how he obtained the

dependence intelligence quotient

of 69.

>> He never testified in any of the prior cases?

>> No, Dr. Mosman did not testify in any prior cases.

>> When Justice Barkat and Justice Sampson and myself talk about the 60 IQ score, that is from Dr. Toomer and is that one a valid IQ score for which you will agree that under the department, that the IQ would be thrown out?

I was sort of surprised when I saw it.

I saw he had a 60 IQ and so what about Dr. Toomer's 60 IQ?

>> I am unfamiliar with which instrument Dr. Toomer used.

I am going to go through all the IQ scores here in a moment and say which ones --

>> The adaptive behavior evaluated.

>> Before you go into the IQ

scores, just so I understand  
your argument correctly, you are  
not asking us to receive Cherry  
and Nixon.

What you are saying basically --

>> We have a 69 IQ result from  
Dr. Mosman.

>> All you have is that one IQ  
score?

>> I am not putting all my  
apples in that basket.

I'm taking Mr. Prichard's  
testimony about that score.

>> Dr. Mosman gave him a 71,  
didn't he?

>> That's right.

>> Cherry is a bright line seven  
here.

>> Cherry is a bright line 70  
but I don't think Cherry says if  
you have a 69, 70 and 71 you are  
out.

>> I think that is what Justice  
Perry said.

Dr. Zimmerman 74, I mean one

went up to, thought there was a mix, 80.

>> Right, well the 80, the problem is you know clear and convincing is the standard.

Isn't that correct?

>> It is not a quantitative, but even doing it not that way, how do you balance it?

>> Well as far as the ADI IQ result -- that test violates the statute because the person that administered that test was not qualified in the state of Florida to administer IQ tests so we have got this bright line. We have to follow the statute.

>> Okay take that one out.

>> Everything has gone over 70, 74 and 75.

>> Well no, 71 by Dr. Prichard and actually the circuit court judge in this case when addressing the IQ scores talks about beta scores in Kemp test

results.

Those are not valid under  
statute.

The statute is very explicit  
because the rules state that  
this department is supposed to  
select which IQ test can be  
implemented and if they choose  
the Stanford-Binet and the  
Weschler Intelligence Scale and  
it also says shall be  
individually administered by a  
person that is authorized in the  
courts with the Florida statute  
to off the rise in the state of  
Florida.

That 80 IQ score is not  
authorized by the statute.

We are going to use the statute  
under Cherry and the other cases  
following cherry to say we have  
the following statute, the  
circuit court order does not  
follow the statute.

>> Excuse me.

What were the scores applied  
under the statute and the rules?

>> Okay, well we have got a 69  
from Dr. Mosman and we have a  
70 --

>> That is under what in the  
rules?

>> Absolutely Dr. Mosman refers  
to within his report which tests  
he gave, contrary to what the  
circuit court judge says.

Dr. Mosman explicitly talks  
about it.

It is a WAIS area and within his  
report he exclusively mentions  
all the different categories of  
that WAIS-III.

>> Well another test?

[INAUDIBLE]

>> He is a 69 by Dr. Mosman, 73  
by Dr. Krop, 71 by Dr. Prichard  
and he has a 72 by another  
doctor.

>> How do you then evaluate,  
when there are for valid scores,

who is than the expert that says  
the sum total is 70 or under as  
opposed to over 70, realizing  
these doctors and the psychology  
community says this is a 72, 75  
and can be as much under 70, I  
mean they kind of criticized the  
idea that there is this number  
but we have got to go for now  
with what the legislature says  
so how do you do that then if  
you are appealing to trying to  
see where the judge went wrong  
and he went wrong by not  
considering Dr. Mosman's 79 and  
as you say there is a 73, 74, 71  
and 72.

I mean, median mean, whatever.

Most of them are over 70.

>> Well the most recent ones

made after the statute was

admitted are 69, 71, 72.

You average those three together

and that is 70.66 average.

So when you go back and you are

talking about the WAIS R.

>> Answer this question because

it really goes to, this is a

crime that occurred in 1978.

And we are now looking at

measuring his IQ and 20, 30

years later.

I read Atkins and if you are

going to say that somebody does

not have responsibility for the

crime because they are mentally

retarded, which is generally

somewhat of a static condition,

but I don't understand how we

don't look at the situation

closest to the time of the crime

because I analogize it for the

under 18 can be executed.

Well, it is at the time of the

crime because you are looking at

whether they have the criminal

responsibility.

So do we have any evidence in

this record of his IQ close in

time with the crime?

>> Well, we have the 60 mentioned in the opinions of your court.

>> But, okay so that was 10 years after.

Is that the first time he actually had a measured IQ?

There is evidence in the record that the military did not accept him.

You know he was 4F because he flunked the intelligence test or whatever.

I don't know what it is.

>> It was 4F in 1965.

>> The entire time he was diagnosed as mentally retarded by the entire school system did they ever give him an IQ test?

>> I don't believe the school system ever gave him a full scale IQ test like the ones we are talking about in the statute.

>> They probably weren't

developed them.

Things are developed now that we are supposed to look at and we are taking out earlier ones that aren't valid that but they are the ones that were in closer in time.

This is a friendly question.

>> I understand, I understand.

No, no, I am agreeing with you.

You are right.

I'm sort have been a difficult position because I'm trying to take a look at what the court has done in Cherry and the other cases.

>> It just seems that we are kind of, you know, we are struggling here because as I started out the conversation by saying that everyone assumes he was mentally retarded.

Not everyone but at least in the opinion it was assumed and the judge assumed he was but now we

are going to say, he is really not based on tests that came in maybe 20 or 30 years after the crime was committed.

So I'm struggling with that.

>> Well I think that is the credibility of the whole process that is in question because of that, because you don't become on retarded over time.

There was substantial evidence and a record like this circuit court judge said and if you take a look at any point in Mr. Hall's life everybody is referring to him as mentally retarded.

>> Normally in these cases there is something in the Department of Corrections that, even though they are classically mentally retarded, they are playing chess or writing these wonderful letters.

Does the judge allow any any of

that adaptive functioning  
testimony at the hearing?

>> Actually the judge did  
exactly the opposite of what you  
are talking about.

He said because Dr. Prichard had  
to go back retrospectively to  
take a look at the adaptive  
functioning prong, that was  
improper.

To use court cases from here as  
you had to have contracted  
adaptive functioning,  
dysfunction and so because  
Dr. Prichard didn't go out and  
talk to prison guards all these  
many years after the offense in  
1978, that meant the entire  
adaptive functioning prong was  
not established so that is one  
of the fundamentally unfair  
aspects of what the circuit  
court judge did on this.

He explicitly did not take a  
look at all the adaptive

functioning and in addition to that, he said because there is no IQ scores, as you mention because there weren't any offered back in the school system for whatever reason, that you can't prove there was an onset before age 18 so the circuit courts order is riddled with these fundamentally unfair conclusions that he comes to based upon the record and on the IQ scores that he relied upon that the statute doesn't allow. So he starts out saying we have to follow the statute and immediately listed in this order.

IQ scores like the one given by the student.

That should've never been considered in the court in determining Mr. Hall.

>> You are now well into your rebuttal time.

You can continue but --

>> I will stop at this time.

>> May it please the court.

I am Ken Nunnelley and I  
represent the state of Florida  
in this proceeding.

Let me start I suppose to make  
this somewhat organized.

We talked about the evidence  
that was presented in 1991 at  
the resumption.

The IQ score --

>> That was the resentencing  
where the judge ended up saying  
the defendant had been mentally  
retarded his whole life?

>> Yes, maam.

The evidence that supports that  
and supports this in quotation  
marks, he is an IQ score of 60  
that Dr. Toomer obtained on the  
beta test.

Now I would suggest that if we  
are going to apply the statute  
as the defense keeps saying we

are going to do, then that test  
is not fair game for  
consideration.

>> Are the tests that are used  
now, this was done in 88.

Would it have been possible back  
then to have done the WAIS?

>> Yes, maam.

>> You back in 1991, when that  
test was offered, did this date  
object saying that is not a  
proper test to show mental  
retardation?

>> No.

There would have been no reason  
to object because there was no  
statute at the time.

>> But, and I know you have  
looked at a lot of these cases.

Do you see is there not a  
fundamental problem is the whole  
premise of Atkins in the U.S.

Supreme Court has said there is  
reduced culpability for the  
crime, and the crime occurs in

1978.

How many?

>> A long time ago.

>> A long time ago, about 33 years.

>> I was still in college.

I don't remember back then.

>> Yet we are evaluating state of mental retardation based on --

Freddie Lee Hall is now in his 60s.

>> He is in his 60s.

>> We are evaluating it based on how he is doing when he is in his 60s, whereas the time that he would have reduced culpability would be in 1978.

There is something wrong with that.

>> There is a two-pronged answer to that Justice Pariente and I'm really not dodging the question but the first part of that is in the time of very resentencing

Mr. Hall was given the WAIS R  
the second version of the wash  
were test.

That test was administered to  
him by a graduate, and masters  
level psychologist who was then  
a Ph.D. program at one of the  
universities in New York.

Heard name was Marilyn Feldman.

There is substantial testimony  
at the time of the resentencing  
proceeding that it was wholly  
and completely proper for her to  
get the test.

Now, if we throw out the beta,  
which the circuit court is being  
criticized for mentioning it in  
the order on the motion, even  
though the defense brought it  
out to start with, that leaves  
us with a full scale IQ score in  
1991 of 80, which is not even  
close to being mentally  
retarded.

>> But, what about -- did the

state offer that test?

>> The defense brought it out,  
Judge.

>> It was their test?

>> That was defense is evidence  
to support mental retardation  
and what I am saying is, when it  
all comes down, when it all gets  
boiled down to brass tacks here,  
the finding of mental  
retardation -- it was wrong.

There was no evidence to support  
it.

If we are not going to count the  
beta 60 which the defendant is  
willing to throw that test out,  
then all the evidence is a full  
scale of 80 which is, you know,  
dull normal, below normal.

The second part of that Justice  
Pariente --

>> Wasn't it Dr. Krop and his  
test was in 1990 or 1991 in the  
resentencing.

>> You like you all have heard

me say many times you can't fake smart.

That's WAIS R test is probably the high watermark just.

>> Would you agree it was done by a student that wouldn't have been an authorized person?

>> No, it was done by a master's level psychologist who in my memory was in the Ph.D. program.

Dr. Lewis who testified as a defense witness at the resentencing proceeding testified at length that it wasn't her opinion as a psychiatrist completely proper for this gentleman's who have administered that test.

That is where we stand with that.

Now, the other important part of this that really didn't -- became important or is becoming important now is in 1977, the

definition of mental retardation  
changed.

Before 1977, DSM, I believe it  
was the one done, set the cut  
score, the diagnosis for mental  
retardation, as one standard  
deviation below the mean which  
would be an IQ of 85.

In 1977, with the the release if  
you will of DSM to, the cut  
score change to 70 where it  
remains today.

They went in other words from  
one standard deviation to two  
standard deviations.

What that means in the context  
of this case and probably likely  
not in any other case we are  
going to see is all of these  
comments back in the 50s are  
based upon a definition.

That is all we are talking  
about.

>> Are we flawed and how we are  
looking at this because we are

taking this IQ and we are  
looking at it in a vacuum so we  
would say that if we had people  
that were showing IQs in their  
60s or 70s but they are  
functioning and they seems to  
have been functioning their  
whole life and they have held  
jobs and they drive cars and  
they graduated high school, you  
know, whereas everything that we  
seem to know about Freddie Lee  
Hall is that his life was and we  
use the word mentally retarded.  
Intellectual disability.

I think it is the term of the  
psychologist.

So, would you say we just ignore  
that or would you say my  
observations about what happened  
in schooling, what his brother  
says, all of those are actually,  
that is really not who Freddie  
Lee Hall was.

He was actually a drug dealer or

he was you know, what is the true story of Freddie Lee Hall other than we know he is a murderer?

>> Yes, maam.

The diagnostic criteria for mental retardation as established by the legislature and as this court has interpreted what the legislature has said consists of three parts.

The sub 70 IQ score, concurrent deficits in adaptive functioning and onset dryer to the age of 18.

Now, this court has said that the legislature meant what it said and established a bright line score of 70 as the cut point if you will.

This court, the court said that in cherry last month and consistently over the course of the litigation.

With respect to the adaptive functioning component this court has said rightly so that the deficits in adaptive functioning must be concurrent deficits or presence deficits.

>> Now let me ask you that.

As you said rightly or wrongly because I haven't gone back to Atkins.

Does that make sense that the current means present because that could be a changing situation 10 years from now.

Somebody all of a sudden has Alzheimer's or some other problem.

>> But that wouldn't be mental retardation.

>> It was effective adaptive functioning.

If we are producing culpability which is what Atkins is about, taking mental retardation and saying that person who committed

that heinous crime, we are going to treat them as somebody who was less responsible because they are mentally retarded.

If that is the case, how can it not be that you look at the situation at the time of the crime?

I understand the onset of core 18 because if somebody ends up subsequently having a car accident and are IQ has changed, do you want something that is static but in terms of looking at adaptive functioning why would you look at what is happening 34 years later and how you function on death row as opposed to what was going on around the time of the crime?

I may have joined in the opinion that said it had to be present but I look back at Adkins and I don't know how that can be if the culpability is what you are

measuring for the culpability  
for the crime and not your  
present state of functioning.  
>> Judge my response to that and  
don't take this as a flip  
response because it is not but  
if you accepted the defense  
argument that mental retardation  
is static, it doesn't matter.  
If you accept the claim that  
wants mentally retarded always  
mentally retarded then it  
doesn't hurt the defendant if we  
assess his adaptive abilities  
now.

>> Accepted as an unrealistic  
prison environment.

Did you have prison guards  
prepared to come in to say they  
were playing chess or writing  
poetry or whatever?

>> No, maam.

We didn't go that route in this  
case.

>> Do you at all, and I don't

want to use the word concede,

but that's --

>> No I'm not going to do that.

>> I know you are not going to do that but do you all see that Freddie Hall is different than a lot of the cases you have been up here arguing and he appears closer to the genuine product of a mentally retarded person than a lot of the others that we have seen?

It is not going to hurt your case.

>> Justice Pariente this is probably the next to last case I am going to have in these old cases like this because Cherry is on its way back.

Eventually we will finish it off, next month, this month I think.

Anyway, this case is to some extent different.

In the sense that we have this

finding in 1991 right in the aftermath of Campbell having come out six months before the resentencing proceeding that basically said to the courts you know, and I'm paraphrasing in this respect that they basically said if you put it on his mitigation, you have to consider it.

The defendant in this case came in with evidence that he had an IQ of 80, individually administered intelligence test and the circuit court said I will consider it and give it a little weight and again I'm paraphrasing what the circuit court said in the sentencing court but the fact of the matter is, we probably shouldn't even be here with this case because this man hasn't rung the bell with the IQ testing to get to the point of looking at the

other parts.

>> They say we shouldn't be here because we should have accepted the finding of mental retardation in 1991.

I have not known that in the definition change from 85 to 70.

What is next week the scoring changes and now we are back to 85?

Now we have to go back to all of these defendants and look at -- and this is why I think it is probably important that we look at adaptive functioning that we find at least those that meet the adaptive functioning deficit because that will be a much smaller group of people than those that may have IQ scores close to 70 so we -- I mean shouldn't we be encouraging judges to look at all of the three so that if this thing changes again, the number we at

least know those that truly have  
deficits in adaptive  
functioning?

>> I think that would be trying  
to anticipate what they  
psychological community is going  
to do and I don't have any  
indication that they are going  
to change the diagnostic  
criteria.

>> It is really saying if they  
don't meet adaptive functioning  
it won't matter what happens.  
They have 70, 75 or 80 if they  
are still as the psychologist  
who testified say there are some  
people that have these very low  
IQs but they are functioning at  
a very high, higher level.

>> This court decided the case  
and found he was not mentally  
retarded.

>> But what is happening in  
these cases is, you know we are  
making his judgment.

We are not psychologists and trying to understand the full picture.

And we hope we are getting it right.

>> Yes maam, I understand that it is kind of like Strickland.

The defense prejudice prongs.

The courts don't have to pass on both prongs.

>> We look at it and say if we don't have deficiencies or prejudice we are in pretty good shape.

>> Sure and when we get to federal court we like both prongs.

>> That protects this court's judgment.

One more layer against being second-guessed down the road but at the same time fundamentally what you have here the circuit judge who addressed all three prongs even though he didn't

have to.

That is probably a good thing  
that he didn't do that.

I don't think the court -- if  
I'm writing an opinion I don't  
know that I would require the  
circuit courts to in every  
instance address all three  
prongs of the diagnostic  
criteria.

>> But is it correct that the  
judge did not count Dr. Prichard  
because he didn't go talk to the  
prison guard?

>> It was a failure of proof on  
the concurrence deficit prong of  
it, just as Pariente.

It was entirely the  
retrospective evaluation that  
this court projected.

One case I cited in my brief and  
I can't remember the name of  
the.

>> In Atkins that comes along in  
the statute, we have several

people on death row, does the state agree that any of them were mentally retarded or are mentally retarded?

>> The short answer, yes but don't ask me the names because I don't know them.

I know there have been cases in which the state agreed that a defendant was mentally retarded in the case, but in the context of this case, under this courts precedence which is what the circuit court had to follow and which was the roadmap, this man did not score a low 70, and that is candidly the end of the inquiry so the inquiry can and fair and I would suggest that while we probably are not going to be seeing very many of these old cases like this, because I think most every time most of the cases in which this issue is being raised are coming up under

the rule at trial.

Now I don't believe there are very many left.

There are a few, but this court has interpreted the statute as the legislature wrote it and directed the circuit courts to explicitly apply in very clear terms, and that case law seems to be working well.

There is no reason for this court to recede from Cherry which is absolutely what this court would have to do to give Mr. Hall relief.

Under Cherry, Mr. Hall loses and that's all there is to it.

If the court has no further questions --

>> Actually I have an unrelated question.

This codefendant, did the codefendant get life, Ruffin?

>> Yes, maam.

>> Did that equal culpability.

When one gets like this that  
litigated?

>> I would assume so back at  
resentencing.

I don't remember it.

I came into the stage pretty  
late.

It was a known fact.

>> By 1991 I guess you were a  
lawyer.

>> I believe it was litigated at  
the time of resentencing and I  
don't have a crystal-clear  
recollections of the most recent  
proceedings.

I would ask the court to affirm  
the circuit court.

>> I would like to address the  
adaptive functioning prong  
because this retrospective  
analysis -- what this court has  
said is you can't focus solely  
on age 18 or less when you are  
doing your adaptive functioning  
analysis.

In this case, you have got  
overwhelming and substantial  
evidence about Mr. Hall and his  
adaptive functioning or  
dysfunction when he was a child,  
when he went to school.

The teachers repeatedly say he  
was mentally retarded when he  
was age eight, nine, 10, 11, 12  
and 13.

You have school records and then  
when he was an adult in the  
military 4F he was thrown out of  
the military for his  
intellectual and capability.

Incapability.

When he was 24 he received  
inferior intelligence and age 33  
Department of Corrections talks  
about he was showing improvement  
in was mentally retarded in  
their opinion.

Also in his testimony from  
Mr. Hall's two brothers and his  
sister at the evidentiary

hearing we had in this case, and they did talk about in addition to when they would visit Mr. Hall currently at the prison, so there was some testimony about what has been going on with Mr. Hall at the prison not only from the Department of Corrections but also from his sister and two brothers.

>> They were mentioning letters that were written and they were somewhat incoherent.

Do you have those letters?

>> I don't know if they are in the record that they are surely incoherent from Mr. Hall.

>> Did anybody and I'm looking back at justice bark at's sentence and this was the case where we focused on mental retardation but this was the case where he was with 16 or 17 children and he was tortured by

his mother in some unbelievable  
and horrible ways.

Does that at all play into the  
mental retardation, what  
happened to him as a child and  
the brain damage that is  
apparently documented with a  
mental illness?

This is your IQ test.

You get there, you get out of  
death row and you are there and  
you are ready to be executed.

>> I would take the former of  
those two because to me it goes  
into cruel and unusual nature of  
the circumstance.

[INAUDIBLE]

His codefendant got life and was  
that mitigated?

>> I recall in the state habeas  
about Mr. Ruffin getting a life  
sentence and there is something  
mentioned in the resentencing  
order from 91 if my recollection  
is right.

If there were no further  
questions I will stop.

Thank you.

>> We thank you both for your  
arguments.