sources that tend to support one side of the case; other materials support the other side. The forensic evaluator, then, is tasked with assessing the materials thoroughly and rendering an opinion in light of all of the materials considered. The evaluator may highlight the strongest points, but should recognize limitations.

The *Gillund* court took issue with the examiner's insufficient explanation of his opinion in light of the inconsistencies. Had the examiner carefully explained his reasoning in support of his opinion, it is possible that his explanation would have been sufficient to uphold the report. For example, had the evaluator explained how he used prior occupational functioning as a baseline and attempted to gather information about daily functioning for comparison, given that the veteran was not working at the time of the evaluation, perhaps this would have been sufficient. Similarly, had the examiner explained how he incorporated the results of the psychological testing into his opinion, perhaps the court would have agreed with the examiner's report.

This opinion cautions forensic evaluators to be mindful of any inconsistencies and to make efforts to explain any discrepancy thoroughly. It is unreasonable to think that inconsistencies will never arise; they most certainly will, but the task is not to brush aside any differences but rather to explain them in a coherent manner. Unfortunately for Mr. Gillund, as a result of the court's ruling, he must submit to yet another (fourth) mental disability evaluation and wait longer than the already six years since he started this process.

Disclosures of financial or other potential conflicts of interest: None.

Post-*Hall* Determination of Intellectual Disability in a Death Penalty Case in Florida

Kiana A. Andrew, MD, MPH
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Associate Professor of Psychiatry

Department of Psychiatry and Behavioral Sciences
Tulane University School of Medicine
New Orleans, LA

The Supreme Court of Florida Rules That Adaptive Functioning Must Be Included in Assessing Intellectual Disability in Claims of Postconviction Relief for Individuals Facing the Death Penalty

In *Thompson v. State*, 208 So.3d 49 (Fla. 2016), the Supreme Court of Florida reconsidered an appellant's intellectual disability claim for postconviction relief and remanded it back to circuit court for a new evidentiary hearing. Pursuant to the United States Supreme Court's ruling in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court of Florida held that Florida courts must consider adaptive functioning, as well as one's intelligence quotient (IQ) in capital case intellectual disability determinations, including retroactive application for postconviction relief.

Facts of the Case

On March 30, 1976, William Thompson and codefendant Rocco Surace were perpetrators in the brutal beating of Sally Ivester. Mr. Thompson and Mr. Surace instructed the victim to obtain money from family members at home. When she could not obtain the specified amount, Mr. Surace began beating her, after which Mr. Thompson joined in the beating. The two men tortured the victim and she died as a result of her injuries. The murder was witnessed by Barbara Savage, who feared similar treatment had she tried to escape or intervene. Mr. Thompson was charged with, and pleaded guilty to, first-degree murder. He was convicted and sentenced to death. He was also convicted of kidnapping and sexual battery, for which he received concurrent life sentences.

After his initial sentencing in 1976, Mr. Thompson filed appeals and motions for postconviction relief. At issue in those filings was his mental condition. Upon direct appeal, the Florida Supreme Court allowed him to withdraw his original plea. On remand, he again pleaded guilty and was again sentenced to death. In affirming his death sentence, the Florida Supreme Court concluded that the trial court did not abuse its discretion in deciding not to order additional psychiatric evaluations for him "in view of the four previous reports" (*Thompson*, p 51).

Before the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Thompson had raised his purported intellectual disability, both in his original criminal trial and in postconviction motions. In his third postconviction motion, Mr. Thompson claimed that, during his second trial, he was "incompetent to make a knowing, intelligent, and voluntary

guilty plea and that he was not competent to be executed" and that he had "been denied the assistance of mental health experts and counsel" (*Thompson*, p 53). The Florida Supreme Court affirmed the lower appellate court's summary denial of these claims.

After the U.S. Supreme Court's decision in *Atkins*, Mr. Thompson filed his fourth postconviction relief motion requesting that his death sentence be vacated on the basis of *Atkins*, as well as Florida's newly adopted statutes (Fla. Stat. § 921.137 (2001) and Fla. R. Crim. Proc. 3.203 (2004)). The postconviction court ruled that this claim was procedurally barred as it had already been raised in his 1989 resentencing hearing. On appeal, the Florida Supreme Court ruled that the postconviction court's ruling was made in error, because the intellectual disability evidence was presented toward mitigation only and not as evidence supporting an *Atkins*-based vacation of his death sentence. Based on this ruling, Mr. Thompson filed his fifth postconviction motion, again arguing that his intellectual disability prohibited Florida from executing him under the Supreme Court's decision in *Atkins*. The postconviction court denied his motion, citing Mr. Thompson's failure to demonstrate intellectual disability as defined by the Florida Supreme Court in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007).

Mr. Thompson appealed, and the Florida Supreme Court remanded the case for a new evidentiary hearing, instructing the circuit court to consider the requirements set forth in *Cherry*. Under *Cherry*, Mr. Thompson "must establish that he has significantly subaverage general intellectual functioning" and that if subaverage general intellectual functioning is established, then he must also establish concurrent deficits in adaptive behavior (*Cherry*, p 711).

During the circuit court's evidentiary hearing in April 2009, the state called Dr. Greg Prichard, a forensic psychologist, who evaluated Mr. Thompson *via* the Stanford Binet 5 intelligence test, measuring Mr. Thompson's full-scale IQ at 88. Although Dr. Prichard did not perform formal adaptive functioning tests, he opined that because of Mr. Thompson's ability to enlist in the Marines, obtain his GED, and work in several different capacities, he could not have an intellectual disability. Mr. Thompson called three witnesses to the stand: William Weaver, Mr. Thompson's eighth grade teacher; Dr. Faye Sultan, a psychologist retained by Mr. Thompson to evaluate him for intellectual disability; and Dr. Stephen Greenspan, a psychologist retained by Mr. Thompson to review past records detailing Mr. Thompson's psychological test results. Mr. Weaver testified that Thompson was "the most academically challenged child" he had instructed. He also related that Mr. Thompson's school records indicated IQ scores ranging from 70 to 79. Dr. Sultan opined that Mr. Thompson was intellectually disabled, based on the Wechsler Adult Intelligence Scale-IV (WAIS-IV) IQ she administered to him, which resulted in a full-scale IQ of 71. She testified that Mr. Thompson had adaptive deficits that manifested well before the age of 18. Dr. Greenspan admitted that he had not evaluated Mr. Thompson, but only reviewed Mr. Thompson's records. Although the court did not allow Dr. Greenspan to testify, his testimony was allowed to be proffered by Mr. Thompson's counsel. Per counsel, Dr. Greenspan would have opined that Dr. Sultan's methodology "was more supported by facts" than that of Dr. Prichard and that Dr. Prichard did not follow correct professional guidelines. In May 2009, the circuit court ruled that Mr. Thompson failed to show by clear and convincing evidence that he was intellectually disabled and denied his motion for relief. In reaching their decision, the circuit court relied heavily on *Cherry*. Mr. Thompson appealed again, and the Florida Supreme Court affirmed the circuit court's ruling.

On May 26, 2015, Mr. Thompson filed his seventh motion for postconviction relief. He argued that since the circuit court had relied heavily on *Cherry* and did not adequately address the adaptive functioning prong in their hearing, *Hall* should be applied retroactively to his case. After a brief hearing at which no evidence was presented, the circuit court denied Mr. Thompson's motion, reasoning that *Hall* required only that courts consider the statistical error of margin when determining IQ. The circuit court also ruled that Mr. Thompson's IQ scores were generally above 80 and that he had failed to show deficits in adaptive functioning. Mr. Thompson appealed.

Ruling and Reasoning

The Florida Supreme Court reversed and remanded Mr. Thompson's case to the circuit court for a new evidentiary hearing, pursuant to both the U.S. Supreme Court's holding in *Hall* and the Florida Supreme Court's own ruling in *Oats v. State*, 181 So. 3d 457 (Fla. 2015). In *Oats* the Florida Supreme Court held that courts must change the manner in which intellectual disability is considered, that is:

> . . . courts must consider all three prongs [intellectual impairment, adaptive limitations, and age of onset] in determining intellectual disability, as opposed to relying on just once factor as dispositive . . . because these factors are interdependent, if

one of the prongs is relatively less strong, a finding of intellectual disability may be warranted based on the strength of other prongs [*Oats*, pp 467–8].

The Florida Supreme Court ruled that, although Mr. Thompson was able to produce evidence of all three prongs at previous hearings, "he did not receive the type of conjunctive and interrelated assessment that *Hall* requires" (*Thompson*, p 50). In closing, the Florida Supreme Court related that Mr. Thompson had yet to be afforded a "fair opportunity to show that the Constitution prohibits his execution" (citing *Hall*, p 2001). A dissenting judge voiced that *Hall* should not be given retroactive effect.

Discussion

In *Hall*, the U.S. Supreme Court further clarified the contours of its *Atkins* holding. The Court sought to prevent "false negatives." Obviously, the Court is concerned that if a state's schema for the detection of intellectual disability is too narrow, for example, by employing narrow exclusion criteria such as the bright-line IQ test in *Cherry*, then said schema increases the chances that a state may execute a truly intellectually disabled client. States must also concern themselves with "false positives," whereby a person convicted of capital murder is erroneously deemed intellectually disabled and excused from "deserved" capital punishment. The Supreme Court holding in *Hall* indicates that the Court believed that Florida's capital-sentencing scheme tilted too far toward the detection of false positives, thus increasing the likelihood that those convicted of capital murder, but at the same time, truly intellectually disabled, would be executed unconstitutionally. As the Court related in *Hall*: "Intellectual disability is a condition, not a number" (*Hall*, p 2000).

Disclosures of financial or other potential conflicts of interest: None.

Intellectual Disability and Postconviction Relief After *Hurst*

Victor Sherrel, MD, MPH
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Associate Professor of Psychiatry

Department of Psychiatry and Behavioral Sciences
Tulane University School of Medicine
New Orleans, LA

The Supreme Court of Florida Re-evaluated a Death Row Inmate as to Intellectual Disability and Adequacy of Jury Waiver After the Recent Supreme Court Rulings in *Hall* and *Hurst*

In *Wright v. State*, No. SC13-1213 (Fla. March 16, 2017), the Supreme Court of Florida considered whether the trial court had erred in allowing Tavares Wright to waive his penalty-phase jury, thus obviating his *Ring* challenge (*Ring v. Arizona*, 536 U.S. 584 (2002)). The court also considered whether the trial court had erred in its rejection of Mr. Wright's renewed motion for consideration of his intellectual disability claim. The Florida Supreme Court reviewed these questions in light of the United States Supreme Court's decisions in *Hall v. Florida*, 130 U.S. 1986 (2014) and *Hurst v. Florida*, 136 U.S. 616 (2016). The court ruled that Mr. Wright failed to establish that he was intellectually disabled as the basis for challenging the death penalty and that he was not entitled to postconviction relief under *Hurst*, having validly waived his right to a penalty-phase jury.

Facts of the Case

On November 13, 2004, Tavares Wright was found guilty of two counts of first-degree murder, two counts of armed robbery with a firearm, two counts of kidnapping with a firearm, and one count of carjacking with a firearm. Mr. Wright and Samuel Pitts committed these offenses over a three-day period beginning on April 20, 2000. In separate trials, Mr. Wright and Mr. Pitts were found guilty of murdering David Green and James Felker during the course of a carjacking, kidnapping, and robbery. Mr. Wright had obtained the murder weapon during a home burglary that he had committed the prior day.

Mr. Wright waived his right to a penalty-phase jury. The jury was dismissed after the court determined that his waiver was made knowingly, intelligently, and voluntarily. The defense presented mitigating evidence of childhood trauma and neglect, as well as evidence of exposure to alcohol and cocaine *in utero*.

A hearing was held to determine whether Mr. Wright met Florida's statutory standards for intellectual disability in capital cases. Although two defense experts differed in their opinions regarding the effects of some mitigating factors on Mr. Wright's functioning, both agreed that he did not qualify as intellectually disabled under § 921.137 of the Florida Statutes (2000). The trial court ruled that Mr.