Filing # 35848977 E-Filed 12/22/2015 05:49:13 PM

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

REPLY 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, 12/22/2015 05:53:41 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO STATEMENT OF THE CASE AND FACTS 1

REPLY TO ARGUMENT 1

***HALL V. FLORIDA* RENDERS UNCONSTITUTIONAL THIS COURT'S RULING THAT ARBELAEZ DOES NOT MEET THE CRITERIA OF INTELLECTUAL DISABILITY.** 1

CONCLUSION.....10

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

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

Brumfield v. Cain, 135 S. Ct. 2269 (2015) 6

Falcon v. State, 162 So. 3d 954 (Fla. 2015) 9

Haliburton v. Florida, 135 S. Ct. 178 (2014) 8

Haliburton v. State, 163 So. 3d 509 (Fla. 2015) 8

Hall v. Florida, 134 S. Ct. 1986 (2014) 2, 3, 8, 10

Hitchcock v. Dugger, 481 U.S. 393 (1987) 9

In re Henry, 757 F. 3d 1151 (11th Cir. 2014) 7

In re Hill, 777 F. 3d 1214 (11th Cir. 2015) 7

Jones v. State, 966 So. 2d 319 (Fla. 2007) 3

Lane v. Alabama, 136 S. Ct. 91 (Mem)(2015) 8

Lockett v. Ohio, 438 U.S. 536 (1978) 9

Oats v. State, No. SC12-749, 2015 WL 9169766 (Fla. Dec. 17, 2015) 3, 4, 5, 6

Witt v. State, 387 So. 2d 922 (Fla. 1980) 7, 8

REPLY TO STATEMENT OF THE CASE AND FACTS

The State's Answer Brief comprises 64 pages, of which 54 pages comprises of the Statement of the Case and Facts. While there are numerous inaccurate and misleading characterizations of expert and lay witness testimony, there are also many arguments within this section. Arbelaez in no way accepts or concedes to the State's version of the history of the evidentiary proceedings in the above-styled cause. However, Arbelaez will concentrate on the State's argument, beginning on page 55 of the Answer Brief, and to the extent that the argument is bolstered by a misstatement of the facts, Arbelaez will address those individual inaccuracies. To the extent that Arbelaez does not address points argued by the State he relies on his Initial Brief. No argument therein is waived.

REPLY TO ARGUMENT

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

As noted *supra*, the State takes up the vast majority of the Answer Brief with its own version of the case and procedural history. The State does not address much of Arbelaez's argument, instead it relies on its own misinterpretation of Arbelaez's position on several, extremely generalized, points. As explained below, the State is in error.

First, the State asserts that Arbelaez "insists that *Hall* requires states to conform the legal definition of retardation [*sic*] to the views of the scientific community." (Answer at 55). The State has consistently asserted that Arbelaez takes issue with Florida's statutory definition of intellectual disability (ID). He does not. Instead, Arbelaez has asserted consistently through the litigation of this issue, that the heart of the problem is this Court's *interpretation* of the statute, whereby it has disregarded scientifically validated standards in favor of medically unsound methods.

The State further asserts that Arbelaez wants this Court to adopt the American Association of Individuals with Developmental Disabilities (AAIDD) definition of "retardation." (Answer at 56). The State misconstrues Arbelaez's argument. Rather, Arbelaez has argued that pursuant to *Hall*, this Court should "consult the medical community's opinions" and "consider the psychiatric and professional studies" . . . ." *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014). The *Hall* Court reasoned:

> [T]his 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. And 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. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.

Id. at 1993.

At the time of this Court's previous holding in Arbelaez's case, the Florida courts ignored much of the science behind IQ testing and scoring, and the assessment of adaptive functioning. *See Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011). There, this Court relied on *Jones v. State*, 966 So. 2d 319 (Fla. 2007), which requires clinicians to look at adaptive functioning concurrent with the intelligence testing, even though, in accordance with scientific norms, deficits in adaptive functioning cannot be exhibited solely in a prison setting, observed solely by prison personnel, or assessed by psychologists solely in a prison setting. This Court's decision in *Jones* is inconsistent with *Hall.*

Recently in *Oats v. State,* No. SC12-749, 2015 WL 9169766 (Fla. Dec. 17, 2015), this Court acknowledged that *Hall* "provided additional guidance pertaining to the necessary showing under *Atkins v. Virginia*, 536 U.S. 304 (2002), for establishing ineligibility for the death penalty as a result of an intellectual disability." *Oats v. State*, No. SC12-749, 2015 WL 9169766, at 2 (Fla. Dec. 17, 2015). As such, this Court determined,

> courts must be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability. See *Hall*, 134 S. Ct. at 1993. In other words, in determining the definition

> of an intellectual disability, the informed assessments of medical experts cannot be disregarded.

Id. (citations omitted) .

The State spends much of its argument explaining that the definition of ID requires that deficits in adaptive functioning be concurrent with subaverage IQ. (Answer at 61). Arbelaez has no quarrel with this definition. However the State does not address any of the scientific concerns raised by Arbelaez in this appeal as to the medical and scientific community's requirement that a longitudinal evaluation be performed when assessing adaptive functioning in death penalty cases. As Arbelaez explained in the Initial Brief, it is functionally impossible to assess adaptive functioning in a maximum security prison. Adaptive behavior is ultimately about choice and has to be observed. Prison guards in a prison setting cannot observe adaptive functioning because the rigid environment and highly structured conditions require inmates to adhere to a strict regimen, deviation from which results in punishment. As such, inmates on Death Row have very few choices that they can make without running afoul of the regimen. It is therefore impossible to observe adaptive functioning accurately in such an environment.

As noted further in the Initial Brief, the fact that the definition of ID requires concurrent subaverage IQ and adaptive deficits does not mean that the assessment can – or should – be made concurrently, especially given the restrictions of a maximum security prison environment. As the AAIDD has repeatedly advised, not

only is it possible, it is best scientific practice for a longitudinal evaluation of adaptive functioning to be done. The State does not address this fundamental point. It is, after all, acceptable – and indeed best practice – to do a longitudinal evaluation in certain ID cases not involving the death penalty, particularly where there has been no formal diagnosis of ID prior to the age of 18.

In order for a practitioner to opine on the third prong of the definition – age of onset – it is of the utmost importance to asses adaptive functioning prior to the age of 18 to assess the age of onset. That point was underscored by this Court's reasoning in *Oats* that there is a major difference between the *diagnosis* of ID prior to age 18, and the *manifestation* of ID before age 18. *Id.* at 11-12. A manifestation of ID must involve an observation of adaptive deficits prior to age 18. The State's position that it is only relevant to look at adaptive functioning at the time of the IQ assessment/diagnosis means that practitioners would never be able to diagnose ID unless a formal diagnosis had been made prior to the age of 18.

The same arguments apply to the IQ prong of ID. The State does not even bother to address Arbelaez's arguments that the current scientific methodology supports the use of United States norms with the Mexican WAIS-III. The lower court made a credibility finding against Dr. Weinstein for using the United States norms. The lower court disregarded the scientific evidence that supported the use of United States norms with the Mexican WAIS-III. The literature detailed in

Arbelaez's Initial Brief shows that it is not only acceptable but preferable for practitioners to utilize the United States norms, and that even the publishers of the Mexican WAIS-III urge practitioners to do so.

Furthermore, in *Oats* this Court acknowledged that the United States Supreme Court in *Hall,* and recently *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), has held "that all three prongs generally must be considered in tandem." *Id.* at 1. As noted in the Initial Brief, the lower court and this Court failed to address the third prong of the definition. There was ample evidence from lay witnesses that Arbelaez suffered adaptive deficits throughout his life which would support a finding of age of onset prior to 18. Dr. Weinstein spoke to a family members, friends, teachers and priests in Colombia who had personally observed Arbelaez as a child and as a teenager. Those witnesses testified about his struggles with school, his struggles with money, and other evidence of adaptive deficits. No Florida court has ever addressed the issue of onset before age 18 in Mr. Arbelaez's case.

The State does not address the scientific concerns about the malingering tests administered and relied upon by the State's psychologist Dr. Suarez or the fact that those tests are scientifically inappropriate for an ID evaluation. Again, if this Court is to be informed by the science relating to malingering in death penalty cases in which ID is an issue, it must take that into account as well.

The State argues that the Eleventh Circuit has recognized that *Hall* has not

been held to be a retroactive change in law, as though this is the end of the inquiry in this Court. (Answer at 57). While the State is correct that the Eleventh Circuit Court of Appeals has ruled that the *Hall* decision is not retroactive, *In re Hill*, 777 F. 3d 1214, 1223-24 (11th Cir. 2015); *In re Henry*, 757 F. 3d 1151, 1158-61 (11th Cir. 2014), this Court has yet ruled on whether it should apply retroactively. *Hall*'s retroactivity in Florida cannot be controlled by the Eleventh Circuit Court of Appeals because the Court's analysis in *Hill* was guided by federal principles and the restrictions under Antiterrorism and Effective Death Penalty Act of 1996. The correct standard in this Court is *Witt v. State*, 387 So. 2d 922 (Fla. 1980). And while it is true that this Court has not formally held that *Hall* is retroactive under *Witt*, it certainly has not said that it is not retroactive. Indeed the Court's reversal in *Oats* on appeal from a successive postconviction motion, suggests that retroactive application of *Hall* is appropriate.

The State further asserts that the change of law in *Hall* does not meet the standard for retroactivity under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). (Answer 58). The State argues that *Hall* is not new law but simply an "evolutionary refinement" of "procedural fairness" that "permits defendants with IQs between 70 and 75 the opportunity to present evidence regarding other elements of retardation [*sic*]." (Answer at 59). However, *Hall* is not merely a refinement of the *Atkins* decision. The specific holding in *Hall* regarding IQ scores between 70 and 75 was

derived from *Hall's* broader holding that the Florida courts' *Atkins* jurisprudence cannot be more restrictive than the medical and clinical realities of diagnosing mental health conditions. *Hall*, 134 S. Ct. at 1999.

Indeed both federal courts and Florida courts have broadly applied the findings in *Hall* in granting evidentiary *Atkins* relief. In *Lane v. Alabama*, 136 S. Ct. 91 (Mem)(2015), the United States Supreme Court remanded pursuant to *Hall* where the Alabama courts had ignored medical and scientific expertise regarding adaptive functioning and improperly applied their own standardless analysis to the question of Lane's intellectual capacity. Similarly, in *Haliburton v. Florida*, 135 S. Ct. 178 (2014), the United States Supreme Court granted Haliburton's petition for writ of certiorari, vacated defendant's judgement, and remanded the case to this Court for further consideration in light of *Hall*. This Court then vacated its order of affirmance and remanded the case for an evidentiary hearing. *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015). Both *Haliburton* and *Lane* demonstrate the U.S. Supreme Court's commitment to its broader holding in *Hall*, and its intent that the *Hall* decision apply retroactively.

In *Witt*, this Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Witt*, 387 So. 2d at 925. If *Hall* is not

applied retroactively intellectually disabled death row inmates will be executed while others with indistinguishable cases will not merely because their convictions and sentences were not final when the *Hall* decision was issued. *See Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015). That is what would occur if Arbelaez is not given the benefit under *Hall*.

The State argues that the instant claim was barred because "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" (Answer at 62). Here the grounds for relief under the instant proceeding were not available at the time of the 2009 evidentiary hearing. *Hall* was decided in 2014, and *Brumfield v. Cain* in 2015. Clearly the lower court did not have the benefit of *Hall* and its progeny when it denied relief to Arbelaez in 2009. These opinions were not known at the time of the evidentiary hearing or this Court's affirmance of the lower court's denial of relief.

An analogous situation arose when this Court was limited in its construction of *Lockett v. Ohio,* 438 U.S. 536 (1978). This Court originally held that *Lockett* did not apply to Florida. However, after the United States Supreme Court decided *Hitchcock v. Dugger*, 481 U.S. 393 (1987), this Court revisited its *Lockett* decisions, having realized the error in its Eighth Amendment jurisprudence. The

same action is required under *Hall* and *Atkins.* This Court's restrictive holding in the instant case, as well as in *Jones*, cannot withstand *Hall*. The Eighth Amendment guarantees that persons facing the "most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall,* 134 S. Ct. at 2001.

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(l).

/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 22nd day of December 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