IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re:	)	CAPITAL CASE
	)	Case No. S117235
ROBERT LEWIS, JR.,	)	
	)	Related Automatic Appeal
	)	Case No. S020670
On Habeas Corpus	)	Los Angeles Superior Court
	)	Case No. A0227897

PETITIONER'S SUPPLEMENTAL BRIEF ON THE MERITS

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PETITIONER'S SUPPLEMENTAL BRIEF ON THE MERITS
(Cal. Rule of Ct. 8.520(d))

Petitioner, Robert Lewis, Jr., submits this Supplemental Brief on the Merits in further support of the Petition for Writ of Habeas Corpus pursuant to California Rules of Court 8.520(d)(1) on the grounds that there are new decisions and materials which were not available in time to be included in the Brief on the Merits and Reply Brief filed in 2013.

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INTRODUCTION

First, the United States Supreme Court delivered its opinion in *Hall v. Florida* (2014) 572 U.S. __,134 S.Ct. 1986 . In the present case, Respondent took exception to the Referee considering current medical resources and claimed that he was bound by a "definition" based on authorities cited in a footnote in *Atkins v. Virginia* (2002) 536 U.S. 304, 308 n.3. (Resp. Reply 28-30) Petitioner cited *In re Hawthorne* (2005) 35 Cal.4th 40 and *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999 for the proposition that the definition was clinical and not rigid. (Pet. Reply 15-17) The United States Supreme Court in *Hall* now confirmed that it is proper to consult current medical authorities.

Second, this Court delivered its opinion in *In re Champion* (2014) 58 Cal.4th 965. In the present case, Respondent offered the testimony of Dr. Charles Hinkin that the IQ scores of Petitioner should be adjusted upward based on his race as a proxy for socioeconomic or other factors. (12 RHT 2011; Resp. Brief 81; Reply 27) The Referee rejected the adjustment based on the lack of evidence and on the state of medical opinion on the subject. (Report 19) This Court in *Champion* cited, without comment, the testimony of the same Dr. Hinkin regarding his purported "ethnic correction" to the scores of the "Black" defendant in that case. This Court reserved ruling on

that issue. It appears to be a matter of first impression.[1]

I.
HALL V. FLORIDA CONFIRMS THAT THE DEFINITION OF INTELLECTUAL DISABILITY IS NOT CONFINED TO RIGID CRITERIA OR DEFINITIONS OF PARTICULAR TEXTS FROZEN IN TIME

Respondent took the position that it was error for the Referee to consider the American Association on Intellectual Development and Disability, *Intellectual Disability: Definition, Classification, and Systems of Supports*, (11th Ed. 2010) (hereinafter, AAIDD 11th ed.). (Resp. Brief 96-99; Resp. Reply 28) Petitioner's expert at the hearing, Dr. Khasanov, based her assessment on the clinical definitions in the AAIDD 11th ed. as well as the prior editions. (9 RHT *passim*) The Referee made reference in his Report to the AAIDD 11th ed. as the most current authority on the subject. (Report 6, n.3)

The United States Supreme Court in *Hall v. Florida* (2014) 572 U.S. __,134 S.Ct. 1986 made it clear that the definition of intellectual disability is

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"Ethnic correction" is also a matter of first impression under the federal Constitution. Last term, this same issue was presented to the United States Supreme Court in *Hernandez v. Stephens* (2014) 134 S.Ct. 1760, *cert. den.*, (on petition from the unpublished decision of the Fifth Circuit, *Hernandez v. Stephens* (2013) 537 Fed.Appx. 531). In that case, the Texas court had allowed the Petitioner's IQ scores to be "adjusted" from somewhere in the 50's to a "70" based on "Mexican norms." The United States Supreme Court declined to hear the Petition and Mr. Hernandez was executed in April 2014.

not rigid and that the Court will consult the current medical references. The Court quoted from the 2010 AAIDD 11th ed. as well as the American Psychiatric Association, *Diagnostic and Statistical Manual V* (Fifth Ed., 2013) (hereinafter, DSM-V) and other materials which were written subsequent to the opinion in *Atkins v. Virginia* (2002) 536 U.S. 304.

In *Hall*, the Court, concerned with the first prong of intellectual disability, said, "The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*. . . . [I]t is proper to consider the psychiatric and professional studies . . .." *Hall v. Florida, supra.* at 134 S.Ct. 1993. The Court considered the AAIDD 11th ed., not earlier editions.

Respondent here additionally criticized Dr. Khasanov for making the statement that the DSM-IV-TR was "lagging behind." (Resp. Brief 98) In *Hall*, the Supreme Court embraced the new version, the DSM V, not the IV-TR. As predicted, the DSM V adopted the same description of adaptive behavior as the AAIDD 11th ed. (Pet. Reply 30-34).

Hall, therefore, puts to rest the claim that the Referee was bound by the citation in the *Atkins* footnote to prior editions of the AAIDD (formerly AAMR) or the DSM IV-TR manuals. This is consistent with this Court's statement in *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1012 that

intellectual disability "'is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence.'"

The Referee's use of current medical authorities was proper.

II.
RACE BASED "ETHNIC CORRECTIONS" TO IQ SCORES ARE BOTH UNCONSTITUTIONAL AND UNSUPPORTED BY THE EVIDENCE

Dr. Charles Hinkin, who testified in the present case, also testified in *In re Champion* (2014) 58 Cal.4th 965 in which this Court summarized: ". . .Dr. Hinkin disagreed with Dr. Riley's method of scoring the tests given. He explained that because Blacks ordinarily perform more poorly than Whites on those tests, it is preferable to use ethnically corrected norms when scoring the tests, which Dr. Riley did not do." *Id.* at 988. This Court deferred ruling on the issue since it was not before the Court: "We need not resolve this dispute. We did not ask the referee to decide whether petitioner was neuropsychologically impaired at the time of his capital trial . . ." *Id.* at 989. In light of this deferral, the Court may choose to address the issue here.[2]

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[2] Petitioner, of course, supports the Referee's decision not to add points to Petitioner's IQ score and was content not to regard it as a serious issue

Here, the same Dr. Hinkin testified that "African Americans" generally score 15 points lower than "white individuals" on IQ tests although the gap narrowed in recent years to about a 10 point range. (12 RHT 2011). He said that race is a "proxy" for differences in "educational opportunities, occupational opportunities, the kinds of things that would – that would affect IQ test performance." (12 RHT 2011-2012). Dr. Hinkin said that Petitioner was not from a "mainstream" group (12 RHT 2008-11) and speculated, without doing any testing of his own, that his poor performance might be due to illiteracy rather than mental retardation (12 RHT 2000-2001) even though he admitted that the Wechsler tests did not involve reading. (12 RHT 1992).[3]

First, conceptually, IQ scores are based on a comparison of the individual to the norm which is the average intelligence of the community as a whole.[4] There is no logical, legal or clinical basis to create subgroups

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based on the lack of evidence and the lack of medical authority. However, in light of this Court reserving the issue in *Champion* and in light of the United States Supreme Court declining to consider the issue in *Hernandez*, Petitioner respectfully seeks leave to address the issue more fully.

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Even taking all of these concerns into account, Dr. Hinkin concluded: "I think that the I.Q. Subaverage intellect prong is probably closer to the mental retardation. I don't think that's it, but that one is certainly in the ballpark." (12 RHT 2018)

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"IQ tests are norm based, which means that standard scores are based on the

and compare an individual to such subgroups. The Referee would have been correct in refusing to make such an adjustment on that basis alone.

Second, Dr. Hinkin's use of the race of the Petitioner (as a proxy or otherwise), both in this and the *Champion* case, to classify him for additional points is a violation of the equal protection under the United States Constitution.[5] The only place in Dr. Hinkin's testimony in the present case where he made any attempt to quantify the addition of points was where he said that "African Americans" test 15 (or more recently, 10) points lower than "white people." (12 RHT 2011) In the *Champion* case, his position is summarized: "Blacks ordinarily perform more poorly than

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individual's performance in comparison to that of others of the same age used in the standardization sample. The norms are intended to reflect the population of the larger society which, in the case of the Wechsler and Stanford-Binet tests, is the most recent census of the United States." Stephen Greenspan and J. Gregory Olley, *Variability of IQ Test Scores*, in Edward Polloway (Ed.) The Death Penalty and Intellectual Disability, American Association on Intellectual and Developmental Disabilities, AAIDD, (Washington, D.C., 2015) p.145.

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The issue of racial classification was presented to the United States Supreme Court in the *Hernandez* case in the "Brief of Public Law Scholars as *Amicus Curiae* in Support of Petitioner" (January 2014), filed in *Hernandez v. Stephens*, Case Number 13-8004. Therefore, the issue of "ethnic correction" to IQ scores is a matter of first impression both for this Court and the United States Supreme Court.

Whites." *Champion* at 988. In both cases, he is classifying the Petitioner for special consideration based on Petitioner's race even if he says race is a "proxy."

It is true that the average scores of people of a particular race[6] or other sub-groups may deviate on the average from the norm for a variety of reasons but those reasons are race-neutral.[7] Nevertheless, Petitioner's race as "African American" is being used as some sort of rough approximation to select him over a "white person" with a similar score for execution.

In light of the fact that this Court deferred ruling on Dr. Hinkin's "ethnic correction" testimony in *Champion* and because of Respondent's

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The concept of race, itself, is not scientific and, therefore, problematic. "Race is a socially constructed concept, not a biological one. It derives from people's desire to classify." Sternberg, Robert J; Grigorenko, Elena L; Kidd, Kenneth K, *Intelligence, Race, and Genetics*, 60 American Psychologist 46-59 (2005). Such efforts to classify are arbitrary and subjective not genetic. *American Anthropological Association Statement on 'Race' and Intelligence*, American Anthropological Association (December 1994).

7

Dr. Hinkin concedes that the disparities in test scores are not inexorably linked to race. (12 RHT 2011) Researchers continue to study the race-neutral variables relating to intelligence. See, Richard E. Nisbett, Joshua Aronson, Clancy Blair, William Dickens, James Flynn, Diane F. Halpern and Eric Turkheimer, *Intelligence: New Findings and Theoretical Developments*, 67 American Psychologist 130-160 (2012).

reliance on his testimony regarding race as a "proxy" in the present case,[8] this issue should be addressed for what it is. Put bluntly, if a "white person" and an "African American" stand before the court with the same IQ, *ceteris paribus*, "ethnic correction" means that the government can kill the "African American" but not the "white person."[9]

Classification by race for different treatment under the law for any significant right, let alone a question of life or death, is a violation of the equal protection under the Fifth and Fourteenth Amendment. Respondent's claim here is a tortured twist on "invidious discrimination" based on statistical effect which is traditionally invoked to *protect* the rights of minorities.[10] Where a statistical pattern of racial discrimination is demonstrated, with an appropriate factual showing that it is "invidious," race might be used to correct the injustice.

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And the fact that the United States Supreme Court has yet to consider "ethnic corrections" per denial of *certiorari* in *Hernandez*, *supra*.

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The "blunt" part of this characterization is attributed to Dr. Michael Radelet, University of Colorado, in private conversation following an earlier article published on the subject by the undersigned.

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This is not a "zero sum" game as it is with a finite number of college admissions, for instance, so the rights of White death row inmates are not implicated as in *Baake v. Regents of the University of California* (1978) 438 U.S. 265. "Ethnic correction" here just makes African Americans more susceptible to death.

Even in those cases where the purpose is benign, there must be evidence establishing actual discrimination, not just discriminatory effects. In *Washington v. Davis* (1976) 426 U.S. 229 the United States Supreme Court held that the mere evidence of average lower test scores by members of a race did not entitle persons, by virtue of belonging to that race, to an adjustment of their scores to gain eligibility for a job. Here, where the purpose is far from benign, the use of race to adjust scores for death violates equal protection.

Third, assuming *arguendo* that the basis of the theory to adjust scores is "socioeconomic status" and not on race (contrary to Dr. Hinkin's reliance on race to classify the Petitioners both here and in *Champion*), there is nothing more than speculation to support the opinion. The Referee correctly decided, first, there was a lack of evidence to support an adjustment and, second, an adjustment was not supported by medical science: "It is impossible to know how much, if any, adjustment should be made in petitioner's IQ scores for socioeconomic factors. In light of the AAIDD's recent pronouncement that adjustment of IQ scores for such factors should not be made, the referee declines to make any adjustment to the scores." (Report p. 19)

This Court, in *Sargon v. University of Southern California* (2012) 55

Cal.4th 747, held that scientific opinion cannot be based on mere speculation and must be based on an adequate factual and scientific foundation. As the Referee found, there was only speculation and no factual or scientific basis.

Fourth, recent scientific research has further confirmed that Dr. Hinkin's speculation was, in fact, wrong. He said that, "when you are dealing with an individual who, for whatever reason, they're dissimilar from the mainstream . . . the chances are their IQ test score and their level of intelligence differing increase." (12 RHT 2009) This unsubstantiated claim really has a part "a" and a part "b" -- and he is wrong on both parts. In part "a" of that opinion, Dr. Hinkin refers to "for whatever reason" and then speculates. However, there was "reason" known at the time of the experts' testimony in 2011. Dr. Khasanov, testified that "the combination of biological, psychological, educational, and behavioral factors" including malnutrition, *in utero* alcohol exposure, neuronal pruning and possible exposure to toxins may cause actual neurological deficits in intellectual ability. (9 RHT 1423-1428) Since then, scientific knowledge expanded through recent studies in epigenetics[11] which have identified actual gene

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Min Zhao, Lei Kong, and Hong Qu, *A systems biology approach to identify intelligence quotient score-related genomic regions, and pathways relevant to potential therapeutic treatments*, 4 Scientific Reports 4176 (2014).

expression patterns that result from this type of deprivation.[12]

Part "b" of Dr. Hinkin's opinion is that lower test scores "chances are" reflect a difference between IQ and actual intelligence. That is also based on speculation and is wrong. The evidence before the Referee, confirmed by the more recent research on epigenetics and gene expression, demonstrates that actual intelligence is impaired and that impairment is measured by the IQ tests. It is not mere lack of motivation or some other behavioral shortcoming, it is a neurological impairment.

Ironically, people (regardless of race) who are subjected to these life experiences are just the people who reduce the average for whatever group in which they are included (racial or otherwise). The further irony is that the very people who are, in fact, intellectually impaired by these adverse influences are the ones whom Respondent seeks to make more eligible for execution.

The Referee was correct and it is time for this Court to reject "ethnic corrections" or "race as a proxy" as unconstitutional and adjustments as unfounded by evidence or science.

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Anne Schafer, Alexander Tarakhovsky and Paul Greengard, *Epigenetic Mechanisms of Mental Retardation*, in S.M. Gasser and E. Li (eds.), Progress in Drug Research (2011); Rachael Yehuda (Ed.) *Molecular Biology of Post Traumatic Stress Disorder*, in 30 Disease Markers 61 (2011).

Dated: May 4, 2015

Respectfully Submitted,

SANGER SWYSEN & DUNKLE

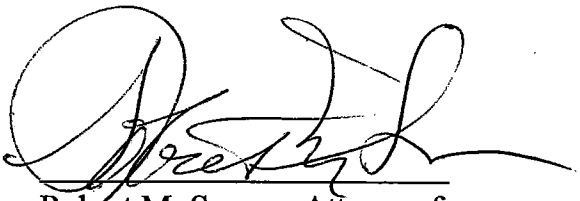
By: _____

Robert M. Sanger, Attorney for Petitioner Robert Lewis, Jr.

CERTIFICATE OF WORD COUNT

I have run the "word count" function in WordPerfect and hereby certify that this brief contains 2790 words, including footnotes.

Dated: May 4, 2015

By: 

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PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On May 4, 2015, I served the foregoing document entitled: **PETITIONER'S SUPPLEMENTAL BRIEF ON THE MERITS** on the interested parties in this action by depositing a true copy thereof as follows:

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_X_ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed this May 4, 2015 at Santa Barbara, California.

Jacob W. Swanson

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