

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1628

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

**RACHEL L. DAY
Fla. Bar No. 0068535
Assistant CCRC**

**Office of the Capital Collateral Regional
Counsel-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
Tel: (954) 713-1284
Fax: (954) 713-1299**

COUNSEL FOR APPELLANT

RECEIVED, 11/19/2015 06:08:30 PM, Clerk, Supreme Court

PRELIMINARY STATEMENT

This proceeding involves an appeal of the summary denial of post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The following symbols will be used to designate references to the record in this appeal:

“R._” -- record on direct appeal to this Court;

“PCR._” -- record on first postconviction appeal to this Court;

“PCR2._” -- record on second appeal to this Court;

“PCR3._” -- record on third appeal to this Court;

“PCR4._” -- transcripts of instant appeal.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Guillermo Arbelaez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Arbelaez, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

PRELIMINARY STATEMENT ii

REQUEST FOR ORAL ARGUMENT..... ii

TABLE OF AUTHORITIES iv

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF THE ARGUMENTS19

ARGUMENT I20

***HALL V. FLORIDA* RENDERS UNCONSTITUTIONAL THIS COURT’S RULING THAT ARBELAEZ DOES NOT MEET THE CRITERIA OF INTELLECTUAL DISABILITY.**20

a. Introduction20

b. Intelligence Quotient23

c. Adaptive functioning.....25

d. Age of onset29

e. Dr. Suarez and Dr. Ruiz were not qualified to evaluate Arbelaez in an *Atkins* evaluation......30

f. Retroactivity.....32

g. The lower court’s finding is erroneous.....34

h. Evidentiary hearing.....35

CONCLUSION.....37

CERTIFICATE OF COMPLIANCE39

CERTIFICATE OF SERVICE39

TABLE OF AUTHORITIES

Cases

Arbelaez v. Florida, 114 S. Ct. 2123 (1994).....2

Arbelaez v. State, 626 So. 2d 169 (Fla. 1993)2

Arbelaez v. State, 72 So. 3d 745 (2011).....27

Arbelaez v. State, 72 So. 3d 745 (Fla. 2011)18

Arbelaez v. State, 775 So. 2d 909 (Fla. 2000)3

Arbelaez v. State, 88 So. 3d 146 (Fla. 2012)18

Atkins v. Virginia, 536 U.S. 304 (2002).....1, 3

Cherry v. State, 959 So. 2d 702 (Fla. 2007)21

Hall v. Florida, 134 S. Ct. 1986 (2014)..... passim

Jones v. State, 966 So. 2d 319 (2007)..... 1, 27, 28, 29

Lane v. Alabama, ___ S. Ct. ___, WL 3511284 (2015)40

Linklater v. Walker, 381 U.S. 618 (1965).....35

Stowell v. Denno, 388 U.S. 293 (1967)35

Witt v. State, 387 So. 2d 922 (Fla. 1980)..... 34, 35, 36

Statutes

Fla. Stat. § 921.137(1) (2005)..... 28, 29

Other Authorities

Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text Rev. 2000)12

Edward A. Polloway Et Al., *The Death Penalty And Intellectual Disability* (Edward A. Polloway ed., American Association of Intellectual and Developmental Disabilities (2015)..... passim

Harrison & Oakland, *The Adaptive Behavior Assessment System – Second Edition* (ABAS-II), 20038

Richard Rogers & Daniel W. Shuman, *Conducting Insanity Evaluations* (2d ed. 2000)5

Rules

Fla. R. Crim. P. 3.203(b).....26

INTRODUCTION

Guillermo Arbelaez is intellectually disabled (ID)¹. He was diagnosed in accordance with prevailing professional criteria and accepted scientific methodology. However, the Florida courts, including this Court, found that he did not prove his ID. In addition to numerous factual errors, the trial court based its ruling on its reading of *Jones v. State*, 966 So. 2d 319 (2007), which, it held, required Arbelaez to assess adaptive functioning at the time of the face-to-face evaluation in 2007 and not consider adaptive deficits exhibited prior to incarceration. The lower court also found that Arbelaez's expert was not credible because he utilized United States norms with his administration of the Mexican intelligence test.

The United States Supreme Court issued its opinion in *Hall v. Florida*, 134 S. Ct. 1986 on May 27, 2014. *Hall* is clear that while *Atkins v. Virginia*, 536 U.S. 304 (2002) gave latitude to the states to develop legal procedures for determining the presence or absence of intellectual disability in death penalty cases, that latitude does not extend to the diagnostic criteria prevailing in the profession of intellectual disability specialists. Such latitude would essentially undercut *Atkins*

¹ While the term “mental retardation” has been used previously in this case, due to the U.S. Supreme Court’s use of the more current term “intellectual disability” when addressing Florida’s definition of the condition in *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014), this motion adopts the current term, “intellectual disability.”

and subject people with intellectual disabilities, including Guillermo Arbelaez, to execution in violation of the Eighth Amendment. Relief is warranted.

STATEMENT OF THE CASE AND FACTS

Guillermo Arbelaez was indicted by a grand jury in Dade County, Florida, on April 27, 1988, for first-degree murder and kidnapping (R. 1). Jury trial commenced on February 11, 1991. The jury found Arbelaez guilty of both counts. The penalty phase commenced on March 4, 1991, and the jury returned a sentencing verdict by a vote of eleven (11) to one (1) (R. 1056). The trial court entered written findings sentencing Arbelaez to death (R. 246). A timely direct appeal to this Court resulted in affirmance of both the convictions and sentences, including Arbelaez's sentence of death. *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993), *cert. denied*, 114 S. Ct. 2123 (1994).

Arbelaez thereafter sought postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850/3.851. After the lower court summarily denied relief as to all issues, this Court reversed in part and remanded for an evidentiary hearing on the penalty phase ineffective assistance of counsel claim. *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).

An evidentiary hearing was subsequently conducted, after which the lower court denied relief. A timely appeal was perfected to this Court. While Arbelaez's appeal was pending, this Court promulgated Florida Rule of Criminal Procedure

3.203, effective October 1, 2004, regarding the procedures to be employed for defendants seeking to raise intellectual disability as a bar to their execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002). On November 30, 2004, Arbelaez filed a Rule 3.850/3.851 motion raising issues regarding his intellectual disability and related legal issues (PCR2. 5-24). The lower court summarily denied the motion, (PCR2.58), Arbelaez appealed the summary denial to this Court, and this Court remanded the issue back to the lower court for an evidentiary hearing pursuant to Fla. R. Crim. P. 3.203 and *Atkins*. The evidentiary hearing commenced on June 23, 2009.

On June 23 and 24, 2009, Dr. Ricardo Weinstein, a clinical psychologist and forensic neuropsychologist, testified at Arbelaez's *Atkins* evidentiary hearing. Dr. Weinstein explained that a clinical diagnosis of ID requires three basic elements: low intelligence typically as measured by an intelligent quotient (IQ) two standard deviations below the mean, concurrent impaired adaptive functioning, and onset before age 18. Dr. Weinstein performed a full neuropsychological evaluation of Arbelaez and found that Arbelaez met the clinical diagnosis for ID. (PCR3. 141-362).

As part of his evaluation Dr. Weinstein administered the Mexican version of the Wechsler Adult Intelligence Scale-III (WAIS-III), which is in Spanish,

Arbelaez's native language.² He testified that with IQ scores on the WAIS-III, the standard deviation is 15. Therefore, "two standard deviations below the mean would be one hundred minus 30, which is 15 times two, and that gives you a score of 70." (163). On his administration of the WAIS-III, Arbelaez obtained a verbal score of 66, a performance score of 69, and a full scale score of 65. (PCR3. 171). This result placed him well within the range of IQ scores consistent with a diagnosis of mild ID. Dr. Weinstein testified that the score is consistent with the results obtained by the State's psychologist, Enrique Suarez, who obtained a full scale IQ score of 68, and Dr. Ruth Latterner, who administered the WAIS-R in 1995 and obtained a full scale IQ score of 67. (PCR3. 201).

Dr. Weinstein used the United States norms for the WAIS-III. He explained that because IQ is a relative construct, it is necessary to use the norms of the population with which the subject of the IQ test is being compared. (PCR3. 160-164). Dr. Weinstein explained:

You always use norms that are reflecting the population you want to compare the individual to. The referral question or the issue is whether Mr. Arbelaez is mentally retarded in relationship to other individuals in the United States that are subject to the protection or lack of protection of what is known as the Atkins decision. Therefore you always would compare Mr. Arbelaez to the U. S. population.

² Arbelaez is a native of Medellin, Colombia.

(PCR3. 165). Dr. Weinstein further explained that it was impossible for him to use the Mexican norms in norming Arbelaez's IQ scores because "there are very serious problems with the norming procedures and the norming results of the WAIS in Mexico." (PCR3. 168-170). Dr. Weinstein also administered several tests to determine if Arbelaez was malingering.³ These tests were the Test of Memory Malingering (TOMM⁴), the Rey 50 Item Test (Rey) and the Computerized Assessment of Response Bias (CARB). (PCR3. 173). Arbelaez did very well on all three of these tests and "scored above the cut-off point." (PCR3. 173). Based on his personal observation, Weinstein opined that Arbelaez "put consistent and good effort into everything that I asked him to do." (PCR3. 174). Dr. Weinstein explained that while none of these malingering tests are normed for the intellectually disabled, he could still draw a conclusion from these good scores because:

If he obtains good scores, he cannot be faking good. Meaning he could not be trying to do better than he could do. Or you know, if he does perfectly in all of the tests that means he's making a good effort.

³ Malingering is "the deliberate fabrication or gross exaggeration of psychological or physical symptoms to achieve a recognized external goal." Richard Rogers & Daniel W. Shuman, *Conducting Insanity Evaluations* 91 (2d ed. 2000). [hereafter "Rogers & Shuman"] (citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1994)).

⁴ Dr. Weinstein explained the TOMM is not a test of memory, but a test of effort.

If he didn't, then you really have to consider other factors. But in his case, he did, so there's no reason to doubt that he was making good effort.

(PCR3. 174). He concluded that Arbelaez put forth good effort, that he passed the malingering measures that he administered, and that his test results were consistent longitudinally.

Dr. Weinstein also administered several other instruments designed to assess Arbelaez's intelligence. Dr. Weinstein tested Arbelaez's academic ability utilizing the Batteria Woodcock Munoz where he obtained a full scale score of 59. (PCR3. 172-173 and 177). This showed that Arbelaez's reading abilities are in the third grade level, his math is in the second grade level, and his writing was in the second grade level. These academic deficits were "very consistent" with Arbelaez's IQ. (PCR3. 177). On the C-TONI, Arbelaez scored a non-verbal IQ of 52. Dr. Weinstein explained that the results of the tests were consistent and that differences in the scores between the Batteria and C-TONI on one hand and the WAIS-III on the other is entirely consistent if one considers the Flynn effect. In this case:

. . . the scores are similar although there's a difference in scores. The difference in scores can be attributed to what is called the Flynn effect and the Flynn effect is related to when the test was normed.

So when you find a significant number, you look into whether they were normed at the same time. And the WAIS-III was normed in 1995, published in 1997. The

Woodcock-Munoz tables are 2006. So you have a ten year difference. And in a ten year difference, applying the Flynn effect, you expect to get about three points difference.

(PCR3. 38).⁵

Weinstein also interviewed Arbelaez's mother, three sisters, three brothers, one brother-in-law, school teachers, and two priests, all of whom knew Arbelaez prior to the age of 18. (PCR3. 172). Dr. Weinstein testified that the best sources of information as to adaptive functioning in an *Atkins* situation are relatives, "including parents, siblings, aunts, uncles. Especially in communities in Latin America where there's a lot more interaction in families. Teachers. And as they develop and grow older, it would be employers" (PCR3. 179-180). The interviews in Colombia consistently showed that,

He was shy. He was withdrawn. He could not control his moods. He would throw tantrums. He was slow in learning. He did not - was not able to achieve academically. It took him a long time to learn about how to take care of himself physically, his personal hygiene.

He could not participate in organized sports because he did not know or understand the rules of the games, particularly soccer.

* * *

⁵ The AAIDD cited the Flynn effect and notes score changes "between successive revisions" of IQ tests. (DPID at 59) . For every year between the year when a person took an IQ test and the year when the IQ test was normed, deduct 0.3 IQ points from the IQ score.

He could not manage money.

When he worked with the brothers selling sodas and beers in the stadium, the brothers had to help him with the management of the money.

(PCR3. 181).

In addition to the structured interviews conducted with people who knew Arbelaez in Colombia, Dr. Weinstein performed a standardized assessment using the Adaptive Behavior Assessment Scale (second edition) (ABAS-II)⁶, instrument and manual which are designed to assess adaptive behavior in persons between ages of five and 89. He administered the tests to Arbelaez's mother and to Flor Arboleda, his sixth grade teacher. As Dr. Weinstein testified, it is important in this type of evaluation not to rely too completely on the standardized assessment because of the retrospective nature of the evaluation (PCR3. 183). Thus the standardized test constituted one small facet of Dr. Weinstein's evaluation of Arbelaez's adaptive functioning.

Dr. Weinstein further interviewed several people who had known Arbelaez during his time in Miami. These included an employer, who told Dr. Weinstein that:

Mr. Arbelaez was a very hard working individual. That he was very responsible in his job. That he had very severe limitations in what he could do. He had a lot of

⁶ Harrison & Oakland, *The Adaptive Behavior Assessment System – Second Edition* (ABAS-II), 2003).

problems understanding and comprehending some instructions and some other issues.

For instance, he gave me an example that just about every week he would want to know why is it that he was not getting his full pay, even though he was explained repeatedly that there were taxes being withheld. He just couldn't understand that concept. He wanted to know why he was not paid all the money that he had earned.

(PCR3. 184-185).

In addition Dr. Weinstein reviewed a number of documents that were provided to him to gain more information as to Arbelaez's adaptive functioning. These included the trial testimony of Miami Police Department officers, the testimony of Arbelaez, the penalty phase transcripts, school and medical records from Colombia, medical records from Miami Dade County Jail and prison records.

(PCR3. 186 and 189-190).

Dr. Weinstein also evaluated Arbelaez in 2007 and determined that Arbelaez currently demonstrated adaptive deficits. As he stated, Arbelaez has:

... functioning adaptive deficits and functional academics deficits. His academics and his ability to apply academics are within the third grade level at best. That is a functional and that's a very specific issue that would prevent him from functioning independently without some support. He has had some physical problems, mental problems and he has some problems adapting to the environment. I guess mainly those would be the two things I was able to observe.

He knows enough English to communicate his needs, but that wouldn't indicate, you know how to say, or to

understand sit down. Put your hands in the back. You know, go this place or go that place.

But that doesn't make it, you know he's not fluent or he's not able to communicate fluently in English.

(PCR3. 194-195).

Dr. Weinstein reviewed the videotape of the state's psychologist, Enrique Suarez's evaluation of Arbelaez and concluded that the recording of the time taken for the test was not accurate. The cutoff score for the test is 14, and Suarez recorded a score of 15. Since Dr. Suarez's time recording was not accurate, the correct score was 13, which is a passing score. Dr. Weinstein further explained:

When the scores are so close to the cut-off point then it's very hard whether that's because the individual is not making a good effort or because you as the examiner are taking a couple of seconds or portions of a second longer to stop your clock.

So what I want to be clear is, I'm not suggesting that Dr. Suarez was purposely trying to deceive. What I'm saying is that there is a very easy way to make errors in the timing of this test. And where you are so close to the cut-off point, it's very hard to determine whether really, what you're reflecting is the person not putting in good effort or that there's other things going on.

(PCR3. 208-209).

Thomas Oakland, Ph.D., a neuropsychologist, clinical psychologist and forensic psychologist and expert in ID, also testified at the *Atkins* evidentiary hearing. Dr. Oakland has researched and published extensively in the field of

intellectual disabilities, especially in the area of adaptive functioning. He coauthored and developed the ABAS-II and is also an expert on ethics within the practice of psychology.

Dr. Oakland explained that adaptive behavior generally refers to whether a person meets standards of personal independence and social responsibility expected of his or her age, social group and community...[and] it refers to the extent to which a person accepts responsibility for their daily behavior independently displayed...” (PCR3. 491). Adaptive behavior is critical in determining ID because it “reflects the most functional qualities associated with mental retardation or the absence of mental retardation.” (PCR3. 492).

As Dr. Oakland explained, the DSM-IV-TR, as promulgated by the American Psychiatric Association (APA), classifies adaptive behavior in ten domains: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and health/safety. The diagnosis of ID requires significant limitations in at least two of the ten. *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Rev. 2000) (DSM-IV-TR). Dr. Oakland testified that:

[communication is the] display of needed receptive and expressive vocabulary skills. [Community use is] engaging in one’s community so as to use the resources within that community. [This can include] public transportation . . . schools . . . libraries . . . [Functional academics are the] application of knowledge that we

require in school in order to do the activities that are required of us as adults. [This can include] adding and subtracting, keeping a bank book, making change. [Home living is] taking responsibility for ensuring that homes are safe, that cleaning occurs, that the garbage is taken care of. [Health and safety is where a person takes responsibility for] ingesting needed medication, taking precautions so that they avoid harm and assisting others in that process as well. [Leisure is how a person uses his or her free time. Self-care involves such things as using the toilet, dressing oneself, and bathing. Self-direction is] one's ability to initiate needed activities . . . rather than to require the assistance of others. [Social activities are] engagement[s] with others . . . and the kinds of activities that we engage in during those social activities. [Work applies only to those engaged in work, and their ability to know assigned work activities and] to do that work independently.

(PCR3. 437).

The American Association on Intellectual and Developmental Disabilities (AAIDD) is the leading professional association concerned with the diagnosis and treatment of ID. (PCR3. 437). It represents a national and international consensus on the diagnosis of ID and is considered to be the world leader with respect to the criteria for diagnosing ID.⁷ The AAIDD sets forth a comprehensive framework for the diagnosis of ID.

The AAIDD classifies adaptive behavior into three broader categories:

⁷ The AAIDD was previously called the American Association on Mental Retardation (AAMR). As such, the organization will be referenced herein as "AAIDD".

conceptual, practical and social. A diagnosis requires a significant limitation in one of the three. (PCR3. 494). The three domains include the skill areas identified in the DSM-IV-TR. Conceptual behaviors include communications, functional academics and self-direction. (PCR3. 493). The social domain includes the “leisure and social skill areas.” (PCR3. 493). The practical domain includes “community use, home living, health and safety and self-care. (PCR3. 493).

The ABAS is a measure of adaptive behavior which incorporates the ten skill areas identified by the DSM-IV-TR and the three domains identified by the AAIDD. (PCR3. 494). The incorporation of the ten skill areas and the three domains leads to a general composite score on the ABAS “similar to an IQ from a measure of intelligence.” (PCR3. 498). Dr. Oakland testified that he personally had utilized the ABAS–II in another death penalty case in Florida, in which he had asked questions to family members relating to past experiences before. (PCR3. 460).

Dr. Oakland noted that there is likely to be confusion as to what behaviors apply in determining adaptive functioning and he explained in detail the correct method to examine a behavior to determine if it is an adaptive skill. Dr. Oakland testified that Florida Statute § 921.137 is “not commonly used within the professional practice of psychology,” and that “Florida law is so inconsistent with professional practice [because]...it requires the concurrent assessment of adaptive

behavior in a prison setting.” (PCR3. 567).

Dr. Oakland clarified that assessing adaptive behavior is simply not possible “within the setting similar to death row.” (PCR3. 557). For example, taking a shower every other day or refusing to do so does not indicate an adaptive skill because Arbelaez is “not in an environment where he could decide when to, what extent and how frequently he could take a shower.” (PCR3. 553) Wearing a prison issued uniform each day does not indicate an adaptive skill because Arbelaez does not have the “ability to select the types of clothing that he wears, or perhaps even if he can, whether he is allowed not to wear clothing.” (PCR3. 554). Eating food that is brought to him does not indicate an adaptive skill because Arbelaez does not “have the choice of determining what he eats, or when he eats or the selection.” (PCR3. 554). Holding a telephone receiver is not an adaptive skill because the skill assumes that the person making the call did it on his or her own and not with the assistance of others. (PCR3. 555). Use of the canteen does not indicate an adaptive skill because “one’s uses of finances are highly restricted” and the items available for purchase “are so restricted that he has limited option to determine how canteen money may be used.” (PCR3. 555). Dr. Oakland concluded “Florida law is so inconsistent with professional practice that . . . it requires the concurrent assessment of adaptive behavior in a prison setting.” (PCR3. 567).

Dr. Marc Tasse, a licensed psychologist and expert in ID and autism, also

testified on at the evidentiary hearing. Dr. Tasse also co-authored of the AAIDD's *Mental Retardation: Definition, Classification, and Systems of Support* (Red Book) and User's Guide.⁸ Both of these publications are definitive texts on intellectual disabilities. Dr. Tasse testified regarding the assessment of adaptive functioning prong in an ID diagnosis. Dr. Tasse explained that proper techniques used within the professional ID community involve a retrospective diagnosis of adaptive behavior and use of multiple sources of information to validate the convergence of data. (PCR3. 397-398). A proper assessment of adaptive behavior involves a retrospective analysis of the individual prior to age 18.

Dr. Tasse clarified that adaptive behavior is a stable construct with a retrospective evaluation, where there is a "general confidence that the current function is probably in the same range or level" in childhood and adulthood without "a lot of intervention." (PCR3. 389 and 398). Clinicians should obtain information in the area of adaptive behavior from "multiple sources, multiple records...as well as multi-respondents." (PCR3. 393-393). To assess adaptive

⁸ The User's Guide was published in 2007, as a companion volume to the *Mental Retardation: Diagnosis, Classification and Systems of Support* manual that was current at that time to assist clinicians in making a diagnosis of mental retardation. The User's Guide had a section devoted to the diagnosis of mental retardation in forensic settings. Since the evidentiary hearing the User's Guide has been incorporated into the main AAIDD *Diagnosis, Classification and Systems of Support* manual. However the standards for conducting an assessment of adaptive functioning in incarcerated individuals are almost exactly the same.

behavior, the recommendation is to use “multi-source information with multiple respondents to get comprehensive pictures.” (PCR3. 393).

A standardized adaptive behavior instrument allows for anchoring “where the person’s deficits of function is in relation to the general population [and] other sources are case files, medical records and interviews with teachers...” (PCR3. 393). Other records include “medical records, employment records, DMV, Social Security Administration [and] any previous psychological evaluation that may have been done.” (PCR3. 394).

Dr. Tasse further explained adaptive behavior by definition occurs in a non-structured general community setting” and that prison records are not reliable sources for adaptive functioning assessments because the prison environment is more restrictive, highly confined and structured environment. (PCR3. 394 and 399). In the field of ID , a community is not “people living in the same place under the same laws” and is not used in that sense with regard to adaptive behavior. By definition, “adaptive behavior is the person’s functioning, ability to respond to expectation of the community. In a confined, highly structured environment like a prison, the person has relatively few opportunities to define adaptive behavior in any range of skilled areas.” (PCR3. 399).

In addition to expert testimony Arbelaez presented several lay witnesses to testify as to Arbelaez’s adaptive functioning during his childhood and early adult

years. Two of Arbelaez's previous employers also testified regarding Arbelaez's limited abilities as an employee. Arbelaez also presented two prison guards from Florida Department of Corrections, Union Correctional Facility who testified about the prison environment and their experience with Arbelaez.

The State presented psychologist Sonia Ruiz, who evaluated Arbelaez in 2001 and testified at the prior evidentiary hearing in this case, psychologist Enrique Suarez, who evaluated Arbelaez for the *Atkins* hearing. Dr. Suarez conducted a videotaped evaluation of Arbelaez on behalf of the State in 2007. During the evaluation Dr. Suarez administered the WAIS-III, the Dot Counting Test, the Validity Indicator Profile Test (VIP), and the MMPI. Dr. Suarez did not administer any academic achievement testing to Arbelaez. He administered a "spelling test" which was not standardized, statistically validated, peer reviewed or published. (PCR3. 1027). On the WAIS-III Arbelaez obtained a full-scale IQ of 68, however, Dr. Suarez opined that Arbelaez did not meet the IQ requirement because the other tests indicated Arbelaez was malingering. The State also presented Union Correctional Institution (UCI) psychological specialist Lisa Wiley, who is employed at UCI.

On May 14, 2010, the lower court issued an order denying *Atkins* relief. This Court affirmed the lower court's order on September 19, 2011. *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011). Arbelaez filed a third successive rule

3.851 motion pursuant to the recent United States Supreme Court opinion in *Porter v. McCollum*, 558 U.S. 30 (2009). The trial court summarily denied relief which was affirmed on appeal. *Arbelaez v. State*, 88 So. 3d 146 (Fla. 2012).

Arbelaez timely filed a Petition for Writ of Habeas Corpus By A Person In State Custody in the United States District Court, Southern District of Florida on September 11, 2012. The district court denied the petition as to all of Arbelaez's claims but issued a certificate of appealability as to "the claims of ineffective assistance of counsel at the sentencing phase of trial." Arbelaez moved to alter and amend the court's judgment, which was denied. Thereafter, Arbelaez filed a timely Notice of Appeal and moved the Eleventh Circuit Court of Appeals to expand the Certificate of Appealability (COA). The Court granted COA as to two issues regarding the state court's determination that Arbelaez is not intellectually disabled (and therefore ineligible for the death penalty). The appeal is currently pending before the Eleventh Circuit Court of Appeals.

On May 27, 2014 the United States Supreme Court issued its opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Arbelaez timely filed a Rule 3.851 motion predicated on *Hall* on May 8, 2015. Following a Case Management Conference, the lower court summarily denied the motion on June 18, 2015. This appeal follows.

SUMMARY OF THE ARGUMENTS

Argument I

This Court's finding that Arbelaez is not intellectually disabled (ID) violates *Atkins v. Virginia*, 536 U.S. 304 (2002). The findings of the lower court, as adopted by this Court were not based on the prevailing standards of the medical community and the accepted methodology in the community that specializes in ID. *Hall* requires legislatures to consult with the scientific community before imposing a method of diagnosing ID. Had the lower court and this Court relied on accepted scientific methodology, Arbelaez would have been found to be ID and ineligible for execution.

ARGUMENT I

HALL V. FLORIDA RENDERS UNCONSTITUTIONAL THIS COURT'S RULING THAT ARBELAEZ DOES NOT MEET THE CRITERIA OF INTELLECTUAL DISABILITY.

a. Introduction

The United States Supreme Court's decision in *Hall* represents a fundamental repudiation of this Court's *Atkins* jurisprudence, and as such, *Hall* constitutes a change in law of the Court's analysis of this case under Florida Statutes § 921.137 and Rule 3.203(b). *Hall* holds that the states cannot disregard scientific and medical standards in determining ID. Indeed, statutes must give way to the scientific community's expertise, and not the other way around.⁹ At the core of the *Hall* protection are those *Atkins* claimants with IQ scores between 70 and 75 who had previously been categorically denied under *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) without an opportunity to present evidence and receive consideration of other factors that might suggest their actual IQ lies lower in the Standard Error of Measurement (SEM) from their test scores. However, *Hall's* reasoning reaches immutably beyond that core holding, as clearly noted by the

⁹ In *Hall*, the U.S. Supreme Court considered this Court's interpretation of Fla. Stat. § 921.137 and Rule 3.203(b) to preclude consideration of a standard error of measure ("SEM") in IQ testing, and rather to require a bright-line cutoff of 70 for *Atkins* protection. The U.S. Supreme Court, citing the DSM admonition that "IQ test scores are approximations of conceptual functioning . . .," held that "an individual with an IQ test score 'between 70 and 75 or lower,' . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S. Ct. at 2000.

sharp dissent, which complained that the majority ruled that the statute must bow to the standards adopted by a professional association. *See Hall v. Florida*, 134 S. Ct. 1986, 2005 (2014) (Alito, J., dissenting).

The U.S. Supreme Court reasoned in *Hall* that “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.” 134 S. Ct. at 1993. “To determine if Florida’s cutoff rule is valid, it is proper to consider the psychiatric and professional studies” *Id.* Observing that its reliance on medical consensus to determine the scope of Eighth Amendment protection under *Atkins* was significant, the Court reasoned

[t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Id. at 1993. The U.S. Supreme Court conformed the Eighth Amendment standard to what “. . . the medical community accepts” *Id.* at 1994-95.

The *Hall* Court rejected the bright-line IQ score cutoff because it failed to comport with medical community standards and the scientifically recognized standard error of measure. Under *Hall*, statutes defining the *Atkins* bar cannot operate in a way as to trump science and/or the medical community’s standards.

Hall establishes that the medical community’s standards regarding ID governs all aspects of the enquiry. A contrary ruling would ignore the reasoning behind the *Hall* decision.

Hall stands for the proposition that the Florida court’s *Atkins* jurisprudence cannot be more restrictive than the medical and clinical reality of diagnosing mental health conditions, because then “*Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.” *Id.* at 1999. The U.S. Supreme Court warned that a contrary view, giving states “complete autonomy to define intellectual disability as they wished,” would “conflict[] with the logic of *Atkins* and the Eighth Amendment.” *Id.* *Hall* precludes ID statutory definitions from being more restrictive than those used by the medical community. Indeed, in *Hall* the U.S. Supreme Court rejected *Cherry* because the state court was much more restrictive than the medical community in defining ID. Any legal standard that does the same is, of course, also unconstitutional under *Hall*. Likewise a state court cannot override the science of ID evaluation by making credibility determinations.

The AAIDD is the world leader in the assessment of ID. In January 2015 it published a manual for practitioners entitled *The Death Penalty And Intellectual Disability* (henceforth DPID).¹⁰ This work encapsulates the science of evaluating

¹⁰ Edward A. Polloway Et Al., *The Death Penalty And Intellectual*

ID in individuals facing the death penalty, including those who have been incarcerated in a high security prison for prolonged periods of time. The scientific approach outlined by the AAIDD in *The Death Penalty And Intellectual Disability* shows that this Court's determination that Arbelaez is not intellectually disabled flies in the face of the relevant science and therefore violates *Hall*.

b. Intelligence Quotient

Dr. Weinstein testified at the 2009 evidentiary hearing that he had tested Arbelaez in 2007 and obtained a full scale IQ score of 65. The instrument he utilized was the Mexican version of the WAIS-III, which is in Spanish, Arbelaez's native language. In scoring the test he utilized the United States norms in accordance with the then prevailing literature. However, the lower court found Dr. Weinstein to be incredible because he used the United States norms rather than the Mexican norms. This finding is contrary to the accepted science on the subject.

In *The Death Penalty And Intellectual Disability*, the AAIDD addresses the issue of the validity of IQ test scores. The AAIDD notes that:

[T]est publishers may use incorrect statistical formulae or make other statistical mistakes, which have the effect of producing IQ test scores that cannot be interpreted. This is what happened with the Mexican version of the WAIS-III. It is essentially identical to the U.S. version, except that the instructions and items are translated into Spanish.

Disability, 267 (Edward A. Polloway ed., American Association of Intellectual and Developmental Disabilities (2015)).

The IQ test scores obtained when using the Mexican norms were considerably higher than when using the U.S. norms provided for the same test. The publisher attributed this to differences between the U.S. and Mexican populations. However, when examining the test's technical manual, Suen and Greenspan (2009) discovered many statistical and other mistakes (in addition to improper sampling methods) that were made when these norms were constructed.

Publication of these findings caused the test publisher to send out a notice steering purchasers away from using the Mexican norms and urging them to use the U.S. norms.

(DPID at 146)(emphasis added). This is exactly what Dr. Weinstein did. The Court's credibility finding against him for applying science correctly cannot stand in light of *Hall*.

A second error of the accepted science as it applies to *Atkins* cases is the State psychologist's use of inappropriate malingering tests. The lower court found that Arbelaez failed to prove that his IQ is actually under 70 because the State's expert, Dr. Suarez, believed that Arbelaez was malingering.

The lower court found that "Defendant went to great lengths to discredit the testing methods of Dr. Suarez in determining that Defendant was malingering." The record reflects that Dr. Suarez administered three tests purportedly to show if Arbelaez was malingering. The AAIDD specifically discusses the issue of malingering tests in an ID evaluation in the *The Death Penalty And Intellectual Disability*. It discusses all of the three tests administered by Dr. Suarez – the Dot

Counting Test, the Validity Indicator Profile (VIP), and the Minnesota Multiphasic Personality Indicator -2 (MMPI-2). The AAIDD states that:

These tests may have shown some usefulness in determining feigned performances in research settings, often with psychology students asked to feign a specific type of illness or condition, but **the use of the original normative data for these tests is inaccurate because the standardization sampling representation typically did not include a group of people with ID. Reviews of these tests have indicated that their reliability and validity are highly suspect** (citation omitted).

(DPID at 271) (emphasis added).

The chapter continues to explain that these tests were not intended to determine malingering in an ID evaluation; that people with ID will typically malingering psychiatric symptoms rather than ID; that many people with ID become frustrated during testing, which is often confused with malingering. Once again, the lower Court's findings are not supported by the science of ID and cannot withstand *Hall*.

c. Adaptive functioning

At the time of the evidentiary hearing and subsequent order, the lower court was bound by this Court's holding in *Jones v. State*, 966 So. 2d 319 (2007). In the application of *Jones* in *Arbelaez's* case, this Court unreasonably applied *Atkins*. *Arbelaez v. State*, 72 So. 3d 745 (2011). The diagnostic methodology required by this Court in *Jones v. State*, 966 So. 2d 319 (2007) is not based on scientifically

sound diagnostic methodology. This is because *Jones* requires clinicians to look at adaptive functioning concurrent with the intelligence testing, even though in accordance with scientific norms, adaptive functioning cannot be exhibited solely in a prison setting, observed solely by prison personnel, or assessed by an expert psychologist solely in a prison setting.

Florida defines the term “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” Fla. Stat. § 921.137(1) (2005); *accord* Fla. R. Crim. P. 3.203(b). This is consistent with the AAIDD definition and the DSM-IV-TR definition. However, in *Jones v. State*, this Court determined that the question is “whether a defendant ‘is’ mentally retarded, not whether he was.” *Jones*, 996 So. 2d at 326. This Court then went on to set up the options as a black and white choice between assessing adaptive functioning in the present time, notwithstanding the impossibility of so doing in a prison environment, and assessing it before the age of 18. As noted *supra*, the recommended scientific methods of assessing adaptive functioning do not fall easily into either category, but rather require a longitudinal analysis utilizing information from as many sources as possible. The *Jones* opinion was predicated upon a plain language construction analysis of Fla. Stat. § 931.137(1). The statute reads in relevant part:

As used in this section, “mental retardation” means significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

See Jones, 996 So. 2d at 325. This Court then continued to conclude that:

The first step in determining the meaning of a statute is to examine its plain language. When the language is clear and unambiguous, as it is here, we have no need to resort to rules of statutory construction to determine the legislature’s intent. Further, words must be given their plain meaning, and statutes should be construed to give them their full effect.

Jones, 996 So. 2d at 327. This Court then went on to state that because intellectual functioning must be assessed at the time of testing, then adaptive functioning must be assessed at that time as well. *See Jones* 996 So. 2d at 326. This in turn, according to this Court, means that adaptive functioning displayed by the individual at any time prior to incarceration is irrelevant to the *Atkins* determination in Florida postconviction death penalty cases.

This Court cites to the DSM-IV notation that:

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

Jones 996 So. 2d at 327. It is this one caveat, taken out of context that led this Court to insist that the clinical diagnosis of ID must be done at the same time as the

assessment of IQ, notwithstanding the impossibility of so doing in a high security prison.

AAIDD specifically addresses this issue in *The Death Penalty And Intellectual Disability*. It states in pertinent part that:

[a]lthough, as noted earlier, current functioning cannot be validly assessed for a person who is incarcerated, judges may require that current functioning be assessed in *Atkins* cases. There are validity limitations when conducting such an evaluation. For instance, the administration of an AB scale to an individual who is familiar with the defendant's prison behavior (e.g., corrections officers, the defendant) would not yield a valid measure of adaptive behavior. Many items on AB scales cannot be answered for incarcerated individuals, and thus incarcerated persons were not included in the standardization sample of these scales.

(DPID at 189) . The manual goes on to specifically cite *Jones* as “inconsistent with accepted methodology in the field.” (DPID at 297) . *Jones* cannot withstand *Hall*.

The *Atkins* evidentiary hearing record is replete with evidence that Arbelaez suffers from adaptive deficits in several areas, and has for his *entire* life. In denying relief based on Dr. Weinstein administration of the ABAS, the lower court disregarded much, if not most, of the Weinstein's adaptive functioning testing, which was the basis for his expert opinion. Dr. Weinstein's opinion that Arbelaez has significant adaptive deficits was based on the entirety of his *longitudinal* evaluation. This was entirely in accordance with accepted practice in the field. As

noted in the *The Death Penalty And Intellectual Disability*:

Forensic assessments of ID, particularly in the context of death penalty litigation, require in-depth investigations, past and present, of both intellectual functioning and adaptive behavior. The requirements for a competent and effective forensic assessment of neurobehavioral functioning, including that which should be done in cases where ID is hypothesized, was recently set out (citations omitted). The comprehensive approach to assessment means that the mental health professional must consider the validity and reliability of any and all previous assessments (and diagnoses), as well as the possibility of various types of errors or inaccuracies in past testing protocols, in interviews with the subject's family, in reviewing often subjective school records, and even in the various social contexts in which the individual was raised.

(DPID at 263-264).

As Dr. Weinstein testified, it is important to obtain convergently valid information from as many sources as possible in order to build a complete picture. Thus a retrospective and longitudinal evaluation is the only appropriate methodology in forensic evaluations for ID in death penalty cases. It is not sufficient to rely on prison guards. The lower court's complete discount of Dr. Weinstein's opinion should be reversed, since it cannot withstand *Hall*. Dr. Weinstein's evaluation comports with the essential requirements of *Hall* - that scientifically accepted methodology be utilized in *Atkins* cases.

d. Age of onset

The lower court and this Court did not address the age of onset of Arbelaez's

disability, however, the record together with *Hall* and the AAIDD demonstrate that if the court had followed the scientific reasons for Dr. Weinstein's choice of method and test results, there is ample evidence that he has been ID all his life.

e. Dr. Suarez and Dr. Ruiz were not qualified to evaluate Arbelaez in an *Atkins* evaluation.

It goes without saying that mental health professionals should be competent in the field of ID if they are to conduct an *Atkins* evaluation. The AAIDD is clear that this means more than just a forensic psychologist. As noted by the AAIDD in *The Death Penalty And Intellectual Disability*,

...[i]ntellectual disability differs so much from other forms of mental disorders, that training in mental illness alone does not, "without more," qualify one as an expert in ID; nor does such training guarantee the necessary competence required to testify as an "expert" in this area for the purposes of a legal proceeding. Thus, psychiatrists and psychologists who have specialized knowledge, training, and experience in the field of forensic mental health assessment are unlikely, "without more," to have the necessary expertise to perform an *Atkins* assessments or possess the required clinical judgment (citations omitted). Moreover, this is a bidirectional problem. Because of the legal context of *Atkins* assessments, even the most skilled and professional in the field of ID also may not, "without more," be sufficiently prepared to meet the ethical and professional demands as required by the nature of the forensic role associated with performing *Atkins* assessments.

(DPID at 327). As such, experts called to testify are not to base their expert opinion on law and ignore the standards of their profession, as Dr. Suarez did here. An

expert's testimony should and must be based on the standards of their medical and scientific communities. Dr. Suarez's failure to know and apply the prevailing standards of practice should render his testimony inadmissible under *Hall*. This Court should make clear that to be admissible, expert testimony must address the community standards of experts in the same field.

The *Hall* Court struck down this Court's first-prong standard because it "disregard[ed] established medical practice" 134 S. Ct. at 1995. Requiring "competent" or "compelling" evidence despite acknowledging that the medical standard is "some indication or some reason to suspect," or "not zero evidence" is unconstitutional under *Hall*. Expert testimony premised on the statute that may or may not comport with medical community standards should not be admissible. The *Hall* Court ruled as it did because "[t]he SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* at 1995. While the *Hall* Court was clear that the views of the medical community "do not dictate the Court's decision," it made clear that courts could not "disregard these informed assessments." *Id.* at 2000 (emphasis added). In other words, courts are not a slave to any consensus of the medical community, but in circumstances as in *Hall* where the courts create a legal fiction more restrictive than the medical community's standard and contrary to the reality of a situation, the Eighth Amendment will be offended. There is no ID other than the medical

reality of ID. Use of a legal standard for any aspect of the enquiry that prevents ID defendants from receiving *Atkins* protection violates the principles underscoring *Hall*.

f. Retroactivity

Witt v. State, 387 So. 2d 922, 931 (Fla. 1980) sets forth the test for whether a case can be applied retroactively under Florida law. Under *Witt*, in determining whether a change in the law should apply retroactively the Florida courts must balance the competing needs for decisional finality with the concern for fairness and uniformity. Pursuant to *Witt*, a change will apply retroactively if it (a) emanates from either the United States Supreme Court or the Florida Supreme Court; (b) is constitutional in nature; and (c) constitutes a development of fundamental significance.

It is clear that the first two prongs of the *Witt* test are met. *Hall* emanates from the United States Supreme Court. It is constitutional in nature since it involves the categorical ban on executing persons with ID under the Eighth Amendment. As to the third prong, in *Witt*, the Court stated that although "specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories. *Id* at 929. The first are those changes of law "which place beyond the authority of the State the power to

regulate certain conduct or impose certain penalties,” and the second are “those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the threefold test of the United States Supreme Court decisions in *Stowell v. Denno*, 388 U.S. 293 (1967) and *Linklater v. Walker*, 381 U.S. 618 (1965) “The threefold analysis under *Stowell* and *Linklater* includes analysis of (a)the purpose to be served by the new rule; (b)the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” *Witt*, 387 So. 2d at 926. *Hall* constitutes a development of fundamental significance under both categories to the instant situation.

Here as noted *supra*, *Hall* prevented the State from imposing the bright line IQ cutoff test mandated by this Court in *Cherry*. It also required the states to look to science and the field of expertise in ID in determining how to evaluate ID in death penalty cases. As such, it limits the power of the Florida courts to substitute scientific methodology with its own more restrictive methods. Pursuant to *Hall*, a category on individuals will be rendered ineligible for the death penalty whose claims of ID have hitherto been rejected. As this Court stated in *Witt*, “[c]onstrutions of fairness and uniformity make it very difficult to justify depriving a person of his liberty or life under process no longer considered acceptable and no longer applied to indistinguishable cases.” *Id* at 925. The first

category of fundamental significance is met here.

The second category is also met. The purpose to be served by applying *Hall* is to prevent the execution of individuals who meet the clinical definition of ID, pursuant to *Atkins*. The Florida Courts have relied extensively on case law and statutory interpretation that are based on scientifically unsound methodologies to deny relief to individuals who meet the clinical definition of ID. The effect on the administration of justice will be that people who properly meet the clinical definition of ID, but who nevertheless have been denied relief, will in fact not be executed. Not holding that the new standard is retroactive would mean that ID defendants, who have shown that they meet the definition of ID, risk being executed. This is contrary to the interests of justice. This the application of *Hall* in Florida must be found to be retroactive under Florida law.

g. The lower court's finding is erroneous

The lower court summarily denied the Rule 3.851 motion. It found that *Hall* does not create a new right, and that *Hall* has “no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning”. (PCR4. 90). This reasoning is inherently flawed. As noted *supra*, *Hall* makes it plain that although *Atkins* gave the states discretion to develop a methodology of determining ID in death penalty cases, that methodology should not disregard the scientific

consensus. The lower court's order, taken to its logical conclusion, would lead to a situation in which evaluations would be required to utilize accepted science in determining IQ, but to disregard it when determining adaptive functioning. *Atkins* itself refers explicitly to the APA and the then AAMR. *Hall* makes it clear that the practice of disregarding science was never the intention of *Atkins*, as Arbelaez has maintained throughout his *Atkins* litigation. *Hall* is clear that death sentenced inmates who have alleged that they are ID have the right to be assessed according to prevailing science, a right hitherto denied to Arbelaez.

The lower court further finds that Arbelaez “does not have deficits in adaptive functioning,” by citing to this Court's affirmance of the denial of Arbelaez's *Atkins* relief. (PCR4. 90). That finding cannot stand in light of *Hall*. This Court should grant relief.

h. Evidentiary hearing

Arbelaez requested an evidentiary hearing on this claim. (PCR4. 60). At the 2009 evidentiary hearing Arbelaez presented the testimony of Dr. Oakland and Dr. Tasse, as noted *supra*. These highly qualified experts testified about the appropriate method of diagnosing ID in an incarcerated individual. The witness list that Arbelaez submitted at the 2015 Case Management Conference, contains the names of five additional experts, each of whom would be able to testify as to the specific scientific issues that arose in Arbelaez's case. (PCR4. 182). Each of these

five experts contributed to *The Death Penalty And Intellectual Disability*, published by the AAIDD in January 2015. Each has researched and published extensively in the field. Dr. Caroline Everington is an authority on adaptive functioning. She co-authored the chapter in the AAIDD book entitled “Challenges in Assessment of Adaptive Behavior.” (PCR4. 94). This chapter deals with the impossibility of conducting an adequate adaptive behavior assessment in a prison setting. Dr. Stephen Greenspan is a world authority on IQ tests. He co-authored the chapter entitled “Variability of IQ Scores,” which deals inter alia with the problems in the Mexican norms associated with the Mexican WAIS-III, and the corresponding need to use U.S. norms with the Mexican WAIS-III – which is exactly what Dr. Weinstein did in assessing Arbelaez. Dr. Greg Olley was the other co-author of this chapter. Dr. Denis Keyes is another luminary in the field of ID. He co-authored the chapter entitled “Retrospective Diagnosis and Malingering,” which deals with the need to do a retrospective diagnosis in determining adaptive functioning in ID cases involving the death penalty, and the scientific unsoundness of this Court’s decision in *Jones*. The chapter also addresses the scientific inappropriateness of utilizing certain instruments, specifically the MMPI-2 and the VIP, in individuals who might be ID. Finally Dr. Marc Tasse is a co-author of the chapter entitled “Professional Issues in *Atkins* Assessments.” This chapter addresses the need for the professionals involved in death penalty ID cases

to be properly qualified as specialists within the ID field, and not mere forensic psychologists.

Guillermo Arbelaez is intellectually disabled and was diagnosed in accordance with prevailing professional criteria and accepted scientific methodology. The lower court, and this Court, wrongly applied and accepted scientifically unsound methodologies in determining that he did not prove his intellectual disability. The United States Supreme Court has been clear that diagnostic methodology required by the courts must be scientifically sound. *Hall*, 134 S. Ct. at 1998 (2014); *see also Lane v. Alabama*, ___ S. Ct. ___, WL 3511284 (2015) (Granting certiorari, vacating judgment, and remanding for further consideration in light of *Hall v. Florida*, in light of the state court’s rejection petitioner’s evidence of intellectual disability in a legal opinion “untethered to any professional standard.”). The courts should not accept unscientific and unsound diagnostic methods when it comes to determining who is intellectually disabled.

CONCLUSION

Based on the foregoing, Guillermo Arbelaez requests that this Court issue an order granting his motion and find him intellectually disabled, vacate his death sentence and resentence him to life in prison, or in the alternative, remand his case to the lower court for an evidentiary hearing, or any other such relief as the Court deems appropriate.

Respectfully submitted,

/s/ Rachel Day

RACHEL L. DAY

Assistant CCRC-South

Florida Bar No. 0068535

dayr@ccsr.state.fl.us

Capital Collateral Regional Counsel - South

1 East Broward Boulevard, Suite 444

Fort Lauderdale, Florida 33301

Tel: (954) 713-1284

Fax: (954) 713-1299

COUNSEL FOR MR. ARBELAEZ

CERTIFICATE OF COMPLIANCE

I further certify that the foregoing Initial Brief has been produced in a 14 point Times New Roman type, a font that is not proportionately spaced and in compliance with Fla. R. App. Pro. 9.220 and 9.100(1).

/s/ Rachel Day
RACHEL L. DAY
Assistant CCRC-South
Florida Bar No. 0068535

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided to the opposing counsel by electronic mail this 19th day of November 2015.

/s/ Rachel Day
RACHEL L. DAY
Assistant CCRC-South
Florida Bar No. 0068535

Copies provided to:

Sandra Jaggard, Assistant Attorney General
Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
Sandra.Jaggard@myfloridalegal.com