

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VICTOR TONY JONES,
Petitioner

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

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- A. Postconviction court order denying relief, referenced as *State v. Jones*, 2006 Order, Case No. F90-50143 (Fla. 11th Jud. Cir. 2006).
- B. Florida Supreme Court opinion denying relief, reported as *Jones v. State*, 966 So. 2d 319 (Fla. 2007).
- C. Postconviction court order denying relief, referenced as *State v. Jones*, 2015 Order, Case No. F90-50143 (Fla. 11th Jud. Cir. 2015).
- D. Florida Supreme Court opinion denying rehearing, reported as *Jones v. State*, 231 So. 3d 374 (Fla. 2017).

A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,
and

VICTOR TONY JONES,

Defendant.

JUDGE VICTORIA PLATZER

CASE NO. F90-50148

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CRIMINAL #10

**ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENTS
AND SENTENCES**

THIS CAUSE comes before this Court on the Defendant's Motion to Vacate Judgments and Sentences pursuant to Florida Rule of Criminal Procedure 3.2031. An evidentiary hearing was held on January 10, 11, and 13, 2006. The State of Florida was represented by Flora Seff, Esq. of the State Attorney's Office and Sandra Jaggard, Esq. of the Attorney General's Office. The Defendant was represented by William Hennis, Esq. and Cristina Spudeas, Esq. of the Office of the Capital Collateral Regional Counsel - South. The Court having considered the pleadings, and being otherwise fully advised, hereby finds and orders as follows:

PROCEDURAL HISTORY

Jones was convicted and sentenced to death on March 1, 1993. The Florida Supreme Court affirmed the convictions and sentences on direct appeal. *Jones v. State*, 652 So. 2d 346 (Fla.), cert. denied, 116 S. Ct. 202 (1995). The United States Supreme Court denied review on October 2, 1995. *Jones v. Florida*, 116 S. Ct. 202 (1995).

In March 1997, Jones filed his initial Rule 3.850 motion, which was amended in

March 1999. On March 8, 2001, after evidentiary hearing, this court denied Defendant's Amended Motion for Postconviction Relief. The Florida Supreme Court thereafter affirmed the denial of the Amended Motion for Postconviction Relief. *Jones v. State*, 855 So. 2d 611 (Fla. 2003).

Subsequently, Defendant filed this successive Second Motion for Postconviction Relief alleging that he is mentally retarded. This court summarily denied the Motion, finding specifically that the Defendant's claim is refuted by the record. That Order is currently on appeal before the Supreme Court. However, the Supreme Court relinquished jurisdiction to this Court on May 27, 2005 for a determination of mental retardation in accordance with Florida Rule of Criminal Procedure 3.203.

TESTIMONY AT EVIDENTIARY HEARING ¹

I. Dr. Eisenstein

The defense called Dr. Hyman Eisenstein, who was appointed by the court as a defense expert to evaluate Jones in regard to mental retardation and who opined that Jones is mentally retarded. Dr. Eisenstein testified that he has been involved in Jones' case since April 1991. Jones was shot in the head during the commission of the crime for which he has been sentenced to death and sustained a right frontal lobe injury.

Since becoming involved in Jones case, Dr. Eisenstein has conducted three neuropsychological evaluations, which all included standardized intellectual testing. A total of five intelligence tests have been completed by three examiners, and as such, Dr. Eisenstein did not administer any additional tests in conjunction with the current proceedings. The prior tests were administered on the following dates with the following

¹ The parties stipulated that the evidence presented during this proceeding was to be considered cumulatively with the evidence from prior proceedings in this case.

results:

<u>Date</u>	<u>Test</u>	<u>Score</u>
April 1991	WAIS-R	72
February 1993	WAIS-R	70
March 1999	WAIS-III	67
June 2003	WAIS-III	72
May 2005	WAIS-III	75

Dr. Eisenstein administered the tests in the 1990's. Dr. Glenn Caddy and Dr. Greg Prichard administered the 2003 and 2005 tests, respectively.

As part of his evaluation, Dr. Eisenstein conducted clinical interviews of Jones at the Dade County Jail. Dr. Eisenstein spent a total of six or seven hours with Jones in order to evaluate Jones' complete circumstance and functioning from date of birth to the age of eighteen.

Dr. Eisenstein also spoke or relied on prior interviews with family members in reaching his opinion that Jones has deficits in adaptive functioning. He interviewed siblings Pamela Mills, Valerie Johnson and Michael Mills; cousin Carl Leon Miller; and Laura Long, an aunt who raised Jones for several of the relevant years. Ms. Long presented a positive view of Jones from age two to fourteen, although she acknowledged that Jones required special classes, had difficulty learning and was frequently punished for his inability to conform to the rules of the household. Ms. Long's son, Lawrence, also lived in the household and was allegedly physically abusive to Jones.

Pamela Mills, who grew up with Jones, reported to Dr. Eisenstein that she attempted to shield Jones from the punishments of Laura Long and her son, Lawrence. Jones was

unable to do his school work and often Pamela would do his school work for him so that he would not be punished by Ms. Long or Lawrence.

Valerie Johnson reported a similar history and also described Jones' drug use at a very young age, possibly as early as ten. Jones began skipping school once he began using drugs. Cousin Carl Leon Miller reported major problems with adaptive functioning similar to those reported by other family members. Laura Long, Michael Mills and Valerie Mills Johnson are currently deceased and as such could not be contacted for the current evaluation. Shirley Anthony, twenty years Jones's senior, lived with Jones when he was sixteen. She and Jones had a common law marital relationship. Jones worked several different jobs during the period they lived together and functioned within normal limits.²

At age six, Jones fell from a tree, which resulted in a loss of consciousness. Jones sustained at least one head injury which was not treated. At age twelve, Jones was involved in a motor vehicle accident involving head trauma. Trauma, as well as drug overdose, can be relevant and material to a diagnosis of mental retardation. In 1975, at the age of fourteen, Jones was discharged from Jackson Memorial Hospital (JMH) and was in numerous half-way houses and/or institutions for drug abuse.

Dr. Eisenstein theorized that Jones may suffer from fetal alcohol syndrome. Soon after Jones was born, he and his siblings were sent elsewhere to live because, his mother, an alcoholic, was unable to care for them. However, Dr. Eisenstein acknowledged that he has no evidence to support this theory.

Dr. Eisenstein found Jones' overall performance affected by his limitations, despite his eagerness to cooperate. Jones has problems in sustained attention and concentration.

² This Court specifically found that the testimony of those family members who testified before it at the last evidentiary hearing was not credible.

Most notably, Dr. Eisenstein found that Jones' major head trauma compromises his ability to perform these tests. **Dr. Eisenstein testified, in fact, that the majority of Defendant's deficiencies were caused by the gunshot wound to the head received at the time of the commission of crime.**

Dr. Eisenstein administered the MMPI to Jones in both 1991 and 1993. The results from the tests, as well as the results of Dr. Suarez administration of the MMPI, were clearly invalid. Dr. Eisenstein has never tested the Defendant for malingering, although he is aware of the tests administered by Drs. Suarez and Prichard which indicated that Jones was malingering. Dr. Eisenstein opined that other factors may have influenced the results, including an inability to understand the questions, fatigue, carelessness, or a cry for help.

According to Dr. Eisenstein, adaptive functioning prior to age eighteen could be determined by interviews and collateral information including hospital and school records. He did not think it was useful to speak with people at the prison since only functioning prior to age eighteen was relevant. Dr. Eisenstein found deficits in communication, functional academic skills and self direction.

Dr. Eisenstein acknowledged upon questioning by the State, that he did not find Jones mentally retarded in any of his previous evaluations. Dr. Eisenstein reviewed the evaluations of all the other experts and agreed that there was no indication from any of the experts that Jones was mentally retarded.

Dr. Eisenstein acknowledged that during his interview with Jones in 2005, he determined that Jones is able to communicate in writing, cleans his cell, exercises to reduce his stress, understands and is able to explain the medications he takes, reports that he goes to the law library twice a week and gives a detailed history of his family. Jones made statements during the interview which were indicative of a certain psychological

insight.

II. Dr. Suarez

Dr. Enrique Suarez, a forensic psychologist, was appointed by the court as the State's expert for the determination of mental retardation and opined that Jones is not mentally retarded. Dr. Suarez based his opinion upon an evaluation of the three necessary criteria for a diagnosis of mental retardation under DSM-IV: significantly low IQ score on standardized test; concurrent impairment in one's adaptive functions; established before the age of eighteen.

Dr. Suarez found that, based upon the results of various tests administered, Jones scored in the borderline range of intellectual functioning. Although often termed "borderline mentally retarded", this designation is a misnomer and does not mean that Jones is mentally retarded. On all but one test, Jones has scored in borderline range. Jones' scores on several tests indicate he is purposely not doing his best.

Although Dr. Suarez did not interview Jones on death row, he has observed other prisoners on death row. When evaluating a prisoner for mental retardation, one must be cognizant of the issue of malingering since often prisoners will want to score poorly in order to benefit legally or medically. The WAIS--III, performed by Dr. Eisenstein, does not have any built in safeguards to detect malingering.

During Dr. Suarez' interview with Jones, Jones was able to recount many details of his life and showed insight into his responses, including an acute awareness of places he had lived and worked. In addition, Jones has a good command of his medical condition, needs, diagnosis and medications.

Dr. Suarez administered the MMPI to the defendant. Upon scoring the test, Dr. Suarez found the test to be invalid as Jones' responses indicated off-the-scale malingering

and exaggeration. The interview indicated that Jones was far more knowledgeable about many things than a mentally retarded person would be.

Dr. Suarez gave Jones the Wide Range Achievement Test (WRAT), which is a cognitive achievement test, in contrast to WAIS, which is an intelligence test. The WRAT looks at what one has done with one's intelligence, and what one has achieved. The WRAT consists of three subtests- spelling, math, and reading. Jones was given both the blue and the tan forms and then Dr. Suarez averaged the answers. The manual has statistical scales where the raw scores can be converted to standard scores for the blue form, the tan form, and for the combined form. The WRAT has no validity or malingering scale built into to it.

On the reading portion of the WRAT, Jones had a standard score of 79, which is equivalent to the eightieth percentile, and equivalent to an 8.2 grade average. The WRAT is age relevant or age corrected. A 5 year old could score a 79 for his/her age, which would not require a performance as high as someone Jones' age.

Jones scored a 4th grade 5 month level on the spelling test. He could be a bad speller. On the math portion, Jones scored at the 3rd grade, 6 months level, which is very low. Most people do not do as well on the math portion. Jones told Dr. Suarez that he never liked math.

Dr. Suarez compared the results of the WRAT he gave Jones with the results obtained by Dr. Caddy on the WRAT 3. Both experts had given the tan version so he compared the results of the tan version. Jones spelled "vegetate" and "institute" correctly for Dr. Caddy, but not for Dr. Suarez. On the math portion, Jones correctly added 6+2 and calculated 15 divided by 5 for Dr. Caddy, but not for Dr. Suarez.

The reading scores on the WRAT are not consistent with mental retardation. The

spelling and math test results are subject to argument.

Dr. Suarez also reviewed medical charts at the pre-trial detention center, the evaluations done by Dr. Jane Ainsely, Dr. Lloyd Miller, Dr. Luke Turner, the raw data of Dr. Frederick Prichard, medical records from JMH after Jones was shot, the reports of Dr. Herrera, the raw and custom data of Dr. Eisenstein and DOC records.

Dr. Suarez testified that he is familiar with the procedure hospitals use when someone is shot in terms of follow up care. While the hospitals do not test directly for intellectual functioning, they do look for the recovery of function. The hospital looks to see if the person has recovered the ability to speak, walk, care for themselves, or able to ask for pain medication. There is nothing in the record from JMH to indicate Jones is mentally retarded.

Dr. Suarez also reviewed the 1975 JMH discharge summary that has one sentence saying that Jones has been labeled borderline mental retarded. Dr. Suarez testified that the report itself contradicts this label. The report states that Jones' mental state is fine, his behavior was completely normal, and he had a completely normal mental status evaluation. Mental status evaluations involve things like alertness, speech, and the ability to be goal directed.

Dr. Suarez suggested that even if past tests are valid, i.e. represent actual intelligence, and Jones was not malingering or putting forth full effort, he would still not meet the criteria to be found mentally retarded. Jones falls into borderline range in most areas. The effect of the WAIS scores over time also indicate he is in the borderline classification. Of the test results obtained, only one score was under 70. That score may very well indicate malingering. Additionally, Dr. Suarez found Jones has no present adaptive impairment. Based upon Dr. Suarez review of Jones' experiences, including his

relationships and employment, Jones has probably never had adaptive impairment. Given that Jones' current abilities do not indicate mental retardation and that all scores have been post gunshot injury, an assumption can be made that his functioning was higher prior to the injury.

Dr. Suarez found no evidence of the onset of mental retardation prior to age eighteen. Jones' school records do not indicate he had any problems as a child. There is no indication of early failing grades, although the records are limited.

III. Lisa Wiley

Lisa Wiley, a psychological specialist with the Florida prison system, worked thirteen years on death row. Her duties involved providing counseling services and referrals for psychiatric assistance. Ms. Wiley was responsible for all death row inmates and had constant contact with approximately 40 inmates.

Ms. Wiley met Jones in 1993 and had contact with him until last year, when she left the prison system. Jones was always appropriate in the way he kept his room and in any conversations he had with Ms. Wiley. He spoke rationally, coherently and logically.

Jones took psychotropic medications, as do approximately 10% of death row inmates. He was offered counseling, but could choose whether or not to take it. Jones refused most psychological services, but did want psychiatric assistance. Jones takes medication for depression and hallucinations. Jones had a flat affect the entire time Ms. Wiley knew him.

Ms. Wiley received notes handwritten by Jones. One such note was a grievance regarding mail. Two other notes from 2004 which were written by Jones were admitted into evidence. These notes appear coherent and rational in form and content. One note indicates Jones understands how his bank account works and how to wire funds from

Europe to his account.

Ms. Wiley spoke with Dr. Suarez about Jones' adaptive behavior. No one from the defense spoke to her about Jones' functioning on death row.

On cross-examination, witness acknowledged she is not a licensed psychologist in the State of Florida. She has testified for both State and Defense in death cases.

LEGAL STANDARD

Mental Retardation is defined in § 921.137, Fla. Stat. and Fla.R.Crim.P. 3.203:

[T]he term "mental retardation" means 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 Department of Children and Family Services.

This definition is consistent with that found in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002):

The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed.1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction,

functional academic skills, work, leisure, health, and safety (Criterion B).

The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 122 S.Ct. at 2245, n3.

Florida law defines mental retardation as an I.Q. under 70. *Zack v. State*, 911 So. 2d 1201 (Fla. 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no credible evidence to suggest that Jones is mentally retarded. Dr. Eisenstein's opinion that Jones is mentally retarded is based primarily on one line in a 1975 discharge statement that Jones is "borderline mentally retarded". Dr. Eisenstein acknowledged that Jones' deficiencies are the result of the gunshot wound sustained during the underlying criminal act.

Jones does not meet the statutory requirements to be defined as mentally retarded. His I.Q. has consistently been tested as above 70. Based on that alone, he is not mentally retarded. *See Zack, Id.*

Even if Jones' I.Q. were determinative of a finding of mental retardation, Jones does not meet the other two prongs of the test. Jones clearly does not suffer from deficiencies in his adaptive functioning. He keeps his cell clean, takes his own medication and is aware of which medications he takes and in which dosages. He has fashioned a way to exercise in his cell. Most tellingly, the grievance letters Jones

wrote show that he has ample communication skills and is sophisticated enough in his thought process to understand how wire transfers are made from Europe to his prison account.

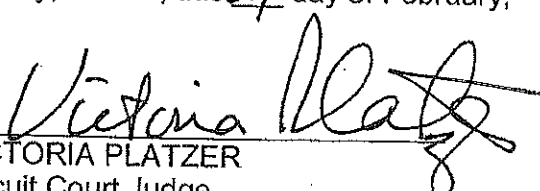
Finally, there is no evidence whatsoever of the onset of mental retardation before the age of eighteen. Jones has failed to present proof by clear and convincing evidence that he is mentally retarded.

WHEREFORE it is hereby

ORDERED and ADJUDGED that the Defendant's Motion to Vacate Judgment and Sentence is **DENIED**.

The Defendant is notified that he has a right to appeal this order to the Supreme Court of Florida within thirty (30) days of the filing of this order.

DONE AND ORDERED at Miami, Dade County, Florida, this 24 day of February, 2006.


VICTORIA PLATZER
Circuit Court Judge

cc: Flora E. Seff, Assistant State Attorney
Sandra Jaggard, Assistant Attorney General
William M. Hennis, III, Office of the Collateral Capital Regional Counsel

B

966 So.2d 319
Supreme Court of Florida.

Victor Tony JONES, Appellant,

v.

STATE of Florida, Appellee.

No. SC04-726.

May 24, 2007.

Rehearing Denied Sept. 24, 2007.

Synopsis

Background: Following affirmance of his convictions of two counts of first-degree murder and sentences of death, 652 So.2d 346, and affirmance of denial of post-conviction relief, 855 So.2d 611, defendant filed successive motion for postconviction relief, alleging that he was mentally retarded. The Circuit Court, Dade County, Victoria Platzer, J., denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] trial court did not abuse its discretion by rejecting defense expert's opinion that the second criteria for diagnosing mental retardation, which was two areas of deficiency in adaptive skills, required a "retrospective" determination of defendant's adaptive functioning before age 18, and accepting state's expert opinion that the inquiry into adaptive functioning must consider present circumstances;

[2] substantial evidence supported conclusion that defendant did not meet statutory definition of mental retardation, as necessary to bar imposition of death penalty; and

[3] trial court did not abuse its discretion by appointing neuropsychologist as an expert at defendant's request.

Affirmed.

West Headnotes (11)

[1] Sentencing and Punishment ⇌ Mentally retarded persons

Trial court did not abuse its discretion, on motion for postconviction relief from sentence of death based on alleged mental retardation, by rejecting defense expert's opinion that the second criteria for diagnosing mental retardation, which was two areas of deficiency in adaptive skills, required a "retrospective" determination of defendant's adaptive functioning before age 18, and accepting state's expert opinion that the inquiry into adaptive functioning must consider present circumstances; state law provided that the exception to death penalty applied to a defendant who "is mentally retarded," not who was, and mental retardation was legally defined as significantly subaverage general intellectual functioning "existing concurrently with" deficits in adaptive behavior. West's F.S.A. § 921.137(1); West's F.S.A. RCrP Rule 3.203(b).

27 Cases that cite this headnote

[2] **Statutes** ⇌ Language

The first step in determining the meaning of a statute is to examine its plain language.

Cases that cite this headnote

[3] **Statutes** ⇌ Purpose and intent; unambiguously expressed intent

When statutory language is clear and unambiguous, Supreme Court has no need to resort to rules of statutory construction to determine the legislature's intent.

1 Cases that cite this headnote

[4] **Statutes** ⇌ Plain Language; Plain, Ordinary, or Common Meaning

Statutes ⇌ Superfluosity

Statutes ⇌ Construction in View of Effects, Consequences, or Results

Words in a statute must be given their plain meaning and statutes should be construed to give them their full effect.

1 Cases that cite this headnote

[5] **Criminal Law** ⇌ Experts

A trial court has discretion to accept or reject expert testimony.

1 Cases that cite this headnote

[6] **Sentencing and Punishment** ⇌ Evidence

Substantial evidence supported conclusion that capital murder defendant did not suffer from deficits in adaptive behavior, as element of test to determine whether he was mentally retarded, such that imposition of death penalty would be barred; while in prison, defendant understood his various medical problems, managed the finances of his inmate account, and had strong language skills, while out of prison, defendant traveled alone, lived in several states, and supported himself through various jobs, and statements given by defendant's relatives that defendant was a slow learner in special classes who was unable to take care of himself were contradicted by the record. West's F.S.A. § 921.137(1); West's F.S.A. RCrP Rule 3.203(b).

2 Cases that cite this headnote

[7] **Sentencing and Punishment** ⇌ Evidence

Substantial evidence supported conclusion that capital murder defendant did not suffer from significantly subaverage general intellectual functioning, as element of test to determine whether he was mentally retarded, such that imposition of death penalty would be barred; significantly subaverage general intellectual functioning correlated with an IQ of 70 or below, defendant's scores on IQ test were 72, 70, 67, 72, and 75, each of the tests were administered to defendant after he was shot in the head when he committed the murders, and expert testified that his testing of defendant indicated that defendant's intelligence was probably higher before the head injury. West's F.S.A. § 921.137(1); West's F.S.A. RCrP Rule 3.203(b).

24 Cases that cite this headnote

[8] Sentencing and Punishment ⇌ Evidence

Evidence did not support conclusion that capital murder defendant met statutory definition of mental retardation before the age of 18, as element of test to determine whether he was mentally retarded, such that imposition of death penalty would be barred; valid record evidence refuted claims that defendant was a slow learner in special classes who was unable to take care of himself. West's F.S.A. § 921.137(1); West's F.S.A. RCrP Rule 3.203(b).

3 Cases that cite this headnote

[9] Criminal Law ⇌ Reply briefs

Capital murder defendant, appealing denial of postconviction relief from sentence of death based on alleged mental retardation, was procedurally barred from raising claim in his reply brief that trial court abused its discretion by appointing neuropsychologist as an expert at defendant's request, where defendant failed to raise such claim in his initial brief. West's F.S.A. R.App.P. Rule 9.210(d).

5 Cases that cite this headnote

[10] Criminal Law ⇌ Province of jury or trial court

Judgments regarding the credibility of witnesses are within the trial court's purview.

2 Cases that cite this headnote

[11] Sentencing and Punishment ⇌ Evidence

Trial court did not abuse its discretion, in proceeding on capital murder defendant's successive motion for postconviction relief from sentence of death based on alleged mental retardation, by appointing neuropsychologist as an expert at defendant's request, even though defendant claimed that trial court was not open to hearing and considering expert's testimony; record indicated that the court considered all the testimony, and its determination that defendant was not mentally retarded was not an indication otherwise.

3 Cases that cite this headnote

Attorneys and Law Firms

***320** Neal A. Dupree, Capital Collateral Regional Counsel—Southern Region, and William M. Hennis, III, Litigation Director CCRC—South, Fort Lauderdale, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, Florida, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

Opinion

***321** PER CURIAM.

Victor Tony Jones, who was convicted of murder and sentenced to death, appeals an order denying his successive motion to vacate the judgment and sentence and an order concluding that he is not mentally retarded. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Jones raises two claims: (1) that the court erred in concluding that the second prong of the definition of mental retardation requires a current assessment of adaptive functioning; and (2) that the trial court erred in concluding that Jones is not mentally retarded. We affirm the circuit court's orders.

I. STATEMENT OF FACTS

On December 19, 1990, Jones, on his second day of work, killed his two employers, Matilda and Jacob Nestor, in their office. *Jones v. State*, 652 So.2d 346 (Fla.), *cert. denied*, 516 U.S. 875, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995). Before he died, Jacob Nestor shot Jones in the head. Jones needed surgery to remove the bullet. He was convicted of two counts of first-degree murder and two counts of armed robbery.

A. Competency, Mitigation, and the Penalty Phase

At a competency hearing held before the penalty phase, several doctors testified: two psychiatrists and two neuropsychologists. During the penalty phase, Dr. Jethro Toomer, a psychologist who evaluated Jones, testified for the defense that Jones was abandoned by his mother, that the statutory mitigator of extreme mental or emotional disturbance applied, and that Jones suffered from borderline personality disorder. Dr. Charles Mutter, a forensic psychiatrist, testified for the State to rebut this testimony. At the *Spencer*¹ hearing, Dr. Hyman Eisenstein testified for the defense that as a result of the gunshot wound, Jones was not competent. No one testified that Jones was mentally retarded. Laura Long, an aunt of Jones who raised him, testified that he performed well in elementary school and was well behaved until about age 11 when he became a runaway and used drugs. The court found three aggravators, but no mitigation, and sentenced Jones to death for both murders. We affirmed. *Jones*, 652 So.2d at 349.

B. Mitigation and the Postconviction Motion

Jones subsequently filed a motion for postconviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure, raising almost two dozen claims. *Jones v. State*, 855 So.2d 611, 614–15 & 615 n. 1 (Fla.2003). The circuit court limited the evidentiary hearing to Jones's "claims of ineffective assistance of counsel related to a voluntary intoxication defense, mitigation, and appellant's pretrial competency." *Id.* at 615. At that hearing, Jones presented the testimony of two relatives: his sister Pamela Mills and his cousin Carl Leon Miller. They testified to physical childhood abuse Jones suffered when they all lived with their aunt, Laura Long. Jones's trial counsel testified that he was successful only in contacting Jones's aunt, grandmother, and third-grade teacher, who largely provided a positive early childhood history for Jones. Jones's third-grade teacher, Mrs. Vera Edwards, testified at the evidentiary hearing that Jones was "well prepared for school every day," well behaved, and of "a little above average" intelligence, and he demonstrated no signs of being physically abused. School records *322 indicated that in later years, when Jones began using drugs and skipping school, his grades drastically slipped. Several experts who had examined him testified on his behalf. Again, no one testified that he was mentally retarded. The circuit court found some of the testimony not credible and held that defense counsel's decision regarding which experts would testify at trial was strategic and reasonable. *Jones*, 855 So.2d at 618. This Court affirmed the circuit court's denial of relief. *Id.* at 615–16.

C. The Hearing on Mental Retardation

Jones next filed a successive postconviction motion, alleging that he is mentally retarded. At the time, Florida Rule of Criminal Procedure 3.203, which governs this issue, was not final, and the circuit court summarily denied Jones's motion. Jones appealed the order, arguing that he was entitled to a hearing under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and rule 3.203. We relinquished jurisdiction for the court to hold an evidentiary hearing.

At the hearing, three witnesses testified: one (Dr. Eisenstein) on behalf of Jones, and two (Dr. Enrique Suarez and Lisa Wiley, a psychological specialist with the Department of Corrections) on behalf of the State. The parties stipulated that evidence from the evidentiary hearing would be considered cumulatively with the evidence from prior proceedings.

The evidence established the following: Jones was born in 1961. At a young age, he and his siblings were taken from his alcoholic mother and sent to live with different relatives. Jones and his sister Pamela lived with their aunt Laura Long in Miami. Jones ran away a few times, and at age 11 stowed away on an airplane and flew to New York City, where he lived for a time with his alcoholic mother. At age 13, he overdosed and was admitted to intensive care in Miami, and in 1975, at age 14, at the request of the juvenile court he was admitted to Jackson Memorial Hospital for psychiatric evaluation. With the observation that Jones had a "completely normal mental status" during his stay, he was discharged with a diagnosis of "unsocialized aggressive reaction of adolescence," with no psychiatric treatment needed. A hospital document indicated that Jones previously had been labeled at a juvenile facility as having borderline mental retardation, but no documentation supported the statement.

School records indicated that Jones was in regular classes. He earned mostly Cs in grades one and two, with some As and Bs in English and writing. His third-grade teacher reported that he was of "a little above average intelligence" and did well in school. In seventh grade he again earned Cs with Bs in English. In eighth grade as he began using drugs, skipping school, and having disciplinary problems, his grades dropped precipitously. Jones dropped out of high school at age 16. During his teenage years, he was in several juvenile placements over various periods of time.

After discharge from the State juvenile system in 1978, Jones stayed in Miami a short time, working as a waiter. Then he hitchhiked alone to Texas, supporting himself by working various jobs and selling drugs. Then, he flew to San Francisco, where he supported himself mostly through robberies. Jones returned to Miami in 1979 for a short time, and then traveled to Atlanta, where he lived for several years, working various jobs over time, including bouncer and waiter. During that time, he had several girlfriends, and lived for a time with a "common law wife." He returned to Miami in 1986, where he supported himself by cutting *323 lawns and selling drugs. Then, in 1989 he was arrested for armed robbery, and he was under sentence of imprisonment in 1990 when, at the age of 29, he committed the murders of the Nestors and was shot in the head.

Various doctors administered either the WAIS-R (Wechsler Adult Intelligence Scales) or WAIS-III intelligence tests between 1991 and 2005, and Jones's IQ scores were as follows: 72, 70, 67, 72, and 75. The doctors also administered other tests, including the MMPI (Minnesota Multiphasic Personality Inventory) and the WRAT (Wide Range Achievement Test).

Dr. Eisenstein, a neuropsychologist, had been involved in Jones's case beginning with the trial and during those fifteen years had tested and interviewed Jones on various occasions. Admitting that he had not previously diagnosed Jones as mentally retarded, he nevertheless opined that he was. Eisenstein testified that the criteria for diagnosing mental retardation are an IQ score of below 70, two areas of deficiency in adaptive skills, and onset before age 18. Acknowledging that Jones's scores were higher than that, the expert stated that the applicable diagnostic manual allowed for a mental retardation diagnosis when the IQ fell in the 70 to 75 range if the other two criteria are met. Accordingly, Eisenstein conducted a "retrospective diagnosis" to assess Jones's adaptive levels *before* age 18. He concluded that Jones's adaptive skill levels *as an adult* were not part of the criteria defining mental retardation.

Eisenstein determined that *before age 18* Jones had significant deficits in adaptive functioning in the areas of (1) communication—family members said Jones was not articulate and was a slow learner; (2) academic function—family members said he was mentally slow and needed special schooling, and some school records showed failing grades; (3) self-direction—Jones's sister said Jones needed her help when he was young and Eisenstein opined that Jones's older, common law wife served as a “mother figure or a caregiver to take care of him”; (4) social interpersonal skills—family members said Jones was a loner; and (5) health and safety—family members said Jones did not take care of himself as a child, and he had numerous medical concerns that no one addressed. Accordingly, Eisenstein concluded that because Jones met two prongs of the definition (onset before age 18 and deficiencies in adaptive skills), Jones's borderline IQ scores did not invalidate his diagnosis of mental retardation.

Lisa Wiley, a Department of Corrections psychological specialist with a masters degree in clinical psychology, knew Jones from 1993 to 2005 when she conducted death row evaluations and counseling. She testified that Jones always kept a neat cell and demonstrated polite and appropriate behavior. He spoke rationally, coherently, and logically, and she never thought he was mentally retarded. She regularly met with inmates such as Jones who were on psychotropic medications, and she helped process death row inmates' requests for assistance. Jones filed written requests for assistance, such as a request to have his television repaired, and filed written grievances. In 2004, Jones wrote the following grievance complaining that money sent from someone in Europe had not been credited to his inmate account:

Dear Sir, This is regarding I've had money transferred through a bank in Belgium and back on the Frith 13-04 I received a bank receipt from them—where as I have never had my money put in my account or received a deposit receipt from Tallahassee and I've tried to get a copy of the receipt made, but could not, so I'm sending you my receipt. *324 So if you could please help me maybe after you see it you could make a copy and fax it to the bank, But according to the date, there is no reason why my money shouldn't be in my account, would appreciate your help.

Dr. Suarez, a psychologist, examined Jones for the State. He also defined the criteria for mental retardation as significantly subaverage intellectual functioning, concurrent deficits in present adaptive functioning, and onset before age 18. He disagreed with Dr. Eisenstein, however, that the test for mental retardation limits the inquiry into adaptive functioning to the years before age 18. Dr. Suarez stated that according to the applicable diagnostic manual, the inquiry into adaptive functioning must consider present circumstances because true mental retardation is lifelong. A child deemed mentally retarded actually may be experiencing a developmental delay. With appropriate training and skill development, that individual may, as an adult, no longer have the level of impairment required for the diagnosis. Thus, a diagnosis of an adult, based solely on the person's adaptive functioning as a child, is invalid. Dr. Suarez stated that the purpose of the onset-before-age-18 requirement is to account for other causes. For example, an adult who suffered a head injury may test as mentally retarded, but without onset before age 18, that would not be the clinical diagnosis.

Suarez interviewed Jones about his life history to the present, administered several tests, including achievement tests, nonverbal intelligence tests, memory tests, and the Adaptive Behavior Assessment System (ABAS). Dr. Suarez found Jones's test scores on several tests indicated that he was purposely not performing his best, and on the MMPI he found that Jones was malingering. On the ABAS administered to DOC staffers familiar with Jones's current abilities, Jones's adaptive functioning scores reflected a score of average, although all three staffers rated Jones's social skills as borderline or below average. Dr. Suarez also examined and considered the medical, school, prison, and testing records related to Jones, including those of the experts who previously examined Jones from the trial to the time of the hearing. Suarez concluded that Jones is not mentally retarded. Jones functions at least in the borderline to low average intelligence range, but borderline does not equal mental retardation. Dr. Suarez further opined that it was highly probable that Jones has mild to moderate cognitive deficits due to brain injury from being shot in the head in 1990. This suggested that Jones's pre-injury level of intelligence was higher than his present level.

Regarding his interview with Jones, Suarez found Jones to be articulate and noted Jones's vocabulary, internally consistent sentences, detailed and insightful narration, and his understanding of concepts. For example, as Jones recounted abuse he suffered as a child, Dr. Suarez asked him if the abuse was ever reported to the authorities. Jones responded, "They had a family code thing. They kept it secret like my cousin making my sister pregnant." In prison, Jones understood his own medical conditions, e.g., diabetes, high blood pressure, and high cholesterol, knew his medications, and was allowed to keep the medications in his cell and self-administer them on schedule. Jones recognized when he had medical problems, and requested help.² As to the onset before age 18 prong, Dr. Suarez testified that Jones's *325 grades were good in school until junior high when his failing grades matched his poor conduct and effort. He also noted that for an eleven-year-old to stowaway on an airline "takes a tremendous amount of sophistication." In short, Jones's demonstrated abilities, communication skills, and evident high degree of thought and daily functioning did not support a diagnosis of mental retardation.

Finding "no credible evidence" to support Jones's claim, the circuit court held Jones did not meet even one of the three statutory requirements for mental retardation. Jones appealed, raising the issues discussed below.

II. DETERMINING ADAPTIVE FUNCTIONING

[1] Jones first argues that the trial court erred in rejecting his expert's opinion that the second prong of the mental retardation definition requires a "retrospective" determination of his adaptive functioning before age 18, instead of an assessment of Jones's adaptive functioning as an adult. He also contends that the trial court erred in finding that Jones did not meet this prong of the definition. We disagree.

The Supreme Court has held that it is unconstitutional to execute a person with mental retardation; however, it left to the States the task of defining that term. *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Florida defines mental retardation in pertinent part as follows:

(1) *As used in this section, the term "mental retardation" means 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 Department of Children and Family Services. 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.*

§ 921.137(1), Fla. Stat. (2005) (emphasis added); accord Fla. R.Crim. P. 3.203(b) (containing the same definition). Thus, we have stated that 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. See *Burns v. State*, 944 So.2d 234, 245 (Fla.2006).

At the hearing in this case, both Drs. Eisenstein and Suarez agreed that these three prongs must be met. Dr. Eisenstein testified, however, that the third prong—onset before age 18—limits the inquiry into the second—deficient adaptive functioning. He stated that in determining whether a person experiences deficits in adaptive functioning, only the person's childhood behavior is considered.³

To the extent that Jones argues that the statute and our rule require only a determination of a person's adaptive skills before age 18, we review the issue de novo. See *Kephart v. Hadi*, 932 So.2d 1086, 1089 (Fla.2006) ("The interpretation

of a statute *326 is a purely legal matter and therefore subject to the de novo standard of review.”), *cert. denied*, 549 U.S. 1216, 127 S.Ct. 1268, 167 L.Ed.2d 92 (2007); *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598, 599 (Fla.2006) (“The certified conflict issue involves the interpretation of the Court’s rules and is a question of law subject to de novo review.”). As explained below, we find that the plain language of the statute precludes the defense expert’s interpretation.

[2] [3] [4] The first step in determining the meaning of a statute is to examine its plain language. *Koile v. State*, 934 So.2d 1226, 1230 (Fla.2006). When the language is clear and unambiguous, as it is here, we have no need to resort to rules of statutory construction to determine the legislature’s intent. *Id.* at 1230–31 (citing *Lee County Elec. Coop., Inc. v. Jacobs*, 820 So.2d 297, 303 (Fla.2002)). Further, words must be given their plain meaning and statutes should be construed to give them their full effect. *Id.*

Both Florida law and our rule state that the exception to the death penalty applies to a defendant who “is mentally retarded” or “has mental retardation.” § 921.137(2), Fla. Stat. (stating no person may be sentenced to death “if it is determined in accordance with this section that the defendant has mental retardation”); Fla. R.Crim. P. 3.203(e) (providing for an evidentiary hearing to consider “the issue of whether the defendant is mentally retarded”). Thus, the question is whether a defendant “is” mentally retarded, not whether he was. Both the statute and our rule define 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.” § 921.137(1), Fla. Stat. (2005) (emphasis added); Fla. R.Crim. P. 3.203(b). Jones does not dispute that the intellectual functioning component must be based on current testing. Moreover, his own expert based his determination of this prong largely on testing administered between 1991 and 2005, from the time Jones was 29 to the time of the rule 3.203 hearing. What Jones argues is that the second prong is concerned solely with an individual’s adaptive behavior as a child under age 18. The legal definition, however, states that the intellectual functioning component must “exist[] concurrently with” the deficient adaptive behavior. The word “concurrent” means “operating or occurring at the same time.” *Merriam Webster’s Collegiate Dictionary* 239 (10th ed.2001). Jones’s analysis would require us to ignore the plain meaning of the phrase “existing concurrently with” that links the first two components of the definition. The third prong—“and manifested during the period from conception to age 18”—specifies that the present condition of “significantly subaverage general intellectual functioning” and concurrent “deficits in adaptive behavior” must have first become evident during childhood.

Further, as Jones admits, Florida’s definition of mental retardation is consistent with the definition of the American Psychiatric Association, which provides the following diagnostic criteria for mental retardation:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person’s effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, *327 self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000) (DSM–IV). Thus, to the extent that Jones argues that the issue is not one of statutory construction but of an expert’s interpretation of the DSM–IV, the argument fails as well. The DSM–IV states that the second criterion for mental retardation is “[c]oncurrent deficits or impairments in *present* adaptive functioning.” (Emphasis added.) Dr. Eisenstein’s testimony that in this phrase the word “present” actually refers to past, or childhood, adaptive functioning would impose an Alice-in-Wonderland definition of the word “present.” See Lewis Carroll, *Through the Looking-Glass* (1872) (“When I use a word, it means just what I choose it to mean—neither more nor less.”), *quoted in Hartford Ins. Co. of the Midwest v. Minagorri*, 675 So.2d 142, 144 (Fla. 3d DCA 1996).

[5] First, we note that the circuit court's task in this case was to apply the law, which is contained in the statute and rule cited above. With regard to expert opinion, however, the court has discretion to accept or reject such testimony. *See Evans v. State*, 800 So.2d 182, 188 (Fla.2001) (applying an abuse of discretion standard to the trial court's determination of competency made after hearing conflicting expert testimony). The court rejected Dr. Eisenstein's testimony and accepted Dr. Suarez's testimony that the word "present" means "now." Dr. Suarez testified that the second prong of Florida's definition of mental retardation and the second criterion of the DSM-IV mean the same thing. As we explained above, we agree. Further, on cross-examination Jones asked the State's expert to explain the following passage from the DSM-IV:

Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.

DSM-IV at 47. Dr. Suarez explained that this statement illustrates that, because mental retardation is lifelong, a child may meet the criteria for the diagnosis because of developmental delays without being mentally retarded. Unless the person also meets the criteria as an adult, the individual is not mentally retarded. Thus, diagnosis of mental retardation in an adult must be based on present or current intellectual functioning and adaptive skills and information that the condition also existed in childhood. Accordingly, the trial court accepted Dr. Suarez's interpretation of the DSM-IV, which was consistent with Florida law, and did not abuse its discretion in rejecting Dr. Eisenstein's contrary opinion.

[6] Next, Jones argues that *Atkins* essentially prohibits a determination of an individual's current adaptive skills if that person, like Jones, is in prison. He claims that adaptive functioning has to be determined from an individual's adaptive functioning in the "outside world." To the contrary, as we stated above, the Court in *Atkins* left the definition and determination of mental retardation to the States. *See Atkins*, 536 U.S. 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)). Moreover, the State's expert did not base his opinion solely on his interviews with prison guards. In determining that Jones was not deficient in adaptive *328 behavior, Dr. Suarez relied on his interview with and testing of Jones, his examination of records regarding Jones's life from his childhood to the time of the rule 3.203 hearing, and interviews and testing of DOC staffers who observed Smith on a regular basis. Thus, as Dr. Suarez admitted, while the adaptive skills test administered to DOC staff regarding Jones's adaptive functioning is not ideally suited to a prison environment, the test was not his sole source of information. Further, the evidence demonstrates that both in and out of prison, Jones understands and manages his own life.

In prison, Jones follows a daily exercise regimen of his own devising and uses improvised equipment to gain, according to Jones, the benefits of health and stress relief. He understands his various medical problems, the related medication, and self-administers it on schedule. He writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. He manages the finances of his inmate account, including obtaining appropriate documentation, following up on money transfers from foreign countries, and filing grievances when he finds a discrepancy in the account. He keeps himself and his cell clean and orderly and visits the prison library twice a week. His language skills in writing, speaking, and other intellectual skills are strong in light of his dropping out of school at an early age. In addition, in the "outside world" as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a "common law wife," as he correctly termed her.

Jones insists that the statements his relatives gave Dr. Eisenstein about his childhood are the only valid evidence regarding his adaptive functioning. First, as we explained above, the adaptive functioning criterion is not limited to childhood, and, second, the validity of his relatives' statements is questionable. The statements Jones's Aunt Laura apparently gave Dr. Eisenstein directly contradicted her prior testimony at Jones's penalty phase, and the court in Jones's prior postconviction hearing found his sister Pamela's and his cousin Carl's testimony not credible. Further, these statements by relatives are contradicted by the record. For example, Jones's relatives said he was a slow learner who was placed in special classes.

However, his elementary school teacher testified previously that Jones was a good student, who was in regular classes and earned good grades. Jones's school records support her statement. The record shows that Jones's failing grades in junior high coincide with his disciplinary problems and lack of effort. In addition, Jones's own detailed statements about his childhood contradict his relatives' statements.

Finally, Jones argues that the circuit court erred in finding that Jones "does not suffer from deficiencies in adaptive functioning." As illustrated by the foregoing discussion, competent, substantial evidence supports the trial court's determination. *See Trotter v. State*, 932 So.2d 1045, 1049 (Fla.2006) (finding that "competent, substantial evidence support[ed]" circuit court's determination that Trotter was not mentally retarded).

III. THE MENTAL RETARDATION DETERMINATION

Jones next argues that the circuit court erred in determining that he also did not meet the other two prongs of the mental retardation definition—significantly subaverage intellectual functioning and onset before *329 age 18—and appears to contend that the court applied an incorrect standard of proof. We affirm the trial court's order.

[7] Jones first argues that the trial court erred in concluding that because his IQ was consistently above 70, he did not meet the first prong of the mental retardation definition. Jones claims that mental retardation may be diagnosed in individuals with IQs between 70 and 75 when they exhibit significant deficits in adaptive behavior. First, we already have found the trial court's determination that Jones is not deficient in adaptive functioning to be supported by competent, substantial evidence. Insofar as this involves the application of Florida's statute, we find this claim also fails under the plain language of the statute.

Under Florida law, the first prong of a mental retardation determination requires that the person exhibit "significantly subaverage general intellectual functioning," and further defines that term as "performance that is two or more standard deviations from the mean score on a standardized intelligence test" specified by the Department of Children and Family Services. § 921.137(1), Fla. Stat. (2005). The Department in turn has designated the WAIS, the test administered to Jones, as an approved test. Fla. Admin. Code R. 65B-4.032. On the WAIS, a score of 70 is two standard deviations from the mean. Accordingly, under the plain language of the statute, "significantly subaverage general intellectual functioning" correlates with an IQ of 70 or below. *See Zack v. State*, 911 So.2d 1190, 1201 (Fla.2005) ("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."). Jones's scores on the WAIS were as follows: 72 (1991), 70 (1993), 67 (1999), 72 (2003), and 75 (2005). In other words, the scores did not indicate "significantly subaverage general intellectual functioning." Further, each of these tests was administered after Jones was shot in the head when he murdered the Nestors. Dr. Suarez testified that his examination of the records and his testing of Jones indicated Jones's intelligence was probably higher before the head injury. Dr. Eisenstein, Jones's expert, testified that the head injury was a "major trauma" resulting in impairment of Jones's ability to concentrate and remain focused, and negatively affecting his perceptual processes. Further, none of the many doctors who examined Jones at trial and during prior postconviction proceedings, including Dr. Eisenstein, considered Jones to be mentally retarded. Thus, competent, substantial evidence supports the circuit court's finding that Jones did not meet the first prong of the mental retardation definition.

[8] Next, Jones contends that the trial court erred in determining that he failed to meet the remaining prong of the mental retardation definition: manifestation or onset before age 18. Much of Dr. Eisenstein's "retrospective" diagnosis was focused on this prong. The expert's findings on this prong were based on statements from Jones's Aunt Laura that contradicted her trial testimony, information garnered from Jones's cousin and sister—witnesses whom the circuit court previously found not credible—and information selectively drawn from Jones's records. As explained in our discussion of the previous issue, valid record evidence refuted claims that Jones was a slow learner in special classes who was unable to take care of himself.

Finally, Jones appears to claim that the circuit court should not have applied the clear and convincing evidentiary standard. We need not address this claim. In this case, the circuit court found that “[t]here is *no credible evidence to suggest* that Jones is mentally retarded.” (Emphasis *330 added.) Thus, Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence. See *Trotter*, 932 So.2d at 1049 n. 5 (finding it unnecessary to address claim that clear and convincing standard was unconstitutional “because the trial court concluded that Trotter was not mentally retarded [under] *either* ” standard).

[9] [10] [11] In his reply brief, Jones raises for the first time a claim that that the trial court abused its discretion by appointing Dr. Eisenstein as an expert at defendant's request because the court was not “open to hearing and considering his testimony.” First, this claim was not preserved for review. Further, because it was first raised in the reply brief, we need not address it. See *Hall v. State*, 823 So.2d 757, 763 (Fla.2002) (“Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief.”); Fla. R.App. P. 9.210(d) (“The reply brief shall contain argument in response and rebuttal to argument presented in the answer brief.”). In any event, the claim is meritless. Judgments of credibility are within the trial court's purview. The record indicates that the circuit court considered all the testimony, and its determination that Jones is not mentally retarded is not an indication otherwise. Accordingly, the court did not abuse its discretion by appointing Eisenstein. See *Porter v. State*, 788 So.2d 917, 923 (Fla.2001) (stating that regarding a trial court's decisions on questions of fact, credibility of witnesses, and evidentiary weight, “this Court will not substitute its judgment for that of the trial court”).

IV. CONCLUSION

For the reasons discussed above, we affirm the circuit court's orders denying Jones's successive motion for postconviction relief and determining that Jones is not mentally retarded.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

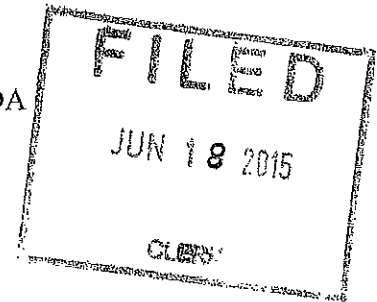
966 So.2d 319, 32 Fla. L. Weekly S272

Footnotes

- 1 See *Spencer v. State*, 615 So.2d 688 (Fla.1993) (requiring trial court to hold a hearing after the penalty phase to afford the defendant and the State an opportunity to present additional evidence).
- 2 In one request, Jones wrote: “I'm especially now very weak and constantly weak and sick on my stomach, and dizzy from blood sugar too high, and have not enough food which left me in coma like state, and I need to see the doctor ASAP.”
- 3 Dr. Eisenstein stated that “adaptive functioning has to address the issue of the individual before age 18” and that “at age 44, [Jones's] adaptive functioning, albeit important, ... is not the criteria for defining and assessing mental retardation.”

C

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA



STATE OF FLORIDA,

RECEIVED BY

Plaintiff,
and

JUL 1 2015

JUDGE DENNIS MURPHY

VICTOR TONY JONES,

CCRC-SOUTH

CASE NO. F90-50143

Defendant.

ORDER DENYING SUCCESSIVE MOTION TO VACATE JUDGMENTS OF
CONVICTION AND SENTENCE

This cause having come before the court on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence dated May 26, 2015. The State filed a response dated June 8, 2015. A *Huff* hearing, pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993), was held on June 18, 2015, finds as follows:

On December 19, 1990, Jones, on his second day of work, killed his two employers, Matilda and Jacob Nestor, in their office. *Jones v. State*, 652 So.2d 346 (Fla.), *cert. denied*, 516 U.S. 875, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995). Before he died, Jacob Nestor shot Jones in the head. Jones needed surgery to remove the bullet. He was convicted of two counts of first-degree murder and two counts of armed robbery.

CLAIM I

HALL V. FLORIDA RENDERS UNCONSTITUTIONAL THIS COURT'S
RULING THAT JONES IS NOT INTELLECTUALLY DISABLED.

Defendant contends he is intellectually disabled pursuant to *Hall v. Florida*, 134 S.Ct. 1986 (2014). He seeks another evidentiary hearing on the issue.

Hall v. Florida, 134 S.Ct. 1986 (2014), does not create a new right. The effect of the opinion is that the courts must consider the statistical error margin in determining IQ. It has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning.

In *Hall*, the United States Supreme Court stated:

Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

Hall, at 2001.

Defendant had a full and complete evidentiary hearing. He presented evidence on all three prongs. The fact remains that he did not prove a single prong, let alone all three.

Starting with the last prong, onset before the age of 18, his aunt, Laura Long, who raised him, testified he performed well in elementary school and was well behaved until about age 11 when he ran away from home and used drugs. His third grade teacher testified that he was "well prepared for school every day", well behaved, and of "a little above average intelligence": *Jones v. State*, 966 So.2d 319, 321 (Fla. 2007). School records indicated his grades dropped in later years when he began using drugs and skipping school. *Id.*, at 322. There was no credible evidence presented of an onset before the age of 18.

As noted in the previous order, attached, he also lacks deficits in adaptive functioning. **Dr. Eisenstein testified on January 10, 2006, that the majority of Defendant's deficiencies were caused by the gun shot wound to the head received at time of commission of crime.** "Dr. Suarez furthered opined that it was highly probable that Jones has mild to moderate cognitive deficits due to brain injury from being shot in the head." *Jones*, at 324.

Further, the evidence demonstrates that both in and out of prison, Jones understands and manages his own life.

In prison, Jones follows a daily exercise regimen of his own devising and uses improvised equipment to gain, according to Jones, the benefits of health and stress relief. He understands his various medical problems, the related medication, and self-administers it on schedule. He writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. He manages the finances of his inmate account, including obtaining appropriate documentation, following up on money transfers from foreign countries, and filing grievances when he finds a discrepancy in the account. He keeps himself and his cell clean and orderly and visits the prison library twice a week. His language skills in writing, speaking, and other intellectual skills are strong in light of his dropping out of school at an early age. In addition, in the "outside world" as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a "common law wife," as he correctly termed her.

Jones, at 328.

As Defendant does need meet the second or third prongs of the test, his IQ is irrelevant in determining intellectual disability. He does not get a do-over under *Hall*. He had an evidentiary hearing that lasted several days and evidence was presented on all 3 prongs. Any deficits are due to the fact that one of his victims shot him in the head.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's Successive Motion for Postconviction Relief is DENIED.

Defendant has 30 days to appeal this order.

Done and Ordered in Miami-Dade County this 18 day of June 2015.

Dennis Murphy
Circuit Court Judge

Copies to:
William Hennis III, counsel for Defendant
Sandra Jaggard, AAG

CERTIFICATE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office.
the MOVANT, Victor Jones by William Hennis III, 26th day
of June, 2015

Peresa Cottegrae
Deputy Clerk

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office.
JUN 23 2015
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk

Peresa Cottegrae
Deputy Clerk

D

231 So.3d 374
Supreme Court of Florida.

Victor Tony JONES, Appellant,

v.

STATE of Florida, Appellee.

No. SC15--1549

[September 28, 2017]

Synopsis

Background: After defendant was convicted of first-degree murder and was sentenced to death, the Supreme Court, 652 So.2d 346, affirmed conviction and sentence. Defendant subsequently filed several post-conviction relief motions. The Circuit Court, Miami-Dade County, No. 131990cf0501430001XX, Dennis James Murphy, J., summarily denied defendant's fourth successive motion. Defendant appealed.

[Holding:] The Supreme Court held that defendant was not entitled to new hearing in order to present additional evidence of intellectual disability in post-conviction relief proceeding.

Affirmed.

Lawson, J., filed opinion concurring in result.

West Headnotes (2)

[1] **Criminal Law** ⇐ Particular Issues

Defendant was not entitled to new hearing in order to present additional evidence of intellectual disability in post-conviction relief proceeding following capital murder conviction and imposition of death penalty in which defendant asserted that intellectual disability precluded imposition of death penalty, where defendant was previously afforded a full and complete evidentiary hearing that lasted several days, during which he presented evidence regarding all three prongs of the intellectual disability standard yet failed to establish that he met any of the three prongs. Fla. Stat. Ann. § 921.137(1).

Cases that cite this headnote

[2] **Sentencing and Punishment** ⇐ Mentally retarded persons

If a defendant fails to prove any one of the components of the test for intellectual disability, the defendant will not be found to be intellectually disabled, such that the imposition of the death penalty is not precluded. Fla. Stat. Ann. § 921.137(1).

Cases that cite this headnote

An Appeal from the Circuit Court in and for Miami-Dade County, Dennis James Murphy, Judge—Case No. 131990CF0501430001XX

Attorneys and Law Firms

Neal A. Dupree, Capital Collateral Regional Counsel, William M. Hennis III, Litigation Director, and Nicole M. Noël, Staff Attorney, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa J. Roca, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

Victor Tony Jones, a prisoner under sentence of death, appeals the circuit court's order summarily denying his fourth successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

We previously affirmed Jones's convictions and sentences of death on direct appeal. Jones v. State, 652 So.2d 346, 353 (Fla. 1995). We affirmed the denial of his initial motion for postconviction relief and denied his petition for a writ of habeas corpus. Jones v. State, 855 So.2d 611, 619 (Fla. 2003). We affirmed the denial of his first and second successive motions for postconviction relief and the circuit court's determination that he is not intellectually disabled. *375 Jones v. State, 93 So.3d 178, 178 (Fla. 2012); Jones v. State, 966 So.2d 319, 330 (Fla. 2007). The appeal of the denial of his third successive motion for postconviction relief was voluntarily dismissed. Jones v. State, 135 So.3d 287 (Fla. 2014) (table).

[1] Jones filed his fourth successive motion for postconviction relief on May 26, 2015, seeking a new determination of his claim that he is ineligible for the death penalty due to intellectual disability in light of the recent decision of the United States Supreme Court in Hall v. Florida, —U.S. —, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). The circuit court summarily denied the motion on June 18, 2015, concluding that Jones is not entitled to relief under Hall because he had a full and complete evidentiary hearing that lasted several days, during which he presented evidence regarding all three prongs of the intellectual disability standard yet failed to establish that he met any of the three prongs. This appeal follows.

“[T]he term ‘intellectually disabled’ or ‘intellectual disability’ means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.” § 921.137(1), Fla. Stat. (2015). “Significantly subaverage general intellectual functioning” is defined as “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.” Id. “Adaptive behavior” “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.” Id.

In Hall, the Supreme Court held that Florida's interpretation of section 921.137(1) as establishing a strict IQ test score cutoff of 70 “creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” 134 S.Ct. at 1990. The Court further held that when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement of IQ tests. Id. at 2001. And “when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” Id. Hall also held that an intellectual disability determination is a “conjunctive and interrelated assessment”

such that no single factor can be considered dispositive. *Id.*; see also *Oats v. State*, 181 So.3d 457, 467–68 (Fla. 2015) (“[A]s the Supreme Court has now recognized, because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs.” (citing *Hall*, 134 S.Ct. at 2001)). Although we held that “*Hall* warrants retroactive application as a development of fundamental significance,” *Walls v. State*, 213 So.3d 340, 346 (Fla. 2016), petition for cert. filed, No. 16–1518 (U.S. May 10, 2017), we conclude that under the circumstances presented in this case, Jones is not entitled to relief under *Hall*.

When the trial court considered Jones's first successive motion for postconviction relief and intellectual disability claim in 2006, it permitted Jones to present evidence regarding all three prongs of the intellectual disability standard. The trial court concluded that Jones was not intellectually disabled and “did not meet even one of the three statutory requirements for [intellectual disability].” *Jones*, 966 So.2d at 325.

[2] *376 Jones argues that he is entitled to relief under *Hall* because the IQ scores that were presented to the trial court in 2006 fall within the tests' acknowledged and inherent margins of error—which *Hall* requires courts to take into account—and he is therefore entitled to present additional evidence of intellectual disability. Jones is correct that in light of *Hall*, he would likely now meet the first prong of the intellectual disability standard—significantly subaverage general intellectual functioning. But as we noted in 2007, each of the IQ tests in this case was administered after Jones was shot in the head during the commission of the murders. There was testimony in 2006 that Jones's intelligence was probably higher before the head injury. Even Jones's expert testified that the head injury “result[ed] in impairment of Jones's ability to concentrate and remain focused, and negatively affect[ed] his perceptual processes.” *Id.* at 329. Jones is not entitled to a new hearing in order to present additional evidence of intellectual disability because he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard in 2006, and *Hall* does not change the fact that Jones failed to establish that he meets the second or third prong. As we have recently reiterated, “If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.” *Wright v. State*, 213 So.3d 881, 895 (Fla. 2017); *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016); see also *Wright*, 213 So.3d at 898 (holding that Wright failed to prove that he is of subaverage intellectual functioning and “[f]or this reason alone, Wright does not qualify as intellectually disabled under Florida law”).

Jones also asserts that the trial court in 2006 and this Court in 2007 improperly concluded that he did not meet the adaptive deficits prong because those determinations were based on reports from corrections officers or other observations of his functioning in prison, which are not valid indicators of adaptive behavior. This claim is procedurally barred and meritless. We rejected this argument in 2007, finding that the conclusion that Jones did not meet the adaptive deficits prong was not solely based on observations of Jones's functioning in prison. *Jones*, 966 So.2d at 327–28. *Hall* does not disturb the previous finding that Jones failed to establish that he has concurrent adaptive deficits, and Jones is not entitled to relitigate this claim.

Finally, Jones argues that he is entitled to relief in light of another recent United States Supreme Court decision, *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). But we have determined that *Hurst* is not retroactive to cases that were final before the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Asay v. State*, 210 So.3d 1, 11 (Fla. 2016), cert. denied, — U.S. —, 138 S.Ct. 41, 198 L.Ed.2d 769, 2017 WL 1807588 (2017). Because Jones's convictions and sentences became final in 1995, he is not entitled to relief under *Hurst*.

For these reasons, we affirm the circuit court's order denying Jones's fourth successive motion for postconviction relief and deny relief based on *Hurst*.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

LAWSON, J., concurs in result with an opinion.

LAWSON, J., concurring in result.

*377 I fully agree with the majority's explanation as to why Hall does not open the door for Jones to relitigate his intellectual disability claim, and I concur in the result of the majority's decision that Jones is not entitled to Hurst relief. See Okafor v. State, 225 So.3d 768, 775–76, 2017 WL 2481266, at *6 (Fla. June 8, 2017) (Lawson, J., concurring specially).

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