two IQ tests, as he did, was desirable because it enables the person conducting the test to see if there is consistency in the testing. Research indicates that the RIAS score is a little higher than the WAIS, but not significantly so.

As a result of his evaluation of Hall in 2008, he concluded that Hall's intellectual functioning was low average; and, considering the standard of error, it would be from the borderline to the low average level of intellectual functioning. By "borderline," he meant an area between 70 and 85, which would put Hall at the high end of the borderline range of intelligence.

When asked to explain why Hall's IQ score was higher in 2008 than it had been in 2000, he explained:

> I think that there are two opposing or two separate possible explanations for that. The first one would be, as it was related to Dr. Cunningham's testimony, the first explanation would be that the IQ score that I got on Mr. Hall in 2008 was inflated due to either bias on my part or that Mr. Hall had become more intelligent in the last eight years. That's one set of explanations.
>
> On the other end, the other side of that could be that the IQs that he got in school in '91 and at trial stage were underestimates due to all the external factors going on in his life: the emotional turmoil, the chaotic home, the failure in school, and the resulting problems he had with self-esteem and with motivation and with effort.
>
> So it's one or the other. It's either that it's artificially inflated on the one I gave, or it's an

> underestimate on the IQ scores obtained when he was in school and at trial stage.

Id. at 211.

He said that he does not think his testing of Hall was biased. The test was administered properly, and his opinion is that the test score was not an artificial inflation.

A person's intelligence can improve over time. People are known to progress from being mildly mentally retarded at a certain age and later not meet the criteria of being mildly mentally retarded. That generally results because of an increase in the adaptive behavior skills of the person in question. It is more likely that a person's adaptive behaviors can improve over time rather than a person's IQ score. With respect to test results obtained from testing of Hall's IQ in the 90's and early 2000, Dr. Price said, "I think it's likely that those are not accurate, that they are somewhat of an underestimate because of the external factors, and I don't know about his effort and his motivation on those tests." Id. at 212. There was not any effort or motivation testing done at the time of the earlier tests. He discussed factors that can cause an IQ test score to be unreliably low.

Dr. Price responded to, and explained away, Dr. Cunningham's criticism of the things Dr. Price did in the testing of Hall in 2008. He explained why he did not have an unqualified opinion when he testified at trial that Hall was not mentally retarded. His opinion now is that Hall was not mentally retarded at the time of Hall's trial. He did not believe that the earlier IQ testing of Hall accurately reflected Hall's intelligence.

Dr. Price discussed the Flynn Effect. He disagreed with Dr. Cunningham's testimony concerning the level of reduction in an IQ score that should be made to take into account the Flynn Effect. It is not standard practice in the scientific community to adjust an IQ score for the Flynn Effect; he gave an explanation why that is so. He had never applied the Flynn Effect on any of his cases, either those where he testified for the defendant or those where he testified for the state.

He considered the WAIS-III manual to be a technical report from the publisher of the test that provides technical information about the test and is a reliable source for how to administer the test. He considered the DSM-III-TR to be a reliable source on the diagnosis of mental retardation.

On cross examination, there was a discussion of standardizing tests and steps that the manual suggests should be

taken in administering the tests. Dr. Price had no reason to believe that the WISC test that Nancy Stephens administered in 1991 was not administered and scored correctly. He believed the test that Dr. Cunningham gave in 2000 was properly administered and scored. According to the DSM-IV-TR, a mildly mentally retarded person can achieve academic achievement up to about the sixth grade level.

The 71 score Hall received on the WISC-R test in 1991 put Hall in the borderline range but not in the mentally retarded range. At that time, Hall's parents had recently divorced, his mother was living with an abusive man, and Hall was subject to that abuse and was witnessing the abuse of his mother. At the time Dr. Cunningham administered an IQ test in 2000, Hall was in jail, he recently had committed a capital murder and was on trial for that murder, and he was on suicide watch.

Through questioning on redirect examination, Dr. Price listed the different IQ test scores of Hall that he was aware of, only one of which was below 70. Dr. Price noted that the correct score on the IQ test Dr. Church administered in 2002 was 72.

V.

Analysis

The court has given consideration to the post-hearing briefs of the parties. In Hall's brief there is a sharp departure from the understanding the parties placed on the record at the commencement of the December 10, 2008, hearing that the purpose of the hearing was to provide the court basis to determine whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence. Supra at 9. Hall asserts now that the hearing should be followed by a finding of this court from a preponderance of the evidence whether Hall is mentally retarded. Pet'r Br. at 1, 36. He argues that this court should not give deference to the state court's adjudication on the merits of Hall's mental retardation claim or the state court's determinations of factual issues related to that claim. Id. at 12-14, 36.

Before devoting further attention to Hall's assertion that the state court's adjudication and determinations of factual issues are entitled to no deference, the court assumes, arguendo, that Hall is correct in that regard and that this court must make a finding as to whether Hall has proved by a preponderance of the

evidence that he is mentally retarded. After a thorough review of the record, the court finds that it is unable to find from a preponderance of the evidence[11] that Hall is, or ever has been, mentally retarded.

Put simply, the court has not been persuaded by the evidence that Hall's claim that he is mentally retarded is more likely so than not so, nor has the court been persuaded by the greater weight and degree of credible evidence before the court that Hall is mentally retarded, or that he ever has been.

Of the expert evidence offered by the parties, the court finds that the evidence of Dr. Price is more persuasive than that provided by Hall's expert witnesses. The latter impressed the court as serving more as advocates on behalf of Hall that he should not be executed than as objective witnesses. In contrast, Dr. Price impressed the court as being totally objective in his evaluation of Hall's level of intelligence and behavioral attributes, with the goal of informing the court rather than to serve as an advocate for either side.

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[11]"Preponderance of the evidence" generally is defined as "the greater weight and degree of credible evidence" before the fact-finder and "the amount of evidence that persuades [the fact-finder] that a claim is more likely so than not so." Fifth Circuit Pattern Jury Instructions, Civil § 3.1 (West 2006).

The court finds that the 85 IQ score for Hall on the testing done by Dr. Price in November 2008 is the best measure the court has been provided of Hall's general intellectual functioning. Therefore, the court cannot find that Hall has satisfied the first element of the definition of mental retardation that he have a "significantly subaverage general intellectual functioning [defined as an IQ of about 70 or below]."[12] Supra at 9.

The court has considered all of the test scores about which there is evidence in the record, and the court has concluded that none of them provides persuasive evidence that Hall has had at any relevant time significantly subaverage general intellectual functioning as contemplated by the Texas' Atkins test for mental retardation. The school personnel, who would be most intimately acquainted with Hall's intellectual functioning, expressed in the school records that Hall was learning disabled but not mentally retarded. The evidence indicates that those views were based on Hall's intelligence testing as well as his behavior. The court is not giving significant weight to the comment in one of the school records that sometime before October 1991 Hall scored in the mentally deficient range. That comment, without more, is not

[12]The definition to which the parties stipulated was referred to by the Fifth Circuit as "Texas' Atkins test for mental retardation." Hall v. Quarterman, 534 F.3d 365, 369 (5th Cir. 2008).

helpful to the evaluation of Hall's intelligence level at times pertinent to this action.

Helping to undermine the opinions expressed by Hall's experts that he is mentally retarded is the evidence putting into question the reliability of the results of intelligence testing he received. Because of the margin of error involved in a measured IQ score and the other uncertainties surrounding the reliability of intelligence testing, the court is unwilling to accept any of the reported IQ scores of Hall as satisfying the "significantly subaverage general intellectual functioning" feature of the definition of mental retardation. The court has taken into consideration the evidence that Hall's home and social environments and his emotional state could have artificially lowered some of Hall's IQ scores and that an IQ test administered to Hall while he was awaiting trial facing the death penalty could have resulted, consciously or otherwise, in an unreliably low score.

The record makes clear that Hall's environment could undermine the validity of his IQ test scores, and the court is not persuaded from the evidence that his environment did not so undermine Hall's pre-2008 test scores as to cause them to be unreliable as evidentiary support for his mental retardation

claim. The court is not impressed by Dr. Cunningham's testimony concerning utilization of the Flynn Effect. Also, the court has taken into account the evidence that IQ tests can be made unreliable by the conduct of the person administering the test.

Similarly, the court finds that much of the evidence on which Hall relies in support of the adaptive functioning feature of Texas' Atkins test for mental retardation is of questionable reliability. He relies on information provided by persons who had a natural tendency to help Hall prove that he is mentally retarded--his mother, his brother, the two attorneys who represented him unsuccessfully at his criminal trial, two investigators hired by his attorneys, and a fellow death row inmate. School personnel provided conflicting information about Hall's behavior. Information from prison personnel, Hall's minister, and other witnesses presented by respondent contradicted much of the behavior information on which Hall relies. The court also has considered on the adaptive functioning issue the undesirable home and social environments to which Hall was subjected and his emotional problems, all of which had the potential to adversely affect his adaptive functioning in ways that are unrelated to general intellectual functioning.

The court is not persuaded by the opinions of Hall's experts on the subject of adaptive functioning. Again, the court's perception is that the experts were advocating a case of mental retardation for the benefit of Hall rather than to make objective presentations to the court. The court finds Dr. Price's testimony on the subject of adaptive functioning to be the most persuasive. The other experts selectively used information that would support their adaptive functioning theory, and they seem to have disregarded information available to them that put into question their stated findings.

There is a possibility that Hall has adaptive functioning deficits that are related to low intelligence, but the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to what Dr. Price referred to as adjustment problems.

The court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons. However, the court has not been persuaded by the evidence that Hall's intellectual functioning goes below the dividing line between mental retardation, on the one hand, and less significant forms of learning disability, on

the other, or that limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning.

The court returns now to the contention made by Hall in his post-hearing brief that the state court's adjudication and determinations of factual issues are entitled to no deference.

If, as Hall suggests, the opinion of the Fifth Circuit that remanded this action to this court for a hearing on the subject of mental retardation included a holding that, because the state court did not give Hall the kind of hearing the Fifth Circuit thought he should have been given, this court should not give deference to the state court's adjudication and determinations of factual issues, the opinion of the Fifth Circuit would directly conflict with the 2001 Fifth Circuit decision in Valdez, 274 F.3d at 950-51, 959, that is discussed at supra 8. If that were so, the Fifth Circuit panel deciding Hall would have violated the rule in the Fifth Circuit that one panel may not overrule the decision, right or wrong, of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court. See United States v. Ruff, 984 F.2d 635, 640 (5th Cir. 1993). Under that rule, "where holdings in two . . . opinions are in conflict, the earlier opinion controls and constitutes the

binding precedent in the circuit." Boyd v. Puckett, 905 F.2d, 895, 897 (5th Cir. 1990). The court prefers to assume that the panel did not intend to violate that rule. Consistent with the belief that Judge Higginbotham expressed in his dissenting opinion (supra at 8-9 n.3), the court does not consider that the majority of the panel intended to say that upon remand this court should not give deference to the state court's mental retardation adjudication and the state court's determinations of factual issues related to Hall's mental retardation claim.

The court is satisfied that the parties were correct when they agreed at the commencement of the December 10, 2008, hearing that the issue properly before this court for decision is whether Hall can rebut, and has rebutted, the presumption of correctness of the state court's determinations of factual issues by clear and convincing evidence.

At the outset of the court's deference determinations, the court considers arguments made by Hall in his post-hearing brief based on the provisions of 28 U.S.C. § 2254(d). Hall is now arguing that the state court's adjudication on the merits of his claim of mental retardation resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court,

Pet'r Br. at 12-13, 29-30, or, in the alternative, that the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, id. at 13-14.

Hall's first § 2254(d) contention is premised on Hall's belief that the state court's adjudication against Hall was that "even if Hall is mentally retarded . . . he is nonetheless subject to execution if he is only mildly mentally retarded," and, therefore, the adjudication was an unreasonable application of Atkins. Id. at 29. This contention undoubtedly refers to the alternative ultimate finding of fact made by the state court. Supra at 77. The fallacy in Hall's contention is that it takes issue with the wrong finding.[13] The determination applicable here is the ultimate finding of the state court that Hall "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)." Id. As reflected by language used in Ex parte Briseno, 135 S.W.3d 1, 7-8 (Tex. Crim. App.

[13]Considering that in Atkins the Supreme Court seemed to leave open the possibility that persons with a minor degree of mental retardation can be subject to the death penalty, Atkins, 536 U.S. at 317, the court cannot say that the alternative determination by the state court of the ultimate mental retardation factual issue involves an unreasonable application of clearly established federal law as determined by Atkins. However, the court need not devote further attention to that point because the main determination of the state court clearly does not involve an unreasonable application of Atkins.

2004), the state court based its main determination of the ultimate mental retardation factual issue on what the Fifth Circuit referred to as "Texas' Atkins test for mental retardation." Hall, 534 F.3d at 369.

As to Hall's second § 2254(d) contention, the court persists in its conclusion that the adjudication of the state court on Hall's mental retardation claim was not based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. Hall, 443 F. Supp. 2d at 821. The court concludes that the ultimate determination by the state court that Hall did not establish that he was mentally retarded was a reasonable determination in light of the evidence presented in the state court proceedings. And, the court concludes that all of the state court's determinations of evidentiary factual issues, Clerk's R., St. Habeas, Vol. 6 at 1570-92, in support of its determination of the ultimate issue of mental retardation were reasonable determinations of the facts in light of the evidence presented in the state court proceedings.

In Hall's post-hearing brief, he makes the point that in its opinion remanding the action to this court the Fifth Circuit criticized the state court for making determinations of fact based on erroneous information. As noted earlier in this

memorandum opinion, supra at 77 n.8, the information the Fifth Circuit thought was erroneous turned out not to be erroneous in one instance and not to be outcome determinative in the other.

On the issue that the parties agreed at the commencement of the December 10, 2008, hearing was the deciding issue, the court finds that Hall has not rebutted the presumption of correctness of the determinations of factual issues made by the state court on Hall's mental retardation claim by clear and convincing evidence.[14] While the state court's determination of the ultimate fact issue was not expressly stated as a failure of Hall to carry his burden to prove mental retardation by a preponderance of the evidence, supra at 77, the only reasonable reading of the determination is that the state court found that

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[14]The Fifth Circuit has defined the clear and convincing evidence standard as follows:

> Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 396 (5th Cir. 2004) (quotation marks omitted). The definition in the Fifth Circuit Pattern Jury Instructions, Civil is worded as follows:

> Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

§ 2.14.

Hall failed to carry his burden. By no stretch of the imagination does the evidence before the court constitute clear and convincing evidence that the state court's determination was incorrect. That would be so even if the state court's ultimate determination were to be viewed to be an affirmative finding that Hall is not mentally retarded. Thus, the state court's determinations of factual issues are presumed to be correct; and, 28 U.S.C. § 2254(e)(1), therefore, requires that this court defer to those determinations.

VI.

Other Issues Presented in Hall's Post-Hearing Brief

Hall presents in his post-hearing brief what he refers to as Ring and Penry claims. Pet'r Br. at 30-36. He maintains that the Fifth Circuit "deferred its COA decision" on those claims. Id. at 14. Whether or not that is an accurate statement of what occurred, the fact is that the Fifth Circuit has not granted a certificate of appealability as to either of those claims. Therefore, the court will not undertake a decision as to either of them.

VII.

Conclusion

As explained above:

1. If appropriate for this court to decide the issue, this court finds that Hall has not proved by a preponderance of the evidence that he is, or ever has been, mentally retarded.

2. The court is of the opinion that the court should give deference to the state court's adjudication on the merits of Hall's mental retardation claim as well as to the determinations made by the state court of factual issues related to that adjudication. The state court adjudicated that Hall's mental retardation claim was not supported by the evidence received at Hall's criminal trial and in his state court habeas action. Hall has not shown that the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or that it resulted in a decision that was based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. The determinations made by the state court of factual issues related to Hall's mental retardation claim are presumed to be correct,

and Hall has failed to rebut that presumption of correctness by clear and convincing evidence.

Therefore, Hall's application under 28 U.S.C. § 2254 must be denied.

VIII.

Order

For the reasons given above,

The court ORDERS that Hall's application under 28 U.S.C. § 2254 be, and is hereby, denied.

SIGNED March 9, 2009.

JOHN McBRYDE
United States District Judge