

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1628

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

By indictment filed on April 27, 1988, Defendant was charged with the first degree murder and kidnapping of five year old Julio Rivas. (DAR. 1-2a)¹ The crimes were committed on February 14, 1988. *Id.* The matter proceeded to trial on February 11, 1991. (DAR. 3)

During trial, Harlam Alfara testified that he and Defendant worked together at the Sheraton. (DAT. 357) Mr. Alfara stated that Defendant was responsible for receiving liquor at the hotel and drove him to work on occasion. (DAT. 357-58) Juan Londrian

¹ The symbols "DAR." "DAT." and "DAR-SR." will refer to the record, transcript of proceedings and supplemental record from Defendant's direct appeal, Florida Supreme Court Case No. 77,668. The symbols "PCR1." and "PCR1-SR." will refer to the record on appeal and supplemental record on appeal, in the appeal from the summary denial of Defendant's first post conviction motion, Florida Supreme Court case no. 89,375. The symbols "PCR2." and "PCR2-SR." will refer to the record on appeal and supplemental record on appeal in the appeal from the denial after an evidentiary hearing of Defendant's initial post conviction motion, Florida Supreme Court Case No. SC02-2284. The symbol "PCR2-EX." will refer to the separately paginated portion of the record containing the exhibits admitted at the evidentiary hearing. The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and supplement record on appeal in the appeal from the summary denial of Defendant's successive motion for post conviction relief, Florida Supreme Court Case No. SC05-1610. The symbols "PCR4." and "PCR4-SR." will refer to the record on appeal and supplemental record on appeal in the appeal from the denial after an evidentiary hearing of Defendant's second post conviction motion, Florida Supreme Court Case No. SC10-1038. The symbol "PCR5." will refer to the record in the instant appeal.

testified that he had known Defendant for six years before the crime and that Defendant had worked with him as an assistant carpenter. (Doc 15-App. CC-Vol. 5 at 392-93) He described Defendant as a good and hard worker. (DAT. 393) He knew that Defendant took medication for epilepsy every day. (DAT. 396-97) Pedro Salazar testified that he thought of Defendant as a brother, that Defendant was close to his family and that it was difficult for him to testify because he considered Defendant a brother. (DAT. 416, 436)

Graciela Alfara testified that Defendant ran up a \$300 phone bill calling Colombia. (DAT. 504-05) She stated that before the crime, Defendant had packed his clothes to move out of her house. (DAT. 518) Det. Martinez testified that Defendant provided him with a phone number where he could be reached in Colombia and called Det. Martinez at his number. (DAT. 557, 561) He stated that Defendant picked up a plane ticket at the airport in Colombia and flew back to Miami unaccompanied. (DAT. 564) Det. Martinez testified that he verified Defendant's employment at the Sheraton and the fact that the phone at Ms. Alfara's residence was in Defendant's name. (DAT. 702-03)

Defendant testified that he went to the Bahamas, Panama and Venezuela before moving to the United States by himself in 1980.

(DAT. 766, 767) He obtained several jobs in this country and had his own apartments. (DAT. 767-72) He stated that in his jobs at the Grand Bay and Royal Key Biscayne Hotels, he was responsible for receiving merchandise. (DAT. 770) He also stated that he worked on his own painting houses. (DAT. 771) He stated that he befriended people at the cafeteria where Ms. Alfara worked. (DAT. 773) He stated that he purchased food and clothing for Ms. Alfara's family and that he took the children to school. (DAT. 779-80, 782) He stated that he also helped renovate Ms. Alfara's home and paid others to do so. (DAT. 783) He discussed having purchased and sold cars in response to a need to have a family vehicle. (DAT. 787-88) He described having a phone installed in Ms. Alfara's home and using it to call his family in Colombia to introduce Ms. Alfara. (DAT. 789)

Defendant explained that he took medication for epilepsy and that periodically it was necessary to change the type or dosage of the medications because it became less effective over time. (DAT. 780) He stated that he did not like the medication, that the medication was not purchased for him and that he did not always take the medication because he could not always afford it. (DAT. 780-82)

In his confession, Defendant admitted purchasing groceries, clothes and toys for Ms. Alfara and her family, arranging to

have a phone installed at her house, paying the power and phone bills for her house and working two jobs at hotels. (DAT. 604-05, 641, 644) He recounted the phone number for the house. (DAT. 610, 636) He described how he got money from the Salazars to purchase a plane ticket to Puerto Rico under a false name and how he contacted his family from there to get a plane ticket to Colombia. (DAT. 617-21, 660, 663-64) He provided the title to the Volvo and explained purchasing it. (DAT. 624, 661-62) He also provided the phone number for an FBI agent in the embassy in Colombia. (DAT. 630) Defendant discussed the dosage of his medication, the requirement that it be taken daily and purchasing his medication. (DAT. 623, 640, 666, 669)

After considering the evidence presented, the jury found Defendant guilty as charged on both counts. (DAR. 217-18, DAT. 963) The trial court adjudicated Defendant in accordance with the verdicts. (DAR. 219-20, DAT. 966)

The penalty phase commenced on March 4, 1991. (DAR. 20) After considering the evidence presented, the jury recommended that Defendant be sentenced to death by a vote of 11 to 1. (DAR. 238, DAT. 1056) The trial court followed the jury's recommendation and sentence Defendant to death for the murder and life for the kidnapping. (DAR. 243-54) In aggravation, the trial court found the murder was committed in a cold, calculated

and premeditated manner (CCP), the murder was heinous, atrocious or cruel (HAC) and the murder was committed during the course of a kidnapping. (DAR. 246-51) In mitigation, the trial court found that Defendant had no significant criminal history and showed some remorse. (DAR. 251-52)

Defendant appealed his convictions and sentences to this Court, raising 5 issues. On September 23, 1993, this Court affirmed. *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993). In doing so, the Court outlined the facts as:

[Defendant] met Graciela Alfara at the Cafeteria Blanquita where she worked as a waitress. Over the period of several months, [Defendant] and Graciela became acquainted and sometime around January 15, 1988, [Defendant] moved into a house shared by Graciela, her two teenage daughters, five-year-old son, and nineteen-year-old cousin. [Defendant] paid Graciela \$150 a month rent for a room he shared with her cousin. Shortly after moving into the home, [Defendant] and Graciela became intimate. This relationship, however, soon ended after Graciela accused [Defendant] of touching one of her daughters on the breast. According to Graciela, she told [Defendant] to move out of the house by February 15, 1988. In contrast, [Defendant] indicated that he and Graciela were to be married on February 15, 1988.

On February 13, 1988, [Defendant], returning from work around 4:30 p.m., stopped by the Cafeteria Blanquita to give Graciela a ride home. Graciela, however, had left with another man. [Defendant] drank a beer and then went home to wait for Graciela to return. Close to midnight, Graciela returned home and kissed her companion good night as [Defendant] watched from a peephole in the door. As Graciela entered the house, [Defendant] grabbed her by the arm and started an argument. Graciela told [Defendant] that she did not love him and that he should move out the next day.

After the argument, Graciela went to her room to sleep. [Defendant] stayed in the living room.

That next morning around 7 a.m., Graciela went to wake her cousin, Harlam Alfara, to go to work. She went past [Defendant] without speaking to him. After waking Harlam, Graciela went back to sleep. Harlam began preparing for work while [Defendant] and Julio Rivas, Graciela's five-year-old son, watched television in the living room. As Harlam started to go to the shower, he asked if [Defendant] intended to go to work. [Defendant] answered no and when Harlam returned to the room [Defendant] and Julio were gone. At approximately 7:30 a.m., while Graciela was sleeping in her room, [Defendant] took Julio and left the house.

[Defendant] drove his car to the Cafeteria Blanquita for a cup of coffee. While Julio remained in the car, [Defendant] ordered a cup of coffee from the waitress, Francisca Morgan. Morgan testified that [Defendant] appeared calm and normal. [Defendant] joined his friend Juan Londrian and drank the coffee. Londrian also testified that [Defendant] appeared calm and normal. As they drank their coffee, [Defendant] told Londrian that Graciela was seeing another man, and he stated that he was going to do something that would assure "that bitch is going to remember me for the rest of her life." Londrian understood that [Defendant] was referring to Graciela by that statement.

After he drank the coffee, [Defendant] left the cafeteria and drove around for a couple of hours. At approximately 10:15 a.m., [Defendant] stopped his car at a convenience store in Key Biscayne and called Graciela to speak with her. One of Graciela's daughters answered the phone, but Graciela refused to speak with [Defendant]. [Defendant] then drove to the crest of the Powell Bridge on the Rickenbacker Causeway and stopped, exited his car, and lifted the hood, pretending that the car had broken down. He called to Julio, grabbed the boy by the arms, and threw the child off the bridge into the water seventy feet below. [Defendant] quickly closed the hood and fled the scene. He abandoned his car in a Coral Gables

neighborhood and ran to the home of a friend, Pedro Salazar, and his family.

[Defendant] confessed to Pedro Salazar that he "shook" the child and "squeezed the boy's neck." He also told Pedro that he had thrown the child off a bridge because he wanted revenge against the child's mother. While [Defendant] was speaking with him, Pedro noticed a scratch on [Defendant's] neck. The Salazars loaned [Defendant] some money and drove him to the airport where he bought an airline ticket to Puerto Rico under an assumed name. After arriving in Puerto Rico, [Defendant] contacted his family in Colombia for money. His family wired him some money, and [Defendant] returned to Colombia.

On February 14, 1988, at approximately 3 p.m., a security officer for a high-rise located on Brickell Avenue spotted a child floating in the water. The security officer and a coworker jumped into the water and retrieved the child. Police and fire rescue workers arrived at the scene quickly, but efforts to revive the child were unsuccessful. Police officers at the scene took photographs of the child. Homicide Detective Martinez, who was also present at the scene, took the photographs to Graciela's residence because she had reported a missing child that afternoon. Graciela identified the dead child as her five-year-old son, Julio Rivas. At that time, Graciela also informed the police that [Defendant] could not be found.

On February 15, 1988, Martinez found [Defendant's] car abandoned in Coral Gables near the Salazars' home. Inside the car Martinez found that the dashboard had been pulled apart and damaged. The air conditioning panel was off the dashboard, and the knob of one of the switches was on the floor. The damage was consistent with something coming into contact with the panel. On February 18, 1988, an arrest warrant was issued for [Defendant]; however, the police could not find [Defendant].

On March 16, 1988, Martinez asked Detective Cadavid to contact [Defendant's] family in Medellin, Colombia, because Cadavid was from Medellin and spoke

the local dialect. Cadavid called [Defendant's] mother and identified himself as a homicide detective with the City of Miami Police Department and asked to speak to [Defendant] if he was home. [Defendant] answered the phone and identified himself. Cadavid identified himself again as a detective in the City of Miami Police Department in the United States and stated that he needed to speak to [Defendant] about a problem in Miami. [Defendant] responded that he knew he was in trouble, but that he could not return to the United States because of a lack of documentation and money. Cadavid offered to help with proper documentation through the American Embassy in Bogota, Colombia, and to provide [Defendant] airfare to the United States. Cadavid also told [Defendant] that he would have to stand trial before a judge, but did not mention the possibility that [Defendant] could get the death penalty. [Defendant] gave Cadavid another phone number where he could be reached in the future.

Following his conversation with [Defendant], Cadavid called the American Embassy in Bogota. Cadavid spoke with Federal Bureau of Investigation Agent Rubin Munoz, a liaison officer for law enforcement officers in the United States and the host country, about arranging for [Defendant] to obtain the proper documentation in order to leave Colombia. After speaking with Munoz, Cadavid called [Defendant] back and spoke with [Defendant's] brother. Cadavid again identified himself as a detective from Miami. [Defendant's] brother indicated that [Defendant] would return to the United States as soon as he could obtain proper documentation and a plane ticket. The brother also told Cadavid that [Defendant] suffered from chronic epileptic seizures and had been through psychiatric treatment in Colombia when he was eighteen to twenty years old. Cadavid then gave [Defendant's] brother a phone number for [Defendant] to call Munoz at the American Embassy in Bogota. Thereafter, Cadavid had no contact with [Defendant].

On March 24, 1988, Martinez contacted [Defendant] with the phone number he got from Cadavid. Martinez identified himself to [Defendant] and told him that there was a warrant for his arrest for the homicide of Julio Rivas. Martinez also provided [Defendant] with

Munoz's telephone number at the American Embassy in Bogota and told him that Munoz would assist him in obtaining a visa. Martinez also gave [Defendant] the Miami Police Department's telephone number.

[Defendant] telephoned Munoz in Bogota following his conversation with Martinez. [Defendant] told Munoz that he had spoken to detectives in Miami and that he had some problems in the United States. He indicated to Munoz that he had left Miami because of fear, but that his family had convinced him to return and face prosecution. [Defendant] further told Munoz that he had caused the death of his girlfriend's son. He explained that he had been living with the mother of the child and that he and the woman had planned to get married. [Defendant] stated that he had an argument with the child's mother after seeing her kiss another man, and the mother told [Defendant] that she did not love him. [Defendant] then told Munoz, "As a Latin you would understand the best way to get to a woman is through her children." Thus, [Defendant] stated, he threw the woman's son off the bridge in order to drown the boy.

Munoz told [Defendant] that he would need a Colombian passport before he could procure a visa for his trip to Miami. Munoz advised [Defendant] that he could not assist him in obtaining a Colombian passport and that [Defendant] would have to handle that himself. During the course of the conversation, [Defendant] indicated to Munoz that he could not afford an attorney for the criminal charge. Munoz told [Defendant] that the court would appoint him an attorney and that he would have the same rights and privileges as any United States citizen. Munoz initiated the next two telephone conversations with [Defendant] regarding the progress in obtaining a Colombian passport. Ultimately, Munoz did not assist or obtain a visa for [Defendant]. In fact, Munoz's only contact with [Defendant] was through telephone conversations, and Munoz never met with [Defendant].

Between March 24, 1988, and April 11, 1988, there were several telephone conversations between [Defendant] and Martinez. [Defendant] initiated some of this contact by calling Martinez at the Miami

Police Department. In one of those telephone conversations, [Defendant] told Martinez that he was represented by an immigration attorney in Miami who was in possession of his identification card which was needed in order to obtain his Colombian passport. He asked Martinez to contact the attorney and to obtain the identification card for him. Martinez contacted the immigration attorney, but the attorney did not have possession of the card. During the conversation, the immigration attorney informed Martinez that [Defendant] had said that he was being represented by an attorney named Martinez. Martinez immediately called [Defendant] to ensure that [Defendant] understood that Martinez was a police officer. [Defendant] said that he was not confused and that he understood that Martinez was a police officer.

The remainder of Martinez's telephone calls with [Defendant] involved periodic checks on [Defendant's] progress in obtaining the proper documentation to enter the United States. During one of these telephone conversations, [Defendant] requested confidentiality but only in terms of media coverage. [Defendant] also inquired about the possibility of working in prison. Martinez responded that work was available, but at trial disputed that he promised Arbelaez work in prison. Finally, [Defendant] telephoned and stated that he had the proper documentation for the trip to the United States. Martinez purchased the ticket and arranged for it to be transferred to the airport in Colombia. [Defendant] picked up his ticket at the airport in Colombia and boarded the plane for Miami alone, unaccompanied by any law enforcement agents.

On April 11, 1988, at approximately 1 p.m., [Defendant] arrived in Miami. Martinez identified himself and assisted [Defendant] through customs. Upon exiting customs, Martinez arrested [Defendant] for the homicide of Julio Rivas and read him his *Miranda* rights in Spanish. Martinez ascertained that [Defendant] had a sixth-grade education, understood his rights, was coherent and did not appear under the influence of narcotics or alcohol, and that he had not been threatened or promised anything for his return to the United States. Martinez asked [Defendant] if he had taken his medication for epilepsy that day and

whether he felt any disorientation. [Defendant] indicated that he had taken the medication, but was not disoriented. [Defendant] also indicated that he wanted to make a statement and that he did not want an attorney present.

Martinez placed [Defendant] into the vehicle. During the car ride out of the airport, [Defendant] admitted to throwing the child off the bridge. Martinez asked [Defendant] to show him the exact location and [Defendant] agreed. Due to the timing of [Defendant's] arrival, he and Martinez stopped and got lunch at a local fastfood restaurant. After lunch, [Defendant] directed Martinez to the Rickenbacker Causeway, told him to make a U-turn on the high bridge and count four posts and then stop. [Defendant] stated that on the day of the murder he had stopped there, raised the hood in order to pretend that he was stranded, and then threw the child off the bridge. Martinez then drove [Defendant] to the police station.

At the police station, [Defendant] initialed a written *Miranda* warning form in Spanish that Martinez read to him before questioning him. [Defendant] indicated that he wanted to make a statement and that he did not need an attorney. Following the pre-interview, [Defendant] made an audio-taped sworn statement in which he acknowledged his *Miranda* rights. The audio-taped sworn statement was similar to his statements to Martinez in the pre-interview. After giving the audio-taped statement, Martinez asked [Defendant] if he would consent to giving a videotaped statement. [Defendant] consented and immediately recorded a videotaped statement in which he again acknowledged his *Miranda* rights and waived them. In both statements, [Defendant] indicated that he killed the child as a plan of revenge against Graciela. [Defendant] was then jailed.

Id. at 170-73 (footnote omitted). Defendant then sought certiorari review in the United States Supreme Court, which was denied on May 24, 1994. *Arbelaez v. Florida*, 511 U.S. 1115 (1994).

On August 15, 1995, Defendant filed his initial motion for post conviction relief. (PCR1-SR. 28-143) On July 31, 1996, Defendant filed an amended motion for post conviction relief, raising 23 claims, including a claim that counsel had been ineffective at the penalty phase. (PCR1. 12-109, 111-24) According to Defendant, evidence that he suffered from epilepsy, brain damage, retardation and other mental disorders could have been presented had counsel been effective. (PCR1. 47-73) On October 18, 1996, the post conviction court entered an order summarily denying this motion. (PCR1. 346-79) It found that the claim of ineffective assistance for failing to present additional evidence concerning his mental state in mitigation were insufficiently plead and refuted by the record. (PCR1. 358-63)

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising 13 issues, including an issue claiming error in the summary denial of the claim of ineffective assistance at the penalty phase. On July 13, 2000, this Court affirmed the denial of the motion for post conviction relief with regard to all of the claims except the claim that counsel had been ineffective for failing to investigate and present mitigation. *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000). With regard to the ineffective assistance

claim regarding mitigation, it determined that an evidentiary hearing was necessary to resolve this claim. *Id.* at 912-13, 920.

On remand, the matter proceeded to the evidentiary hearing on January 7, 2002. (PCR2. 419-66) During the evidentiary hearing, Dr. Merry Haber, a clinical psychologist, testified that she was appointed to assist the defense at the request of Defendant's original attorney in May 1988. (PCR2. 553-56) While she had no independent recollection of her work in this matter, her records indicated that she interviewed Defendant on three occasions and reviewed background materials, including medical records. (PCR2. 558-65) In preparation for the evidentiary hearing, Dr. Haber reviewed Dr. Latterner's report of her 1995 evaluation of Defendant; Dr. Latterner's deposition; an affidavit from one of Defendant's teachers; an affidavit from Defendant's employer at Tony Roma's; a letter from E.B. Ramirez, a Colombian psychiatrist; a letter from Defendant's mother; a letter from Luis A.A. Toban, a social service provider from Colombia; Defendant's sixth grade records; Dr. Castiello's report; some of Defendant's prison records, the deposition of Lisa Wiley; raw data from tests performed by Dr. Sonia Ruiz; Dr. Ruiz's report; Dr. Ruiz's deposition; this Court's opinion and Defendant's trial testimony. (PCR2. 570-77) She stated that

information strengthened her belief that Defendant had problems with depression and that a neuropsychological evaluation should have been conducted. (PCR2. 589) However, she was unable to say what effect the information would have had on her opinion of Defendant at the time of trial because Defendant's condition had worsened while he was on death row. (PCR2. 590, 602-05)

On cross, Dr. Haber admitted that her file indicated that Defendant was cooperative, coherent, maintained good eye contact, had a good memory, had productive thought processes, was not hyperverbal and exhibited no loosening of associations. (PCR2. 627-29) It also showed that Defendant did not display ideas of reference, homicidal, suicidal or paranoid ideations, delusions or hallucinations of any type. (PCR2. 630-32) Defendant reported no problems with his sleep or appetite. (PCR2. 632-33) She saw nothing in her evaluation of Defendant at the time that indicated that IQ testing or any other testing was needed. (PCR2. 633-34) She acknowledged that Defendant had told her that Julio Rivas had died accidentally when Julio jumped from the bridge. (PCR2. 636) She eventually admitted that she had reviewed Defendant's confession regarding the planning and execution of the murder. (PCR2. 636-37, 644, 650)

After reviewing the tape again in court, Dr. Haber admitted that there was no basis to test Defendant's intelligence and

that she did not believe that the statutory mental health mitigators applied. (PCR2. 652-53, 655-56) In fact, she found nothing noteworthy in her evaluation and no evidence of psychosis and believed Defendant's adaptive functioning was adequate and his memory was very good. (PCR2. 656, 658, 659-63)

On redirect, Dr. Haber acknowledged that she did not see any signs of a depressive disorder when she evaluated Defendant. (PCR2. 671) She believed that the IQ score obtained by Dr. Latterner was probably lower than Defendant's real intelligence level because he had been under stress on death row for a period of time before the test was administered. (PCR2. 680-81) While she now recommends neuropsychological testing in every death case, she did not do so at the time of Defendant's trial. (PCR2. 682)

Ruth Latterner, a retired neuropsychologist, testified that she evaluated Defendant on August 11, 1995. (PCR2. 688-92) The evaluation consisted of a clinical interview and the administration of a battery of tests. (PCR2. 693-94) She intentionally chose not to review background and other materials. (PCR2. 745)

During the interview, Defendant claimed to have problems with his memory and to have experienced auditory, visual and olfactory hallucinations that he could not describe. (PCR2.

696) Dr. Latterner observed that Defendant was hyperreligious and verbose and that he was loose and tangential verbally. (PCR2. 697)

Dr. Latterner stated that she administered the WAIS IQ test and obtained a verbal IQ of 66, a performance IQ of 71 and a full scale IQ of 68. (PCR2. 700-02) She averred that this score placed Defendant at the level of educable mental retardation, which allegedly meant that Defendant would be able to live independently if trained and hold a job that did not require great cognitive skills. (PCR2. 702-03) On other tests she administered, Defendant exhibited impairments in concentration and attention, language skills, academic achievement and abstract reasoning and produced primitive drawings. (PCR2. 706-39)

Based on her evaluation, Dr. Latterner opined that Defendant was mentally retarded and had organic brain syndrome, mixed. (PCR2. 700) She insisted that Defendant's memory and learning ability were impaired. (PCR2. 705, 740) She averred that the mixed nature of the brain damage affected both Defendant's intellectual and emotional functioning. (PCR2. 739) She based her opinion that Defendant had both brain damage and retardation on the fact that Defendant's performance on other tests she gave was lower than would be expected for someone with

Defendant's IQ score. (PCR2. 741-42) She described Defendant's epilepsy as a symptom of his brain damage. (PCR2. 744)

On cross, Dr. Latterner stated that she had been alone with Defendant during her evaluation and that her notes and raw data had been lost. (PCR2. 747-48) She did not consider anything but her testing and interaction with Defendant and would not permit the review of materials to influence her opinion. (PCR2. 757, 759) Moreover, she ignored the information Defendant provided her because she assumed he was incredible and believed the structure on death row improved Defendant's testing performance. (PCR2. 763-65) She did not consider Defendant's adaptive functioning because she found the issue irrelevant. (PCR2. 757, 762-63) The drawings purported to have been done by Defendant in connection with a pen pal website were not primitive, but Dr. Latterner insisted they were not indicative of his abilities. (PCR2. 773-81, 791) She acknowledged that the validity of her conclusions was limited to how Defendant performed at the time she tested him and that she did not believe Defendant was capable of malingering. (PCR2. 781-82, 786)

On questioning by the court, Dr. Latterner insisted that IQ scores were not influenced by the level of education a person received when the scores were low and that a lack of stimulation

would not have affected Defendant's performance on her tests. (PCR2. 792, 794-95) She admitted that epileptic seizures increase the amount of brain damage. (PCR2. 801)

Lisa Wiley, a psychological specialist with the Department of Corrections, testified that she was responsible for delivering mental health services to death row inmates. (PCR2. 836-37) As part of her responsibilities, Ms. Wiley made weekly rounds of death row and also performed evaluations of the inmates every 90 days. (PCR2. 839-40) She was part of the mental health treatment team and made referrals to psychologists and psychiatrist when necessary. (PCR2. 846) She had previously worked at a center for the retarded providing care. (PCR2. 838-39) If she observed anything that suggested an inmate was retarded, she was required to make such a referral. (PCR2. 847) She may also conduct IQ testing. (PCR2. 848)

Ms. Wiley knew Defendant and saw her nine times a year on average before he began to refuse her services in April 2001. (PCR2. 837, 859-60) While she had never conducted IQ testing of him, she had been involved in his treatment for a decade and had referred him to both a psychologist and psychiatrist. (PCR2. 851-55) However, neither Ms. Wiley nor any other member of the treatment team had ever raised a concern that Defendant might be retarded. (PCR2. 855-57)

Ms. Wiley spoke to Defendant in English. (PCR2. 860-61) While they experienced a moderate language barrier years earlier, Defendant's English had improved, and he and Ms. Wiley were better able to communicate now but he had never been unable to communicate his thoughts. (PCR2. 861-62) Defendant did exhibit more difficulty communicating when he was anxious. (PCR2. 864)

When Defendant first arrived on death row, he was not receiving mental health treatment. (PCR2. 870) However, he began to receive treatment for depression, anxiety and epilepsy within months of his arrival. (PCR2. 870, 872) Defendant was frequently not compliant with his treatment for epilepsy based on complaints about the type of medications, its timing, its delivery, the number of pills and their side effects. (PCR2. 873-74) Ms. Wiley did not believe that Defendant had related well to the staff and noted that he complained frequently about almost everything. (PCR2. 874-75)

Ms. Wiley was familiar with the concept of adaptive functioning, evaluated inmates' level of adaptive functioning as part of her work and found Defendant's adaptive functioning to be adequate. (PCR2. 877, 896) She averred that the fact that Defendant had been able to learn English as an adult was

indicative of a level of intelligence above retardation. (PCR2. 895) She opined that Defendant was not retarded. (PCR2. 949)

On cross, Ms. Wiley stated that Defendant had been diagnosed with both a depressive disorder and a psychotic disorder while in prison. (PCR2. 909) While Defendant had been placed on suicide watch on occasion, he had not attempted suicide while incarcerated. (PCR2. 910) Defendant had reported hallucinations and flashbacks over the years, and Ms. Wiley had once observed him appearing to respond to internal stimuli. (PCR2. 912-28)

Dr. Sonia Ruiz, a psychologist, testified that she evaluated Defendant on November 5, 2001. (PCR2. 1004-15) Her evaluation consisted of a review of records concerning Defendant, an interview with him and the administration of psychological tests. (PCR2. 1017-18)

During the interview, Defendant was very verbal and provided information regarding his travels, his family, his education, his employment history, his health and his incarceration. (PCR2. 1022-30) He claimed to have experienced auditory hallucinations but could only vaguely describe them, which was not typical of real hallucinations. (PCR2. 1032-33) He displayed a very good memory and was responsive and coherent during the interview but his credibility was questionable.

(PCR2. 1024-26, 1033) His affect was not flat, but his thinking was somewhat concrete. (PCR2. 1035, 1040)

The tests she administered were the Ravens Progressive Matrices, the Bender Visual Motor Gestalt test and the Minnesota Multiphasic Personality Inventory-II (MMPI-II). (PCR2. 1042) Dr. Ruiz described the Ravens as a test of nonverbal intelligence and stated that Defendant completed it very quickly. (PCR2. 1044-47) The results showed an IQ in the borderline range, no signs of brain damage or retardation and malingering. (PCR2. 1047, 1049-51, 1056-59)

The records Dr. Ruiz reviewed included Dr. Latterner's report, Dr. Castiello's report, this Court's opinion from Defendant's first post conviction appeal and Defendant's confession. (PCR2. 1017-18) She also reviewed Defendant's medical records from the jail. (PCR2. 1071)

Based upon this information, Dr. Ruiz opined that Defendant was very clear, lucid and stable with no major mental disorder or retardation. (PCR2. 1016) She noted that to be considered retarded, a person needed to have a low IQ score and deficits in adaptive functioning, as well as evidence that the condition onset before age 18, and averred that Defendant's adaptive functioning was quite high. (PCR2. 1063-66)

On cross, Dr. Ruiz admitted that she could not say what Defendant's mental state would have been years earlier but noted that incarcerated individuals frequently develop depression and symptoms of major mental disorder because living on death row is stressful. (PCR2. 1102, 1104-06) Defendant's test results were not consistent with an inability to read. (PCR2. 1133-37) Adaptive functioning was just as important as a low IQ score in diagnosing retardation, and even individuals in the mild, or educable, range of retardation required support to function independently. (PCR2. 1138-39)

After considering the evidence presented and the arguments of counsel, the post conviction court denied the claim of ineffective assistance of counsel at the penalty phase, finding Defendant had established neither deficiency nor prejudice. (PCR2-SR. 14-41) In doing so, it determined that Defendant had failed to prove that he was retarded. *Id.*

Defendant again appealed the denial of post conviction relief to this Court, raising 5 issues, including one concerning the denial of the claim of ineffective assistance of counsel at the penalty phase. He also filed a petition for writ of habeas corpus, raising five claims of ineffective assistance of appellate counsel. On January 25, 2005, this Court affirmed the denial of post conviction relief and denied the state habeas

petition. *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005). With regard to the claim of ineffective assistance of counsel at the penalty phase, this Court held that Defendant had failed to establish either deficiency or prejudice regarding the presentation of evidence of epilepsy, that he did not establish prejudice regarding presentation of other mental health issues and that he did not establish deficiency regarding presentation of evidence concerning his childhood. *Id.* at 32-41. In doing so, it specifically affirmed the finding that Defendant was not retarded. *Id.* at 35-36.

While the appeal from the denial of the first motion for post conviction relief was pending, Defendant filed a second motion for post conviction relief, asserting that he was retarded and exempt from the death penalty. (PCR3. 5-24) The trial court summarily denied this motion. (PCR3. 58-64) Defendant appealed this decision to this Court, which reversed and remanded for an evidentiary hearing on the claim. *Arbelaez v. State*, 950 So. 2d 413 (Fla. 2006).

The evidentiary hearing commenced on June 23, 2009. Ricardo Weinstein, a psychologist, testified that retardation was a developmental disability characterized by subaverage intelligence and concurrent deficits in adaptive behavior, which manifested before the age of 18. (PCT4. 141-47) He defined

intelligence as the ability to reason abstractly and learn. (PCT4. 159) He averred that it was "virtually impossible" for people to notice that someone is retarded, even if they are trained in retardation, and that retarded adults are indistinguishable from normal adults. (PCT4. 149-50) He stated that to diagnose retardation, it was necessary to administer an IQ test and assess adaptive functioning through the administration of adaptive functioning tests and review of records. (PCT4. 153)

In this case, Dr. Weinstein was hired by Defendant and conducted his evaluation by interviewing Defendant, his family members and friends, reviewing documents and conducting testing. (PCT4. 155-56) In doing the evaluation, Dr. Weinstein spent two eight to ten hour days with Defendant in March 2007. (PCT4. 156)

During his time with Defendant, Dr. Weinstein administered the Spanish version of the WAIS-III normed in Mexico, the Bateria Woodcock-Munoz III and the Comprehensive Test of Non-Verbal Intelligence (CTONI) to measure Defendant's intelligence. (PCT4. 157, 164) Defendant obtained a verbal IQ of 66, a performance IQ of 69 and a full scale IQ of 65 on the WAIS-III. (PCT4. 171) Dr. Weinstein averred that Defendant received a full scale IQ of 59 on the Woodcock-Munoz and an IQ of 52 on the

CTONI. (PCT4. 172-73) He opined that the difference in score on the WAIS and Woodcock was accounted for by the Flynn effect and standard error of measure. (PCT4. 171-73)

Dr. Weinstein stated that IQ tests are developed by constructing questions and tasks that people are expected to perform and then a score system is developed through norming, giving the tests to a representative sample of the population to whom the test is designed to be administered and scaling the obtained scores so that fifty percent of the population will be above and below the mean score of 100. (PCT4. 160-64) He stated that norming process allowed the same test to be administered to the population even though the expected performance on the test would vary by factors such as age. (PCT4. 167-68)

Despite using the WAIS normed in Mexico, Dr. Weinstein scored the test using the scoring system for the American version of the WAIS because he believed that Defendant had to be measured against the population of the United States. (PCT4. 160, 165) He also believed that the standard error of measure for the Mexican norms was too great. (PCT4. 168-70)

Dr. Weinstein stated that he used the Test of Memory Malingering (TOMM), Rey 15 Item test and Computerized Assessment of Response to Bias (CARB) to determine if Defendant was put for

effort in the other tests he gave. (PCT4. 173) He opined that the results of these tests showed that Defendant was put forth good effort. (PCT4. 173-74) He admitted that these tests had never been validated for use with the retarded but stated that he used them anyway because conducting formal malingering testing was good practice. (PCT. 174) He stated that he did not consider administering the MMPI because it is not a test of effort and because mentally retarded people have problems with attention, concentration, memory and academic skills that prevent them from doing the test. (PCT4. 174-75) He also did not consider administering the Validity Indicator Profile (VIP) because there is a high rate of false positive results with retarded people according to the manual. (PCT4. 175-76)

Dr. Weinstein stated that the results of the mini mental status examination, the Rey Complex Figure Drawing, the Facial Recognition test, Trail Making, Maze and Judgment tests indicated that Defendant had damage to the frontal lobes of his brain, which he opined was consistent with retardation. (PCT4. 177) He stated that the Woodcock-Munoz also tested Defendant's academic achievement and that Defendant scored at almost the first grade level in oral language, the third grade level in reading, the second grade level in math and the second grade

level in writing, results which he again found consistent with retardation. (PCT4. 177-78)

Dr. Weinstein stated that he did not attempt to assess Defendant's adaptive functioning during his meeting with Defendant because retarded individuals are not reliable reporters of their abilities and try to hide their disabilities. (PCT4. 178-79) He stated that he believed that adaptive functioning in *Atkins* cases should be evaluated by speaking to individuals who knew the person well and have knowledge of his functioning in the community, such as family members, teachers and employers. (PCT4. 179-80) In this case, Dr. Weinstein spoke to Defendant's mother, three sister, three brothers, a brother-in-law, a school teacher, priests and friends in Columbia. (PCT4. 180-81) These individuals told Dr. Weinstein that Defendant was different, shy, withdrawn, could not control his temper, was slow to learn academically and about his personal care and could not participate in organized sports because he could not learn the rules. (PCT4. 181) He stated that they also claimed that Defendant was not able to manage money when he worked with his brothers selling refreshments at a stadium. (PCT4. 181) He also averred that Defendant always worked in limited capacities. (PCT4. 181)

Dr. Weinstein also administered the Adaptive Behavior Assessment Scales (ABAS) to Defendant's mother and teacher and obtained scores that were more than two standard deviations below the mean. (PCT4. 182) He stated that he used a Spanish translation of the ABAS, which was appropriate for outside the United States even though it asked about skills that were not culturally appropriate in Columbia. (PCT4. 182-83) He did not consider this an obstacle to using the test because he was administering the tests retroactively and results of such retroactive testing are always suspect. (PCT4. 183)

Dr. Weinstein stated that he also interviewed one of Defendant's employers, the mother of a family with whom Defendant had lived and several other friends in Florida. (PCT4. 184) He claimed the employer stated that Defendant was a good and very responsible worker but had difficulty comprehending the concept of withholding taxes, had limited job responsibilities and had to be instructed several times to learn job tasks. (PCT4. 184-85)

Dr. Weinstein stated that he reviewed a number of documents during his evaluation. (PCT4. 187-88) He stated that he believed that school and medical records were particularly helpful to him but stated that he relied on all the records he reviewed. (PCT4. 189) He claimed that the school records

showed that Defendant did not do well in school and did not pass grades, although he did not recall if Defendant had been held back once or more than once. (PCT4. 190)

Dr. Weinstein stated that he believed Defendant had concurrent deficits in adaptive functioning based on the interviews he conducted, the materials he reviewed and the ABAS tests he administered to Defendant's mother and teacher. (PCT4. 191) He stated that he decided not to speak to prison officials about Defendant because they did not know how Defendant functioned in the "real world." (PCT4. 191-92) He identified the areas of deficits as limited academic skills, limited employment skills and limited social skills because Defendant was allegedly gullible and naïve. (PCT4. 213-14) He also stated that Defendant had a history of not taking his epilepsy medication and that while Defendant was now able to attend to his personal hygiene appropriately, he did not do so until his late teens without being reminded. (PCT4. 214-15)

Dr. Weinstein stated that if he were to evaluate Defendant's adaptive behavior as of the time that he measured Defendant's adult intelligence, he would still find that Defendant had deficits in adaptive behavior. (PCT4. 193-94) He would base such an opinion on the fact that Defendant did poorly on the academic achievement test he administered to Defendant

and on Defendant's "physical problems, mental problems." (PCT4. 194-95) However, he acknowledged that Defendant had been able to learn enough English to be able to communicate his needs to prison staff. (PCT4. 195)

Dr. Weinstein stated that to determine whether Defendant met the third element of retardation he spoke to Defendant's mother and people who knew Defendant during his developmental years. (PCT4. 195) He stated that the deficits he identified were present during that timeframe. Id.

Dr. Weinstein stated that he had reviewed the report and raw data from Dr. Suarez and a videotape of Dr. Suarez's evaluation. (PCT4. 200, 202) He believed that IQ score Dr. Suarez obtained was consistent with his scores. (PCT4. 201) However, he disagreed with Dr. Suarez's opinion that Defendant malingered because he believed that Dr. Suarez had improperly administered one test and used two inappropriate tests. (PCT4. 204-09) He also disagreed with Dr. Suarez's administration of the ABAS to prison guards to determine concurrent adaptive functioning. (PCT4. 209-11)

The following morning, Defendant complained that he had not been given the medication for his epilepsy properly while in the jail and had not received any medication that morning. (PCT4. 222-23) Defendant claimed not to be feeling well and to believe

that he might have a seizure because he was having difficulty speaking and frequently has seizures after having difficulty speaking. (PCT4. 228) When the nurse arrived to give Defendant his medicine, Defendant complained that he was not receiving the same medication in the same dosage in the jail that he had been receiving in the prison. (PCT4. 240) The nurse explained that Defendant was receiving the medication that the doctor at the jail had ordered. (PCT4. 241-42)

On cross, Dr. Weinstein admitted that none of the documents that he reviewed showed that Defendant had ever previously been found to be retarded. (PCT4. 232) He admitted that he knew that Florida's definition of retardation looked at Defendant's present mental status. (PCT4. 233)

Dr. Weinstein admitted that his undergraduate degree was in business and that the school from which he earned his PhD did not have classes and did not give grades. (PCT4. 234-36) He admitted that he was not board certified in neuropsychology. (PCT4. 237) He no longer maintained a practice and had started to wind his practice down after the *Atkins* decision. (PCT4. 238)

Dr. Weinstein acknowledged that he had not reviewed any of the police reports regarding this case, Defendant's confession or the videotape of the confession. (PCT4. 249-51) However, he

did review a document Defendant's counsel prepared called life history. (PCT4. 251-52) He admitted that he spent two hours interviewing Defendant but did not include any information about the interview in his report. (PCT4. 253-55)

Dr. Weinstein admitted that he did not formally evaluate Defendant's concurrent adaptive functioning. (PCT4. 262) He asserted that he did consider it informally based on Defendant's performance on the academic achievement test he gave. (PCT4. 262063) However, he admitted that adaptive functioning was not concerned with how well an individual performed on a test but with how well a person was functioning in the world. (PCT4. 263) He initially stated that he did not interview prison personnel because they would not know anything about Defendant's adaptive functioning but admitted that the people who saw Defendant all day, every day would have information about Defendant's current functioning. (PCT4. 264-66) However, he claimed that such information would not be useful in finding deficits. (PCT4. 265-66)

When asked to describe the supports provided to Defendant so that he could function in prison, Dr. Weinstein stated that the fact that the prison provided his medication and reminded Defendant to take it was a support. (PCT4. 268-69) He admitted that the record shows that Defendant was not always willing to

take his medication even while incarcerated. (PCT4. 268-69) However, he described this behavior as a tantrum, stated that it showed that Defendant was incapable of caring for himself properly and acknowledged that the behavior was manipulative. (PCT4. 269-71)

Dr. Weinstein insisted that Defendant's memory was impaired and used the alleged impairment as a basis for ignoring Defendant's statements. (PCT4. 272-73) When asked if reviewing evidence regarding the crime that showed Defendant's memory was not impaired would affect his opinion, Dr. Weinstein stated that he would ignore that information as well. (PCT4. 275-76)

Dr. Weinstein admitted that it was possible that Defendant might have been aware of the consequence of being found retarded when he evaluated Defendant. (PCT4. 277) However, he did not believe that it "was the main thing in his mind" during the evaluation. (PCT4. 277-78)

Dr. Weinstein stated that he did not believe that the MMPI was appropriate during a retardation evaluation because it measured personality and not intelligence and because a retarded person would not have the reading comprehension or attention skills to take the test. (PCT4. 279-81) He stated that he did not assume Defendant was retarded before he did his evaluation but admitted that he tailored his testing because there had to

be a real belief that Defendant was retarded for the evaluation to have been requested. (PCT4. 281-82) He admitted that Dr. Ralph Reitan was a leading expert in the field of neuropsychology, but when confronted with the fact that Dr. Reitan recommended using the MMPI in all neuropsychological evaluations, claimed that Dr. Reitan had never written about retardation and that neuropsychology and retardation were not related. (PCT4. 283-84)

Dr. Weinstein stated that the teacher he spoke to taught Defendant when he was approximately 14 and in the sixth grade and that he spoke to her concerning what Defendant was like approximately 37 years earlier. (PCT4. 290-91) He acknowledged that this was true of all of the individuals he spoke with in Columbia. (PCT4. 295) He acknowledged that these individuals had no information about Defendant's present functioning and that he gave the ABAS to Defendant's mother and teacher based on Defendant's actions decades earlier. (PCT4. 295) He stated that he used a Spanish translation of the ABAS, which was not adapted to the cultural differences between the United States and Columbia, which resulted in some of the questions being inapplicable. (PCT4. 295-96)

Dr. Weinstein believed that the people he spoke to knew Defendant was on death row. (PCT4. 298) However, he claimed not

to know if they realized that giving answers showing mental illness would benefit Defendant. (PCT4. 298)

Dr. Weinstein stated that he would not consider an adolescent boy normal if he was sloppy regarding his hygiene. (PCT4. 292) However, he agreed that many adolescent boys are sloppy and careless with their money and refused to answer if many adolescent boys were uninterested in school. (PCT4. 293-94)

Dr. Weinstein stated that knowing that Defendant had held jobs that were more responsible than the jobs described to him was unimportant because he assumed that Defendant required a great deal of instruction to learn the jobs and was closely supervised. (PCT4. 299-300) He admitted that he knew that Defendant had left jobs after he learned that Immigration Officials had questioned his employment at those jobs and that Defendant had obtained new jobs on these occasions. (PCT4. 301) However, he insisted that Defendant received assistance in obtaining every job he had. (PCT4. 301)

Dr. Weinstein admitted that the only evaluation of Defendant's adaptive behavior he did was a retrospective evaluation, and that he made no attempt to evaluate Defendant's adaptive behavior related to the time he was evaluating Defendant's intelligence. (PCT4. 313-14) However, he

acknowledged that present deficits in adaptive functioning were necessary to establish the second element of retardation. (PCT4. 319) He averred that he made a determination that Defendant did have adaptive functioning deficits still because his performance on the academic achievement tests indicated that he did not possess sufficient skills to do more than simple jobs, because Defendant had problems controlling his emotions and because he was not always compliant with his medication. (PCT4. 321)

Dr. Weinstein acknowledged that he did not consider any information about the facts of the case because he believed that it was irrelevant to whether Defendant was retarded. (PCT4. 315) However, he did know that Defendant was able to travel internationally on his own after the crime. (PCT4. 322) He also believed that the planning of the crime showed that Defendant did not have "proper intelligence." (PCT4. 324) He also chose to ignore information showing that Defendant's actions in supporting the victim and his family because he believed the victim's mother used Defendant. (PCT4. 325-27) He acknowledged that Defendant was able to dress himself, feed himself, use the bathroom by himself and follow the procedure to obtain medical treatment in the prison. (PCT4. 333-34)

On redirect, Dr. Weinstein acknowledged that all definitions of retardation require a finding of concurrent deficits in adaptive functioning. (PCT4. 335) However, he continued to insist that doing a retrospective evaluation of adaptive functioning was appropriate. (PCT4. 336) He justified his reliance on decades old information by stating that he believed that the informants remembered Defendant and were providing accurate information. (PCT4. 351-55)

Dr. Marc Tasse, a psychologist specializing in research and lacking forensic experience, testified that the definition of retardation in Florida law was consistent with the clinical definitions. (PCT4. 378-88) He averred that retardation was a life-long condition but stated that it was possible for earlier development delays to be eliminated with treatment. (PCT4. 388-89) He believed that it was not possible to treat retardation in adulthood. (PCT4. 389)

Dr. Tasse stated that intellectual functioning referred to the ability to reason, think, solve problems and learn from experience and was measured using an IQ test. (PCT4. 390) He stated that it was important to evaluate intelligence in accordance with a person's native language and culture. (PCT4. 391) Dr. Tasse stated that adaptive behavior encompassed the manner in which a person learned skills and behaviors and

responded to the expectations and demands of society. (PCT4. 393) As such, it was related to a person's age and culture. (PCT4. 393) Dr. Tasse stated that intelligence and adaptive functioning tended to be stable over the course of a lifetime. (PCT4. 398) He stated that he would not expect a person who had adaptive functioning deficits in the past to improve without extensive education and training. (PCT4. 398)

On cross, Dr. Tasse admitted that relying on the recollection of individuals from decades earlier caused a concern for the accuracy of the information these individuals provided. (PCT4. 402-03) He admitted that a further concern about the reliability of the information arose from the fact that the determination that a person is retarded might cause a benefit to the person and his family. (PCT4. 403-04)

Dr. Thomas Oakland, a school psychologist, testified that had been involved in the development of the ABAS, a test of adaptive behavior. (PCT4. 434, 493-94) The test was developed using only United States citizens. (PCT4. 495) He stated that the ABAS would only be useful when administered in a foreign country if the foreign country was similar to the United States. (PCT4. 583) He did not believe that it was appropriate to use the ABAS in Columbia. (PCT4. 583)

Dr. Oakland stated that most retardation evaluations were conducted during childhood because severe forms of retardation were noticed during infancy and others were noticed during the early school years. (PCT4. 501-02) He stated that the ABAS should be given to people who know the individual being assessed well and have frequent contact with the person for extended time periods so that they have the opportunity to see the individual behave. (PCT4. 515-16) He also stated that the recency of the contact was important. (PCT4. 516)

Dr. Oakland stated that he would ignore all information about a defendant's behavior that was not directly responsive to a question on an adaptive behavior test. (PCT4. 587-88, 595-97) He would also not consider behaviors relevant unless the defendant had unlimited choices in exhibiting the behavior. (PCT4. 598) However, he acknowledged that goal-directed, self-initiated behavior would be relevant to adaptive functioning. (PCT4. 591-92)

Amparo Arbelaez Alvarez, Defendant's older sister, testified that Defendant was the only one of the 12 sibling who did not complete high school, that their mother did Defendant's homework for him and that he routinely failed in school. (PCT4. 630-32) She stated that Defendant met his friends at church and that they were all much younger than he. (PCT4. 632) Although

she acknowledged not going to church much and have limited personal knowledge of what occurred there, she claimed that Defendant mainly helped clean the church, was not allowed to be an altar boy because his clothing was dirty and was not allowed to go on church trips. (PCT4. 633-35)

Amparo averred that their oldest brother ran a bar in a stadium, that Defendant worked for him selling sodas and that the brother would beat Defendant for not bringing the money back from this work. (PCT4. 636) She believed that reason Defendant did not have the money was that the customers fooled Defendant. (PCT4. 636) She claimed that Defendant did not attend to his personal hygiene, did not use table manners, could not eat with utensils, did nothing around the house, did not play sports, did not converse often and was a loner and depressed. (PCT4. 637-40) She averred that their mother had to remind Defendant constantly to take his epilepsy medication. (PCT4. 640-41)

Amparo stated that Defendant would jump off the roof but admitted that he did so because he was acting as a lookout when the children were misbehaving in their mother's absence. (PCT4. 641, 648-49) She also acknowledged that the family was poor, that they could not always afford Defendant's medicine and that their home was not a good place to study. (PCT4. 649-50) She

also acknowledged that Defendant disliked school and preferred to spend his time with friends using drugs. (PCT4. 650-51)

Flor Arboleda testified that she was Defendant's sixth grade Spanish teacher and a college classmate of his sister Amparo. (PCT4. 665-67) She averred that Defendant's memory, vocabulary, reading, writing, spelling, punctuation and pronunciation were poor and that he did not listen well. (PCT4. 667-70) She claimed Defendant did not interact with the other students well but behaved well in class. (PCT4. 670)

Ms. Arboleda acknowledged that she would have met Defendant's parents during teacher conferences but did not recall them. She did recall Amparo, who she claimed was not a friend, and remembered suggesting to her that Defendant needed professional help. (PCT4. 673, 683, 685, 688)

Defendant attempted to admit a document that allegedly contained Defendant's grades through Ms. Arboleda. However, since Ms. Arboleda was unable to testify to the predicate for the document, it was excluded. (PCT4. 674-79)

Ms. Arboleda admitted her interaction with Defendant was limited to one hour a day, four or five days a week in 1973. (PCT4. 681) She acknowledged that she was testifying because Amparo informed her Defendant was facing the death penalty and she wanted to help him. (PCT4. 683-84) She believed that

Defendant would have been incapable of giving a coherent confession. (PCT4. 686-87)

Sgt. Henry Walker testified that Defendant was able to follow the grievance and canteen procedures, made goal-directed plans with others, kept himself and his cell clean and exhibited no behaviors consistent with retardation. (PCT4. 733-40, 743, 747-49) Sgt. Jerome Lee testified that he knew Defendant fairly well because they would chat frequently about the Miami Dolphins in English. (PCT4. 768, 771-74) He never observed anything about Defendant that caused him to believe Defendant was retarded. (PCT4. 768) He stated that he had observed Defendant taking his turn playing volleyball with the other inmates. (PCT4. 769) He stated that the inmates play volleyball according to their own rules, which they change on occasion, and that Defendant never had a problem following the rules as they changed. (PCT4. 770-71) He testified that Defendant arranged for teams to play the game and played on his own initiative. (PCT4. 771-72) Off. John Flaherty testified that Defendant spoke in broken English but was able to communicate his needs. (PCT4. 1092) Off. Flaherty had never observed Defendant being unable to care for himself or in need of special assistance to engage in daily living tasks and noted that Defendant kept his cell neat and tidy. (PCT4. 1093-95)

Vicente Soler testified that he met Defendant when Defendant was working at a restaurant for which he was responsible for purchasing, that Defendant was friendly and approached him seeking a second job and that Defendant took a while to learn tasks but performed them well once he learned them. (PCT4. 785-88, 795) Defendant was subsequently given an additional job as a night watchman, withholding taxes were not originally taken out of Defendant's check for this job, and when they were, Defendant became upset and refused to accept the explanation for the taxes. (PCT4. 789-90) During this employment, Defendant maintained a residence and his personal hygiene, aside from neglecting dental care, and arrived at work on time despite being limited to a bicycle for transportation. (PCT4. 791-92, 795-96, 805) He left the employment when the fact that he had stolen an identity came to light. (PCT4. 792, 797-98) Defendant subsequently contacted Mr. Soler, explained that he needed a letter about his employment to adjust his immigration status and got the letter. (PCT4. 792-93, 800-03)

Jorge Salazar testified that his brother brought Defendant to live with the family, that Defendant was home very little, that Defendant did not socialize much and that Defendant was clean in his appearance but left the bathroom a mess. (PCT4. 807-09, 811-12, 813-15, 817, 824) He had Defendant work with

him painting houses, during which time he allowed Defendant to promise additional work even though it upset him and claimed that he needed to give Defendant special instructions. (PCT4. 810-11, 819) He claimed that Defendant had to be reminded to take his medicine. (PCT4. 813)

Martha Arguelles, Mr. Salazar's sister, testified that she met Defendant when she moved to the United States after Defendant had moved out of her family home and had spoken to him on a couple of occasions. (PCT4. 834-36) During these conversations, Defendant only spoke about his work and religion, used a limited vocabulary and rejected the suggestion that he take more time off work. (PCT4. 836-40) Ms. Arguelles admitted that she had destroyed evidence for Defendant in this case. (PCT4. 847-48)

Katrin Banks, a psychological specialist at UCI, testified that she was assigned to three death row inmates, one of whom was Defendant, because she spoke Spanish and spoke to him once a month for an hour. (PCR4. 5727-31) She was able to understand Defendant and believed he understood her during her conversations with him. (PCR4. 5737-38) She noted that Defendant tends to ignore questions that he does not like. (PCR4. 5738-39) She also claimed that Defendant was paranoid

and did not always cooperate based on his perceptions of events.
(PCR4. 5739-41)

Sandra Martinez, a psychologist at UCI, testified that she was assigned to treat Defendant for a year and a half beginning in 2006, and generally only saw Defendant once a month for an hour. (PCR4. 5757-60) Dr. Martinez had never seen any documentation of any intelligence testing regarding Defendant but believed he was of borderline intelligence based on his limited vocabulary even in Spanish. (PCR4. 5763-64)

Tomas Tabares testified that he lived in Miami between 1976 and 1992, was the manager of a 7-11, met Defendant around 1981 or 1982 and gave him a job cleaning the store. (PCR4. 730-33) He described Defendant as a good worker but incapable of complicated work and having the mentality of a child. (PCR4. 734-35) He stated that Defendant was clean but had bad teeth and could not afford dental work. (PCR4. 735) Mr. Tabares knew that Defendant was epileptic, that he could not always afford his medicine and that he occasionally had to be reminded to take it. (PCR4. 736) He stated that he had last seen Defendant in 1991 or 1992, and believed that Defendant was still working at Tony Roma's at the time. (PCR4. 733, 740)

When confronted with the fact that Defendant was incarcerated at that time, Mr. Tabares asserted that he must

have gotten the dates wrong because his "mind is not what it used to be." (PCR4. 739) He was also unaware that Defendant had worked at several hotels, owned a car or had a driver's license. (PCR4. 740-41) He also acknowledged that he was against the death penalty and trying to help Defendant avoid that punishment. (PCR4. 742)

Dr. Enrique Suarez, a psychologist with a specialization in forensic psychology and neuropsychology, testified that it was important to look at whether Defendant needed to support to live a daily life to determine the level of adaptive functioning. (PCT4. 860-78, 884-86) He reviewed documents regarding Defendant's life before the crime, police reports about the crime, Defendant's confession, witness statements, Department of Corrections records, medical records and the reports of the other experts who had evaluated Defendant. (PCT4. 888-90) These documents revealed no evidence that Defendant had required support to function in his daily life prior to being incarcerated, that he received support while incarcerated and that he was ever suspected of being retarded. (T7. 886-87, 891-92)

Dr. Suarez stated that it was important to consider culture in evaluating both intelligence and adaptive functioning. (PCT4. 897-98) He noted that education had a large influence on IQ

score and that the process of norming IQ tests took into account the general education level of the population to whom the tests were to be administered. (PCT4. 894-99) He stated that using a norm that did not comport to the test given rendered the score on the test meaningless. (PCT4. 894-96, 900) He chose that WAIS normed in Spain because the populations of Spain and South America were similar and the population of Mexico included a large indigenous group. (PCT4. 893, 899) He also administered CTONI, the MMPI, the dot counting test, the VIP and a spelling test. (PCT4. 893, 901-24)

On the WAIS, Defendant obtained a full scale IQ of 68 but the pattern of subtest scores was inconsistent with retardation. (PCT4. 991-93) Moreover, the result of his other testing indicated that Defendant was malingering and were not consistent with the type of false positive associated with retardation. (PCT4. 994-1000, 1018-20) As such, Dr. Suarez opined that Defendant's true reasoning level was probably in the average range. (PCT4. 999)

Dr. Suarez also interviewed Defendant, who appearance and hygiene were appropriate. (PCT4. 925-29, 933, 938) During the interview, Defendant attempted to evade questions by feigning memory lapses only to acknowledge the information when pushed, denied artistic ability, later acknowledged it when confronted

with evidence of such ability and provided information regarding mental health symptoms inconsistent with real mental illness, which raised further concerns of malingering. (PCT4. 939-40, 961-67, 972-74)

Defendant showed communication skills inconsistent with retardation and provided information about his ability to immigrate to this country, understand currency exchange, live independently, travel independently, obtain employment, housing and means of transportation, progress in his employment, develop social relationships and care for others that was also inconsistent with retardation. (PCT4. 940-67) He admitted to disliking school and using drugs instead, and the information about his noncompliance with his medication was consistent with manipulation. (PCT4. 954, 960) Further, Defendant was fluent in Spanish and had learned sufficient English to communicate his needs, which was inconsistent with retardation. (PCT4. 967-69) Moreover, information that Defendant provided was consistent with information from the records Dr. Suarez reviewed. (PCT4. 955-56) The information about the planning of the crime and escape thereafter was also inconsistent with retardation. (PCT4. 974-79)

To further assess Defendant's present functioning, Dr. Suarez administered the ABAS to prison officials. (T. 1001-06)

The information he received from these tests and the records review was inconsistent with functioning deficits. (PCT4. 988-89, 1002, 1007-08) As a result, Dr. Suarez opined that Defendant was not retarded. (PCT4. 1009)

Dr. Sonia Ruiz, a psychologist, conducted an evaluation of Defendant in 2001, during which she interviewed Defendant, administered the Bender Gestalt, Raven's Progressive Matrices and the MMPI to Defendant and reviewed Defendant's confession, the reports of Dr. Castiello and Dr. Latterner and Defendant's medical records from the jail. The evaluation revealed malingering, a borderline intelligence level, no retardation, and abilities to communicate and live independently that was inconsistent with retardation. (PCT4. 1097-1120) She explained that she did not administer the WAIS or Stanford-Binet to Defendant because he had already been given the WAIS, which raised the issue of the practice effect, and because the Mexican version of the WAIS tended to underestimate IQ scores by 10 points. (PCT4. 1128-29)

Lisa Wiley, a psychological specialist at UCI, testified that she met Defendant in 1992, met with frequently until 2005, and observed that Defendant always appeared neat, groomed and clean without any sign of retardation, and his cell was always clean and orderly. (PCT4. 1137-51) His prison medical records

showed he had received regular mental health services but no one has ever suggested that he might be retarded. (PCT4. 1152-81) She noted that Defendant had learned to speak English sufficiently to convey his needs. (PCT4. 1161-63)

After considering the evidence presented, the post conviction court denied the claim, finding that Defendant had not proved that he is retarded because the testimony that Defendant had presented regarding his adult IQ score was not credible and he had not presented evidence that he had concurrent deficits in adaptive function. Defendant appealed the denial of that motion, claiming that Florida's requirement that he show that he has concurrent deficits in adaptive functioning was unconstitutional and that the post conviction court erred in finding that he had not proven that he was retarded. (PCR4. 6388-6405) On September 19, 2011, this Court affirmed the denial of the retardation claims. *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011). Defendant sought certiorari review, again claiming that Florida's requirement that he prove he has concurrent deficits in adaptive functioning was unconstitutional and that the Florida courts erred in finding he had not proved that he was retarded. The United States Supreme Court denied certiorari on April 16, 2012. *Arbelaez v. Florida*, 132 S. Ct. 1950 (2012).

On November 23, 2010, Defendant filed a third motion, claiming that *Porter v. McCollum*, 558 U.S. 30 (2009), constituted a retroactive change in law that required reconsideration of the denial of his claim of ineffective assistance of counsel at the penalty phase. On February 11, 2011, this Court determined that the post conviction court had jurisdiction to consider this claim. On May 20, 2011, the post conviction court summarily denied the claim, finding that *Porter* was not a change in law, that it would not be retroactive if it had changed the law and that the claim of ineffective assistance of counsel was meritless.

Defendant appealed that denial to this Court. On April 26, 2012, this Court summarily affirmed the denial of this motion. *Arbelaez v. State*, 88 So. 3d 146 (Fla. 2012).

On September 11, 2011, Defendant filed a petition for writ of habeas corpus in the Southern District of Florida, raising numerous claims including that that this Court had improperly denied his retardation claim. On August 20, 2014, the district court denied the petition, finding Defendant's retardation claim meritless. *Arbelaez v. Crews*, 43 F. Supp. 3d 1271, 1286-97 (S.D. Fla. 2014). Defendant has appealed the denial of the petition, and that appeal remains pending.

On May 11, 2015, Defendant filed a fourth motion for post

conviction relief. In this motion, Defendant contended that *Hall v. Florida*, 134 S. Ct. 1986 (2014), required the post conviction court to reconsider its prior rejections of retardation claims. (PCR5. 38-61) He averred that this was true because *Hall* allegedly required the States to adopt the definition of retardation provide by the AAIDD and interpret that definition and apply it in accordance with that organization's views on how retardation should be legal proceedings regarding retardation should be conducted. *Id.*

On May 15, 2015, the State responded to the motion. (PCR5. 63-85) It argued that the motion was untimely and successive and that *Hall* had no application to this matter. *Id.*

At the *Huff* hearing, Defendant argued that he needed another evidentiary hearing on his retardation claim to present testimony on how retardation should be diagnosed. (PCR5. 177-82) The State responded that *Hall* only held that it was unconstitutional for Florida to refuse to allow Defendant's whose IQ's were above 70 but within the standard error of measure of 70 to present evidence of the other two prongs of retardation. (PCR5. 182-83) Since Defendant had not been precluded from presenting such evidence, the State asserted that *Hall* was inapplicable. (PCR5. 183)

On June 18, 2015, the post conviction court denied the

motion. (PCR5. 90) It determined that *Hall* had not created any new rights and had merely required that courts considered the standard error of measure in determining whether a defendant's IQ score satisfied the first prong of retardation. *Id.* Because Defendant had failed to prove the second prong of retardation, it found that *Hall* was inapplicable to Defendant. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's fourth motion for post conviction relief, which sought to relitigate a retardation claim, because the motion was untimely, successive and meritless.

ARGUMENT

THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S UNTIMELY, SUCCESSIVE AND MERITLESS MOTION FOR POST CONVICTION RELIEF.

Defendant once again asserts that he is retarded and that the lower court erred in rejecting this claim. Defendant supports his claim this time with the assertion that the United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), is a retroactive change in constitutional law that requires reconsideration of prior rejections of this claim. However, the lower court properly summarily denied this claim and should be affirmed.²

In making his arguments regarding *Hall* and its alleged effect on this case, Defendant insists that *Hall* requires states to conform the legal definition of retardation to the views of the scientific community. However, this assertion is contrary to the express language in *Hall* itself. There, the Court expressly stated that the work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. Instead, it merely stated that it was appropriate for legal authorities to

² This Court reviews a trial court's summary denial of a motion for post conviction relief de novo. *Kormondy v. State*, 154 So. 3d 341, 351 (Fla. 2015)

"consult" and be "informed" by the views of the medical community. *Id.* at 1993. These statements are entirely consistent with the Court's prior recognition that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Thus, Defendant's assertion that *Hall* required Florida to adopt the AAIDD definition of retardation and interpret the definition so adopted in accordance with that organization's views is simply false. Instead, the actual holding of *Hall* was limited to a determination that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001.

Given the actual holding of *Hall*, the lower court was correct to deny Defendant's attempt to relitigate his retardation claim. Pursuant to Fla. R. Crim. P. 3.851(d), a motion for post conviction relief must be filed within one year of when the defendant's convictions and sentences became final. Here, Defendant's convictions and sentences became final on May 24, 1994, when the United States Supreme Court denied certiorari

after direct review. *Arbelaez v. Florida*, 511 U.S. 1115 (1994). As that was well more than one year before the filing of this motion, the motion was not timely unless one of the exceptions to Fla. R. Crim. P. 3.851(d) applied.

While Fla. R. Crim. P. 3.851(d)(2)(B) does recognize an exception to the one year limitations period, that section provides "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Defendant does not suggest that *Hall* has been held to be retroactive, and no court has held that it is. In fact, the Eleventh Circuit held that *Hall* is not a retroactive change in constitutional law. *Kilgore v. Sec'y, Florida Dep't of Corrections*, 2015 WL 7175659, *10-*14 (11th Cir. Nov. 16, 2015); see also *In re Hill*, 777 F.3d 1214, 1223-24 (11th Cir. 2015); *In re Henry*, 757 F.3d 1151, 1158-61 (11th Cir. 2014). Instead, he asked the lower court to make that determination in the first instance. However, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Defendant could not use the assertion that the alleged change in law in *Hall* should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he had to show that it has been

held retroactive for the exception to apply. See *Tyler v. Cain*, 533 U.S. 656 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). As such, this motion was untimely and properly denied as such.

Even if making a request for retroactive application was proper under Fla. R. Crim. P. 3.851(d)(2)(B), the motion would still have been untimely because the alleged change in *Hall* would not be retroactive. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or this Court had made a significant change in constitutional law, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52, 53 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30. It further stated that new cases that merely concerned evidentiary standards and procedural fairness were evolutionary refinements that did not apply retroactive. *Id.* at 929.

Here, as noted above, the *Hall* Court merely held that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. In fact, the Court did not even find that Hall's own death sentence was unconstitutional. *Hall*, 134 S. Ct. at 2001. Thus, the new rule announced in *Hall* was merely a procedural requirement that Florida permit defendants with IQs between 70 and 75 the opportunity to present evidence regarding the other elements of retardation. *Kilgore*, 2015 WL 7175659 at *11-*12; *In re Henry*, 757 F.3d at 1161; see also *Mays v. Stephens*, 757 F.3d 211, 217-19 (5th Cir. 2014), cert. denied, 135 S. Ct. 951 (2015) (rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). Moreover, this Court had actually held that defendants could do so even before *Hall*. *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009). Thus, *Hall* is a mere evolutionary refining regarding the admission of evidence and procedural fairness that does not apply retroactively. *Witt*, 387 So. 2d at 929. The lower court was correct to find Defendant's motion untimely and should be affirmed.

Instead of presenting argument based on the holding of

Hall, Defendant's argument was based on dicta from *Hall*. However, as this Court has recognized, dicta does not change the law at all. See *Puryear v. State*, 810 So. 2d 901, 904-06 (Fla. 2002). Thus, Defendant's attempt to assert that dicta from *Hall* changed Florida law is meritless. The motion was properly summarily denied.

This is all the more true as when one considers the dicta in context. While the Court did state in *Hall* that it was appropriate to consult the views of the medical community regarding the definition of retardation, it stated the reason why doing so was appropriate was that "the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans." *Hall*, 134 S. Ct. at 1993. Thus, the Court's rationale for consulting the medical community was based on definitions they provide for general use.

As the definitions quoted in *Atkins* show, the medical community requires a finding of deficits in adaptive functioning concurrent with the adult IQ score used to meet the first element of retardation to satisfy the second element. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (noting that the AAIDD definition refers to "substantial limitations in present

functioning" and requires a showing that the adaptive functioning deficits exist "concurrently with" the low IQ score) (emphasis added); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 49 (4th ed. text rev. 2000) ("DSM-IV") (stated that second diagnostic criteria concerns "[c]oncurrent deficits or impairments in present adaptive functioning") (emphasis added). In fact, Gregory Olley, whose testimony proposed to present to show that requiring a showing of concurrent deficits is improper in death penalty cases, admits in those articles that a "customary assessment of adaptive behavior examines current functioning." J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 1, Psychology in Mental Retardation and Developmental Disabilities* (American Psychological Association/ Division 33, Washington, D.C.), Summer 2006, at 2, 2 (emphasis added). Thus, the definitions of retardation the medical community provides for general use are fully consistent with Florida law. Since the reason the Court gave for consulting the medical community was that their definitions had uses beyond exempting people for execution, *Hall* does not support Defendant's assertion that requiring concurrent deficits in adaptive functioning is unconstitutional. The motion was properly summarily denied.

Instead of seeking to show that the definition of retardation provide for general use is inconsistent with Florida law, Defendant wanted to show how the AAIDD believes that retardation claims should be evaluated in death penalty cases.³ However, this is inconsistent with the purpose for consulting the medical community. As such, the lower court properly refused to allow him to do so.

Further, considering the actual holding of *Hall*, this claim was barred. As this Court has held, claims raised in prior post-conviction proceedings cannot be relitigated in a successive post-conviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. See *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Here, Defendant had already claimed to be retarded twice, and the claim was rejected finding that Defendant had failed to prove he was retarded twice. Moreover, Defendant claimed that his lack

³ Defendant's desire to challenge the statement in the lower court's order denying the retardation claim about Defendant's efforts to discredit Dr. Suarez's finding of malingering is particularly specious. What the lower court actually said in its last order on this claim was, "Defendant went to great lengths to discredit the testing methods of Dr. Suarez in determining that Defendant was malingering. However, it is Defendant's burden to prove his IQ is under 70. He has failed to do so." (PCR4. 6403) Thus, in context, the statement indicated that the lower court considered Defendant's attack on the malingering finding irrelevant such that continuing the attack would not further Defendant's cause.

of concurrent deficits should be ignored both times, and that claim was rejected both times. As noted above, *Hall* changed nothing about that ruling. Thus, Defendant's attempt to relitigate this issue was procedurally barred. The lower court properly summarily denied this claim and should be affirmed.

Moreover, applying the actual holding of *Hall* to this case shows that it is simply inapplicable even if it applied retroactively. The lower court did not refuse to allow Defendant to present evidence of his adaptive functioning because Defendant presented evidence that his IQ was above 70 but below 75. Instead, the record reflects that Defendant was permitted to present evidence of his adaptive behavior and that the evidence he presented regarding his IQ score indicated that it was below 70. Moreover, the lower court considered this evidence and rejected this claim because the evidence Defendant presented to show that he had significantly subaverage general intellectual functioning was incredible and he had failed to prove that he had concurrent deficits in adaptive functioning. (PCR4. 6388-6405) Thus, the error in the application of *Atkins* that the Court found in *Hall* simply did not occur in this case. As such, *Hall* does not apply, and Defendant's claim that it does was meritless. *In re Hill*, 777 F.3d at 1224; *Mays*, 757 F.3d at 218-19. His motion for post conviction relief was properly

summarily denied, and that denial should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying Defendant's fourth motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Rachel Day, Esq., dayr@ccsr.state.fl.us, Assistant CCR, 101 East Broward Blvd., Suite 444, Ft. Lauderdale, FL 33301, this 4th day of December 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New
12-point font.

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