

with the rule. Id. at 1562. Hall had a clear understanding of what was happening at his trial and the sequence of trial events. Id. at 1559. However, Hall obviously did not have a realistic view of his chances of success before the jury, though he had rational thoughts relative to factors that could lead to a successful trial outcome. Id. at 1560-61. Hall had enough presence of mind, and the verbal skills, to articulate positions he thought his lawyer should take in his defense, including focusing on his mental background and showing that he was "just not too bright in school." Id. at 1562.

f. Dr. Denkowski's Second Affidavit

On November 27, 2002, Hall filed a second affidavit of Dr. Denkowski. The court does not consider that it added anything helpful to the decisions to be made by the court. It was more of a memorandum of argument that would be presented by Hall's attorneys than an objective statement of facts and opinions by an expert witness. Clerk's R., St. Habeas, Vol. 6 at 1600-16.

3. The State Habeas Court's Adjudication and Determinations of Factual Issues

By order signed December 3, 2002, the state trial court adopted as its own the proposed findings of fact and conclusions of law the State filed in the habeas action on November 6, 2002.

Clerk's R., St. Habeas, Vol. 6 at 1678. The state trial judge who made the habeas findings of fact had presided over Hall's trial as well, with the consequence that she could, and presumably did, consider her firsthand evaluations of the credibility of the trial witnesses.

On February 26, 2003, the Court of Criminal Appeals of Texas denied Hall's application for writ of habeas corpus by an order saying that the court adopted the trial judge's findings and conclusions and that the denial was based on those findings and conclusions and the court's own review of the record. Ex parte Hall, No. 53,668-1, slip op. at 1-2 (Feb. 26, 2003).

The standard for determining whether Hall was mentally retarded that the state court used in its habeas adjudication and fact findings was basically the same as the standard to which the parties stipulated in the instant action. Clerk's R., St. Habeas, Vol. 6 at 1574-75, ¶¶ III, IV, & V.

After making determinations of evidentiary facts, each of which is supported by the state trial and habeas evidentiary

records,⁸ the state court made the following determinations of ultimate facts (which it characterized as conclusions):

- I. Applicant cannot be classified as mentally retarded because he fails to meet all three criteria of the definition set forth in Tex. Health & Safety Code Ann. § 591.003(13). See Stevenson, 73 S.W.3d at 914-17; Ex parte Tennard, 960 S.W.2d at 61. Therefore, Applicant does not fall within the classification of mentally retarded capital offenders who are exempt from the death penalty under Atkins, 122 S. Ct. at 2244-52.

- II. Alternatively, even if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty. See Atkins, 122 S. Ct. at 2550 (recognizing that not all people claiming mental retardation will be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus").

Id. at 1592.

⁸The Fifth Circuit thought significant what it perceived to be errors on the part of the state court, Dr. Price, and Dr. Denkowski in stating that the IQ test Dr. Church administered to Hall resulted in a score of 72. Hall v. Quarterman, 534 F.3d 365, 370 & n.20, 371 n.27 (5th Cir. 2008). Not only is there nothing in the state court record to indicate that Dr. Price, Dr. Denkowski, or the state court would have reached any different results if they had treated Dr. Church's test score as 67 rather than 72, the record now affirmatively establishes that when properly scored the test administered by Dr. Church shows an IQ score of 72 for Hall. Tr. of Dec. 10, 2008, Hr'g at 59, 126.

Also, the Fifth Circuit expressed concern with the state court's credibility determination related to Dr. Church based on her lack of a Texas license or certification. Hall, 534 F.3d at 370-71. The state court did question whether the affidavit of Dr. Church, as well as the affidavit of Dr. Denkowski, should be considered, but said that a consideration of the affidavits would not cause the court's findings or conclusions to change. Clerk's R., St. Habeas, Vol. 6 at 1574. The court has no reason to think that the state court was not being truthful when it made that statement.

The state court's determinations of evidentiary fact issues served to explain and support the main and alternative determinations of ultimate facts set forth above. Id. at 1571-92. Based on such determinations, the state court adjudicated that Hall's mental retardation claim was without merit.

D. The Adjudication and Determinations of Factual Issues Made by the State Court on Direct Appeal After Remand by the Supreme Court

Following the remand of Hall's criminal case to the state court by the Supreme Court based on Atkins, on May 5, 2004, the Court of Criminal Appeals of Texas adjudicated Hall's mental retardation claim in a continuation of Hall's direct appeal. Hall, 160 S.W.3d at 24. The state court considered the evidence received at Hall's trial, with emphasis on the punishment phase evidence, and the evidence received in Hall's state habeas action in making its adjudication of, and determinations of factual issues related to, Hall's mental retardation claim. Id. at 38, 39-40. By the time the state court adjudication and determinations were made, the state court had decided Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), in which the court adopted guidelines to be used for determining whether a defendant is mentally retarded. Hall, 160 S.W.3d at 36. Those guidelines

include a definition that is the same as the one the parties stipulated is applicable to the instant action. Supra at 9.

The state court likened Hall's mental retardation claim to an affirmative defense upon which the burden of proof is always upon the defendant, both at the trial stage and habeas stage. Id. at 38-39. To sustain his claim of mental retardation, Hall was required to prove mental retardation by a preponderance of the evidence. Id.

As the state court noted, it already had reached a conclusion adverse to Hall's claim in Hall's state habeas proceeding in which the mental retardation claim was directly presented in the context of Atkins. Id. at 39. However, the state court re-reviewed the evidence. Id. After having done so, the court's conclusion did not change. Id. Finally, the state court deferred to the adjudication and factual determinations made by the state trial court in Hall's state habeas action. Based thereon, the state court affirmed the state trial court's judgment imposing the sentence of death. Id. at 40.

Thus, the state court's adjudication and determinations of factual issues from which Hall is seeking relief here are those discussed in the immediately preceding subsection of this memorandum opinion.

IV.

Hearing Conducted December 10, 2008

A. General Remarks

Because of a concern that a proper hearing, at which witnesses testified from the stand and were subject to cross-examination before the judge, was not held on the issue of whether Hall was mentally retarded, the Fifth Circuit ordered that such a hearing be held in this federal habeas action. Hall, 534 F.3d at 371-72. When the court fixed the date for the hearing and defined prehearing procedures to be followed, the court ordered that "[w]itness testimony at the hearing will be limited to testimony taken in open court at the hearing," Oct. 6, 2008, Am. Scheduling Order at 2, ¶ 2, and directed that "no witness testimony will be received at the hearing by affidavit, declaration, or deposition," id. at 1.

As the prehearing procedures were being pursued, the court realized, and became concerned, that neither side was taking seriously the court's expectation that all witness testimony would be developed from the witness stand. The court raised this issue with counsel during a telephone conference conducted December 2, 2008. Tr. of Dec. 2, 2008, Conference at 31. Counsel responded that they were satisfied to present most of

their witness evidence by other than live testimony. Id. at 33. At the commencement of the December 10, 2008, hearing, both sides confirmed that they did not expect to cross-examine any witness whose testimony is received through affidavit, letter, or other hearsay-type document so long as they had an opportunity to cross-examine the experts, Dr. Cunningham and Dr. Price. Tr. of Dec. 10, 2008, Hr'g at 15.

To expedite the hearing, the parties agreed at the outset that the testimony given by the hearing witnesses at Hall's trial would be considered as part of the evidence at the hearing. Id. at 19-20.

B. Witnesses Who Testified at the December 10, 2008, Hearing⁹

1. Witnesses Called by Hall

a. Karen Hall (Gray)¹⁰

After having asked a few preliminary questions of Ms. Hall, counsel for Hall said that he did not have further questions, because her entire trial testimony was going to be considered by the court. On cross-examination, respondent's counsel developed

⁹The court has considered all the evidence received at the hearing even though much is omitted from the short summaries in this opinion.

¹⁰By the time she testified at the hearing, Hall's mother had changed her last name from Hall to Gray.

that in October 1991 Hall was living with his mother and Warren Wells, and that Mr. Wells was abusive to both of them. Hall was withdrawn, and she guessed that he was depressed.

b. Cheryl Conner

Ms. Conner's testimony added little significance to the testimony she gave at Hall's criminal trial. Supra at 33-39. But, at the hearing, Hall's counsel apparently expected her to be an expert witness in support of Hall's mental retardation claim, an expectation that was somewhat frustrated by Ms. Conner's evasive response to counsel's first question to Ms. Conner:

Q. Yes, Ms. Conner, I wanted to ask you whether or not you considered Michael Hall mentally retarded.

A. (Pause.) Originally his classification was learning disabled, but when I looked at his records, because I felt like there was more going on, I found that, yes, he did have a classification of mental retarded in the past.

Q. How did he --

THE COURT: I don't think you answered his question. Did you form your own judgment whether he was mentally retarded, or were you simply relying on what other people had classified him in the past?

THE WITNESS: I knew that there was more involvement with Michael than what the records showed, so I did some investigation and found that past test results had shown a substandard score.

Tr. of Dec. 10, 2008, Hr'g at 30-31.

She said that she was qualified to make an assessment of mental retardation, and was qualified to do so when she was working with Hall at school. According to the State of Texas, the IQ feature of a mental retardation diagnosis requires an IQ score of 75 and below. She did not give Hall an IQ test.

Her impression was that Hall was regressing while he was in her classroom, and she did not know whether the regression was the result of depression, a brain lesion, or drugs. Depression can be caused by a bad home life. Falling asleep in class and failing to engage can result from depression.

c. Stephen Dollar

After asking Mr. Dollar preliminary questions, Hall's attorney informed the court that, if the court is going to consider Mr. Dollar's habeas affidavit, Hall had no further questions. The cross-examination by respondent's counsel did not add anything of significance.

d. Paul Conner

After asking preliminary questions of Mr. Conner, Hall's attorney asked Mr. Conner if he stood by his state habeas affidavit. Mr. Conner responded that he did, and that everything in it is true. There was no cross-examination.

e. Dr. Cunningham

Dr. Cunningham's testimony repeated much of the testimony he gave at Hall's criminal trial. He interviewed and tested Hall for over ten hours in 2000. His diagnosis was that Hall had mild mental retardation. Mild mental retardation is an IQ score of between 55 and 70, up to 75 when the standard error of measurement is included; moderate mental retardation is an IQ score of 40 to 54; severe mental retardation is an IQ score of from 25 to 39; and profound mental retardation is an IQ score below 25.

In 1991 Hall scored 71 as his IQ on the WISC-R. The form on which the 1991 test score is recorded has a notation that: "[S]cores from last WISC-R were lower (mentally deficient range[]). However Michael falls in the borderline average range in this testing." Hr'g Ex. 4 at 592. The IQ test Dr. Cunningham administered to Hall in 2000 resulted in a score of 67, with a true range of 64 to 71, bearing in mind "an inherent degree of inaccuracy that's associated with all IQ testing." Tr. of Dec. 10, 2008, Hr'g at 58. He said that there is a ninety-percent likelihood that the range of scores between 64 and 71 contain Hall's true IQ.

He said that Dr. Church reported that her testing of Hall resulted in a score she described variously as 69 and 67. Both of her reported results were erroneous. The test form that she filled out at the time she gave the test "reflects a full scale IQ score of 72." Id. at 59.

The next, and most recent, intelligence test taken by Hall was a WAIS-III taken in 2008, the same kind of test Dr. Cunningham gave Hall in 2000. The 2008 test resulted in a score of 85, which, when the expected margin of error is considered, means that there is a ninety-percent likelihood that the range of 82 to 89 contains Hall's true IQ.

In explaining the basis of his assessment of Hall, Dr. Cunningham said:

I assessed Michael Hall in 2000, and my entire assessment is based on his status at that time. I have not attempted to update my findings with more contemporaneous information beyond the test that was given to him in 2002 and some affidavits that were provided in 2002. But otherwise, I have not attempted to bring this up to date as of today.

Id. at 61.

Dr. Cunningham discussed techniques he used in evaluating Hall's adaptive behavior. He administered a WAIS-III test; he looked at the academic functional literacy test given to Hall in school as well as one given to Hall in 2002 by Dr. Church; and,

he assessed Hall's adaptive behavior by the interviews he did with third persons in the year 2000. The interviews he did, his WAIS-III testing, and his IQ testing all were done by him in 2000. All of his opinions were based on 2000 information, except when he sat on the witness stand he had also reviewed the affidavits of Mr. Coble, Mr. Harris, and Mr. Conner; the intellectual assessment and achievement testing done by Ms. Church in 2002; and his review of summaries of what other witnesses were going to testify to in this case.

The test he used for the measurement of adaptive behavior did not look at what causes adaptive deficits. The IQ score must be relied on to form a judgment as to the cause of the deficits in adaptive behavior. He can reach different scores on adaptive behavior, depending on whose informant's information he is relying on. His informants were consistent in enough areas of adaptive behavior that he did not need to create an average for his diagnosis. Hall's adaptive behavior deficits put him in the mild mental retardation range.

When asked what distinguishes the conduct of somebody who is mildly mentally retarded, say with an IQ score of 70, from a person who has a measured IQ score of 76, he explained:

THE WITNESS: There may be little discernible difference between somebody whose IQ score is only three or four or five points apart from each other. In other words, to sit down and talk to them, to interact with them, I might not identify a significant difference between them.

THE COURT: How would you discern that difference?

THE WITNESS: You would discern it by actually assessing them. In other words, you typically can't tell that somebody is mildly mentally retarded by simply having a conversation with them. They may be able to express themselves. They have reading ability through about sixth grade. They may be able to do many things.

THE COURT: If they were one or two scores above mild mentally retarded, I guess they would have the same characteristics.

THE WITNESS: They would have many of the same characteristics, and so it's sort of an artificial dividing line to say at this point mental retardation begins.

Id. at 67-68.

He discussed what he calls the Flynn Effect, giving the following explanation:

This means that the population as a whole is getting better at the task that these IQ scores test. An IQ score is never like an x-ray. It's never that we took out your brain and weighed it. It's always where do

you score in relation to the group. If the rest of the population is moving, then this test becomes more and more inaccurate in terms of reflecting your actual IQ every year that goes by from the date of standardization. . . .

. . . .

The Flynn Effect is the inflation of IQ scores that needs to be corrected if we're going to properly understand where is Michael actually scoring related to everybody else. The older the test norms are, the more inflation is present.

Id. at 80, 83.

Dr. Cunningham said that when the Flynn Effect is considered, the score on the WISC-R that Hall took in 1991 would be 66 or below. Standardization bias means that "the standardization of WAIS-III was over-represented in individuals who had very low IQs that resulted in the standardization distribution, not as accurately reflecting the actual population as would be appropriate," causing the WAIS-III to overestimate IQ scores by 2.34 points. Id. at 85. He discussed the effect that changes in standardization had on the results of Dr. Church's IQ testing on Hall.

He said that, other than the evaluation of Hall in November 2008, Hall meets the standard for an IQ score below 75, which means that Hall's IQ scores are "in the zone of eligibility for mental retardation"; and, when the standard error of measurement

with the Flynn Effect is considered, "they are all well into the 60s." Id. at 89.

The direct examination of Dr. Cunningham concluded with the answer that "[a]t the time of my evaluation in 2002 and incorporating data available in 2000 and incorporating data through 2002, it is my opinion that [Hall] was at that time a person with mental retardation." Id. at 94.

On cross-examination, Dr. Cunningham testified that he has never been employed by the State in a capital case, but has been employed approximately 135 times by inmates in capital cases.

Dr. Cunningham could not answer "yes" or "no" to the cross-examiner's question asking whether Hall's IQ score of 85 in the November 2008 testing is consistent or inconsistent with his opinion that Hall was mentally retarded at the time he committed his crime. He discussed confidence levels in IQ score results, saying that "the observed confidence interval range for an IQ score of 85, as Dr. Price administered . . . would be from 82 to 89." Id. at 108. He also discussed possible inaccuracies in IQ testing results, posing the hypothetical, "say somebody's true IQ score is actually a 65, and sometimes when you test them they get a 63 and sometimes a 67 and sometimes a 69." Id. at 108. He then explained that when that hypothetical person has a 69 score,

then "[t]he observed range on that 69 would be between 65 and 73." Id. at 109.

Dr. Cunningham gave the following possibilities as to why Hall had an IQ score of 85 in November 2008:

In 2008 we get this 85 that is broadly discrepant from these others. Now, one possibility is that Michael Hall has gotten much smarter in the last eight years since I tested him. That's one possibility. Another possibility is that there are some other factors that are at work that are causing us to get this higher result now than what we saw before. What could those be?

Well, one possibility is that there is a standard error of measurement that's operating that has resulted in this score being a little bit more of an outlier. Another possibility is the Flynn Effect, which is that this score has been inflated in terms of the rest of the group. Another possibility is that there were problems in the administration or scoring of this test that caused it to depart from standardization and that resulted in inflated scores.

There are several different hypotheses that we might look at about how come this score is fundamentally different than the scores that were obtained previously over a 13-year period of time.

Id. at 110-11. He added as a hypothesis as to why Hall's November 2008 IQ score of 85 was so much higher than earlier IQ scores that the earlier testing did not accurately measure Hall's intelligence at the time of the testing.

There is sound scientific research and recommendations for the correction of IQ scores for the Flynn Effect, but it is not

broadly practiced in the educational or professional community "because science takes a while to disseminate its way out into standard and into everyday practice." Id. at 112.

He described things the person administering an IQ test can do to cause the test result to be unreliable. There were significant problems with Dr. Church's expert report concerning Hall. She made errors in administering the WAIS-R, there were discrepancies in her scoring, and the scores she reported in her report and her affidavit were inconsistent with the scores she reported on the protocol of the test that she gave.

If the IQ score of 85 derived from the test Dr. Price performed in November 2008 were to be corrected for any perceived errors and reduced by the Flynn Effect, the range of the score, assuming a 95% confidence interval, would be at its lowest 72.

A person's score on an IQ test can be negatively affected by depression, sleep deprivation, anxiety, behavioral disorders, and attention deficit disorder. The relationship existing between the person performing the test and the subject can affect the score. He discussed why that is so. All of the adverse things happening in Hall's environment might or might not undermine the validity of his IQ test scores, though he considered Hall's IQ scores to be reliable.

2. Witnesses Called by Respondent

a. Stephen Hillman

Mr. Hillman was a commissary manager at the prison unit where Hall was confined. He identified as part of the records of the prison unit Commissary Order Slips used by Hall in 1998 to order items from the prison commissary. Hr'g Ex. 13. The order slips show that the person who completed them was able to specify the quantity desired, write out a description of the items desired, fill in the price of the individual items, and show the amount where more than one item was desired and a total of all of the amounts. Apparently the multiplication and addition on the order slips are correct. The handwriting is legible, and the spelling appears generally to be correct. Mr. Hillman noted that to complete the order slips an inmate needs to use math and be able to read and write. The inmates fill out the order slips themselves. Hall did not have a cell mate who could fill out the slips for him. There would not have been anyone outside Hall's cell who could have filled them out for Hall.

b. Melissa Byley

Ms. Byley was a librarian at the prison unit where Hall has been confined. She identified book request forms completed by Hall requesting books from the prison library. Hr'g Ex. 9. To

comply with the requirements for completing the forms, Hall had to list the authors and titles of the books he was requesting. She identified another exhibit as a record of the library that lists by author and title of book the books Hall ordered from the library. Hr'g Ex. 8. Each time Hall received a book from the library, he was obligated to keep it seven days. If he had not completed it within seven days, he was required to re-check it. Based on her experience, Hall's check-out list was greater than the average death row inmate. Hearing exhibit 10 is a notice that appears on the back of the book request forms that gives the inmates instructions about checking out books. Hearing exhibit 12 is a specimen page of a large book available to the inmates in which books are listed by author and title to assist the inmates in selecting books they wish to request.

c. Robert Woodrow

Reverend Woodrow was a minister for the Hillcrest Church of Christ in Arlington, Texas. He became acquainted with Hall when Hall started attending the church in March or April, 1997. He believed that Hall's stepbrother invited him. Rev. Woodrow did not interact often with Hall before Amy Robinson's murder. After the murder, he visited with Hall at least eleven times in 1998 and at least seven times in 1999. Hall was able appropriately to

respond to questions Rev. Woodrow asked him, and Hall would initiate conversations with Rev. Woodrow. He talked to Hall like he would talk to most any teenager.

He identified hearing exhibit 6 as an exchange of letters between him and Hall after Hall was convicted and sent to prison. Hall's letters show that Hall was capable of expressing himself. In Hall's letters, he requested Volumes I and II of Herbert W. Armstrong's autobiography and a King James Holy Bible of Prophecy in large print, black leather. Hall mentioned in one of his letters that he read a J.K. Rowling Harry Potter book, and half of another. Also, Hall discussed current events in the letters he wrote. At least twice in his letters, Hall mentioned that he was depressed.

His experience with Hall was that Hall had no trouble reading the correspondence he sent to Hall or understanding the conversations they had. One of the reasons he did not think Hall is mentally retarded is because of their conversations.

d. Russell Bartholome

Mr. Bartholome was a high school teacher who in the spring and summer of 1997 was asked to help with a youth group at Hillcrest Church of Christ where he had occasion to interact with Hall. Hall's dress and grooming seemed to be appropriate for his

age. Hall had a girlfriend in the church group briefly during that period of time, and he noticed that they had a hand-holding relationship. The girl was very smart, very capable, artistic, and well-read. Hall used a workbook provided to members of his group the same as other members. The reading level of the workbook was middle school to lower high school. The answers Hall filled in answered the questions that the workbook posed. They often had group discussions that involved posing questions to members of the group. Hall answered appropriately.

e. Linda Haynes

Ms. Haynes was a psychologist at the Irving School District when she evaluated Hall. She identified as an exhibit the report her committee proposed in April 1993 of an evaluation they made of Hall in March 1993. Hr'g Ex. 29 at 288-93. The goal of the evaluation was to determine whether Hall was seriously emotionally disturbed--whether he had emotional issues that were interfering with his ability to learn.

From looking at Hall's IQ scores, she did not have the impression that Hall was mentally retarded. The testing of Hall done for the Irving Independent School District showed on a WISC-R Hall's full-scale IQ score to be 71. Id. at 290. She did not recall that any of the committee members who participated in

the evaluation of Hall in 1993 considered him to be mentally retarded.

f. Ken Trainer

Mr. Trainer, who was Hall's workshop teacher when Hall was in the tenth grade, added little of significance to the testimony he gave when called as a witness by Hall at Hall's trial. As the school year progressed, Hall became more motivated, sometimes voluntarily coming in early in the morning or working late in the afternoon on his projects. Hall preferred not to do things when other students were in the class. They would pick on him, and he did not associate with the others easily.

The project Hall did on his own was a game console--a television monitor with a joystick. Hall came up with the idea for the project and showed Mr. Trainer a picture of what Hall wanted to do, and then the two of them drew the plans for the console. Over a period of time, he gained complete confidence in Hall's ability to use the woodworking tools. It would sometimes take Hall longer to catch on, but then he would catch on and be able to do the things the other students were doing. Hall could do the projects on his own after having been given instructions.

g. Dr. Price

Dr. Price had been involved in 232 capital cases since 1986, and he had testified 24 times in capital cases in the last eleven years, 54% of the time for the prosecution and 46% for the defense.

Dr. Price's opinion was that Hall's measured IQ at this time is 85 and that it was approximately 67 to 72 at the time of Amy Robinson's murder. He corrected what he said to say that his opinion was that Hall's measured IQ at the time of the crime was 67 plus or minus five points.

In his opinion, the evidence indicates that Hall had adaptive behavior deficits related to both his low intelligence and his adjustment problems. He means by "adjustment problems" the problems Hall was having in his life--problems with his family and coping and adjusting problems in school. His behavior deficits were not all the result of low intelligence, but were tied to his family, home, and failing in school, as well as low intelligence. He was unaware of any way to distinguish or separate adaptive function deficits caused by low intelligence from those caused by environmental factors. He did not think that there is any way they can be separated from a scientific standpoint. Because of Hall's prison environment, there is no

way a measurement could be made at this time of his adaptive behavior. In his opinion, the evidence indicated that Hall had problems with adaptive behavior and general adjustment to his environment, both home, school, and work, in the years 1998 through 2000.

He could not say that Dr. Cunningham's WAIS-III IQ score of 67 for Hall in the year 2000 was an accurate reflection of Hall's actual IQ. "There were a lot of things going on in Mr. Hall's life, even at the time of the trial, that could have had an effect on his measured IQ, and that may have lowered it." Tr. of Dec. 10, 2008, Hr'g at 204. If a defendant has knowledge that a low intelligence level will help him in the defense of a case, he can, in effect, rig the outcome of an IQ test in the sense of causing the test to make the defendant to appear less intelligent.

Dr. Price explained a phenomenon he has observed in the testing of persons facing the death penalty.

THE WITNESS: I've been testing inmates, death row inmates, and defendants for 26 years; and I've noticed something that's really interesting. They tend to do that faking, that doing more poorly than they can, much more at trial stage than after they've been in prison on death row for years. It's been a rare case indeed that I've had somebody try to rig the IQ score, as you said, when I've gone to test them on death row. It's been an interesting thing to observe

how consistent that's been, when at trial stage it happens sometimes.

THE COURT: Do you have any scientific explanation for that?

THE WITNESS: Well, I don't know if it's scientific. It's certainly a theory that I have that at trial stage, of course, everything is up in the air. They don't know what's going to happen. They're scared. They're anxious a lot of times or angry. And they just do that. Sometimes they try to fake. They get to death row for a few years, and for a lot of them all they really have is their self-respect. And they would rather, to put it kind of crudely, they would rather be executed than to look like they're dumb or in some way disturbed. They try -- especially on cognitive tests that I've given them. I can only think of one death row inmate that tried to score poorly on purpose on tests that I've given them. And, you know, I've tested hundreds.

Id. at 205-06.

When Dr. Price tested Hall in November 2008 he used three tests to have a quantitative indication of Hall's effort and his level of motivation, which are standard tests that would be conducted when doing a forensic evaluation of IQ. All three tests showed that Hall was putting forth good effort and was motivated to do his best. He conducted two IQ tests, one was the WAIS-III and the other was a RIAS. The RIAS is an accepted test for measuring IQ. Hall's score on that was 85. The gold standard in IQ testing is the WAIS. The RIAS correlates .75 with the WAIS. Hall's test score on the WAIS was 85. The giving of