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

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

The State relies on the statement of case and facts in its answer brief.

SUMMARY OF THE ARGUMENT

The matter is on appeal from the summary denial of a motion for postconviction relief that only raised a claim that Defendant was entitled to re-litigate his claim that he is retarded in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). In spite of the fact that Appellant, Guillermo Octavio Arbelaez ("Arbelaez" or "Appellant") had an evidentiary hearing on his claim of Intellectual Disability and this Court found that "Arbelaez did not prove that he has concurrent deficits in adaptive behavior" *Arbelaez v. State*, 72 So.3d 745 (Fla. 2011) (Table), he asserts *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Hall v. State*, 41 Fla. L. Weekly S372, 2016 WL 4697766 (Fla. Sept. 8, 2016); and *Oates v. State*, 181 So.3d 457 (Fla. 2015) necessitate a finding of ID and that he be found ineligible for the death penalty. *Hall v. Florida* and its progeny do not open up the settled determination that Arbelaez has failed to prove deficits in adaptive behavior, for additional scrutiny. Summarily rejecting Arbelaez's May, 2015 successive motion based on *Hall v. Florida*, the trial court recognized the *Hall v. Florida* had no impact on the assessment of deficits in adaptive functioning and that Arbelaez had no such deficits as affirmed by this Court in *Arbelaez*, 72 So.3d at 745. Arbelaez has not shown manifest injustice to overcome the application of the law of the case

doctrine to gain another review of that settled fact. This Court should affirm the summary denial.

ARGUMENT

DEFENDANT'S REQUEST FOR RELIEF BASED ON *HALL V. FLORIDA; HALL V. STATE;* AND *OATS V. STATE* SHOULD BE REJECTED.

Arbelaez contends that he is entitled to have his death sentence vacated and a life sentence imposed in light of the decisions in *Hall v. Florida*; *Hall v. State*; and *Oats v. State*. He challenges the factual and credibility findings made regarding the first (IQ) and second (concurrent adaptive functioning deficits) prongs of his ID claim after his 2009 evidentiary hearing and affirmed in *Arbelaez*, 72 So.3d at 745. For support, Arbelaez asserts that *Hall v. Florida* has been made to apply retroactively in *Walls v. State*, 2016 WL 6137287 (Fla. 2016) and suggests this permits another review of that final decision. While this Court has held *Hall v. Florida* to be retroactive, it does not permit a second review here. This Court's determination that Arbelaez did not prove "concurrent deficits in adaptive behavior" is the law of the case and manifest error has not been shown to recede from that determination.

A. LAW OF THE CASE

Twice previously, Arbelaez attempted to prove he is ID and twice the claim was rejected. In his post-*Atkins v. Virginia*, 536 U.S. 304 (2002) litigation and

after an evidentiary hearing issued an 18-page order explaining the basis for rejecting the IQ and concurrent adaptive functioning deficit prongs of the ID claim. On appeal, this Court affirmed stating: "Arbelaez did not prove that he has concurrent deficits in adaptive behavior as required by section 921.137(1), Florida Statutes (2004), and Florida Rule of Criminal Procedure 3.203(b)." Arbelaez, 72 So.3d at 745. Under the law of the case doctrine, consideration of those issues actually considered and decided in a former appeal in the same case are barred from a second review. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001) (stating "[u]nder the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision[s] are based continue to be the facts of the case."). The exception to this rule arises where manifest injustice would result. *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997); *Thompson v. State*, --- So.3d ---, 2016 WL6649950 (Fla. Nov. 10, 2016)

Recently, in the context of an ID claim, this Court considered whether manifest injustice would result should the doctrine be applied to the defendant in *Thompson*. In finding manifest injustice, this Court focused on the directions it had given the trial court to apply *Cherry v. State*, 959 So.2d 702 (Fla. 2007), the trial court's major focus on the IQ score and the "bright line" cutoff score recognized in *Cherry*. *Thompson*, 2016 WL6649950 at *8-10. This Court cited Thompson's argument that while the trial "court spent more than four pages of its

order explaining how Thompson failed to prove the first prong, its only mention of prongs two and three was one paragraph on the last page of the order." *Thompson*, at *8. It was also most concerned that the direction to apply *Cherry* and its bright-line rule may have caused the trial court to reject the defense expert's IQ finding even though the trial court believed the defense expert credible. *Thompson*, at *10. This was supported by the trial court's finding that "[Thompson's] own expert, Dr. Sultan testified that his IQ is 71, which is above the threshold of 70." *Id*. The fear that manifest justice would result was summed up as:

> Simply put, it is impossible to know the true effect of this Court's holding in Cherry on the circuit court's review of the evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71–88. What is clear is that this Court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to Cherry, a case that has since been abrogated by the United States Supreme Court in Hall. The circuit court took Cherry into consideration at Thompson's intellectual disability hearing and in denying Thompson's intellectual disability claim, and this Court relied on Cherry to affirm the circuit court's order. Because of this reliance on Cherry's bright-line cutoff of 70 for IQ scores, Thompson has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall*, 134 S.Ct. at 2001.

Thompson, at *10.

These concerns are not present in Arbelaez's case rendering Thompson distinguishable. In fact, a review of the hearing, resulting order, and this Court's

affirmance on appeal establish unequivocally that Arbelaez had a full and fair hearing and that manifest injustice would not result should the law of the case doctrine be applied. Here, the trial court issued a detailed 18-page order addressing the IQ and adaptive functioning prongs. The IQ was rejected as not proven. This was found, not because of the score obtained (Full Scale IQ of 65), but because of the fact that the defense expert mixed the norming scales. The State's expert[1] testified it was improper and invalidated the result where the Mexican WAIS-III was given, but the United States' norms were used. (PCR4 vol. 36 6403). The trial court found Dr. Weinstein's, defense expert, using the United States norms with the Mexican WAIS "problematic" and noting "Dr. Weinstein himself stated IQ tests must be normed, explaining his consists of giving the test to a representative sample of the population with whom it is intended to be used." (PCR4 vol 36 6403). Given this, it is clear that the rejection of the IQ was not based on the Cherry bright-line, but on improper scoring (missing norming tables) and malingering. This Court's concern in *Thompson* is not present here.

Equally important, the concern that too much focus was placed on the IQ in Thompson is not present here. After detailing the efforts and evidence presented with respect to adaptive functioning deficits, the trial court found:

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[1] The Full Scale IQ obtained by the State's expert was 68, but Dr. Suarez determined the score was invalid because of Arbelaez's malingering. (PCR4 vol 36 6403)

In addressing the second element required to prove mental retardation, again Dr. Weinstein was the only Defense expert to testify as to Defendant's adaptive behavior. In reaching his conclusion, he placed considerable weight on the ABAS given to Defendant's mother and teacher. The Defense presented testimony from Dr. Thomas Oakland, one of the developers of the ABAS, to challenge Dr. Suarez's use of the ABAS with prison personnel. However, the testimony of Dr. Oakland equally challenges the validity of the use of the ABAS by Dr. Weinstein. According to Dr. Oakland, the ABAS respondents must be people who have knowledge of and frequent extended contact with the person being assessed. It is also important that the contact be recent. Of the two respondents Dr. Weinstein chose to administer the ABAS, one was Defendant's former elementary school Spanish teacher Flor Celina Arboleda-Palacio. The teacher's sole contact with Defendant was almost four decades ago when he was a student in her sixth grade Spanish class. She would see him for only one hour a day in class, rarely saw him after that year and never saw him again after he left Columbia for the United States. She conceded that she was a friend of Defendant's sister, was pained by the fact that he was facing the death penalty and wanted to help.

When Dr. Weinstein conducted his testing of Defendant's IQ in 2007, he made no attempt to obtain any information regarding Defendant's current adaptive behavior. He wholly relied on the use of a retrospective diagnosis, focusing on adaptive behavior during Defendant's childhood and early adult life prior to the crime in 1988. Additionally, all the testimony presented by Defendant's lay witnesses focused on this time period.

Defendant argues that a proper assessment of adaptive behavior involves a retrospective analysis of an individual prior to age 18. Defendant presented evidence through all three of his experts that this is the only proper

> way to assess adaptive behavior. Both Dr. Weinstein and Dr. Oakland insisted that the requirement that behavior deficits be concurrent with sub-average intelligence means before age 18. They disagree with Florida's legal interpretation that deficits in adaptive behavior must exist in the present; at the same time of the IQ testing. In making these arguments Defendant urges this court to ignore Florida Supreme Court's decisions by which it is bound.
>
> This Court finds that Defendant's reliance on a retrospective evaluation is not in compliance with the Florida Supreme Court's holdings in *Phillips* and *Jones* that found this type of evaluation is not sufficient to prove deficits in current adaptive behavior. Defendant made no effort whatsoever to present any evidence to show that he had present adaptive behavior deficits occurring contemporaneously with the determination of his IQ. Therefore, he has failed to meet his burden that he has deficits in adaptive behavior by either standard of proof.

(PCR4 vol 36 6403)

The trial court made credibility and factual findings which are supported by the record as set forth in the State's answer brief in this case and relied upon here. Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses. *See Cox v. State*, 966 So.2d 337, 357–58 (Fla. 2007). This Court has explained repeatedly that it is "highly deferential to a trial court's judgment on the issue of credibility" given the trial court's "superior vantage point." *Archer v. State*, 934 So.2d 1187, 1196 (Fla. 2006) (*quoting State v. Spaziano*, 692 So.2d 174, 178

(Fla.1997)). The propriety of the trial court's assessment of each ID prong was raised in the appeal in case number SC10-1038, briefed extensively, and resolved by this Court in *Arbelaez*, 72 So.3d at 745. There are no new facts and the intervening law, does not undercut the trial court's resolution of the IQ and adaptive functioning deficit prongs. This Court should apply the law of the case doctrine and affirm the summary denial of Arbelaez latest attempt to prove ID.

B. ARBELAEZ DID NOT ESTABLISH HIS IQ

Arbelaez challenges the trial court's 2009 findings on the IQ prong and points to *Cardona v. State*, 185 So.3d 514 (Fla. 2016). As set forth above, the trial court rejected Arbelaez's offering of his IQ not only because it found the State's expert's finding of malingering, but that Dr. Weinstein's "use of norming data other than that intended for the test given invalidates the results." These are credibility findings due deference.

Here, Arbelaez asks that accommodations given in *Cardona*, 185 So.3d at 526-27 be afforded to him as well. However, the accommodations provided in Cardona are not at issue here and do not alter the fact that Arbelaez's scores are invalid. The State score is invalid because of malingering. Clearly, Cardona does alter that factual finding. More important, the accommodations in Cardona do not provide for mixing of tests from Mexico with scoring/norming results from the United States. In finding the mixing of the test from Mexico and the United States

norms "problematic" the trial court in essence found Dr. Suraez's testimony more credible. 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). Deference is owed that finding; and nothing in Cardona or any intervening law calls that finding into question.

C. FINDINGS ON ADAPTIVE FUNCTIONING BEHAVIOR

The State relies on its answer brief setting forth the facts developed during the 2009 evidentiary hearing and which support this Court's conclusion that "Arbelaez did not prove that he has concurrent deficits in adaptive behavior." *Arbelaez*, 72 So.3d at 745. The time to challenge the adaptive functioning findings was in the prior appeal. Noting in Hall v. Florida or its progeny call into question those findings. As explained above, the law of the case should be applied. The rejection of the ID claim was not based on only one prong, but on the evidentiary failings.

D. *OATS V. STATE* DOES NOT REQUIRE A NEW EVIDENTIARY HEAIRNG

Arbelaez points to Oats to suggest there should be a reassessment of his ID claim.

Oats is distinguishable from the procedural and factual determinations made in the instant case. Again, the rejection of the IQ prong was based on malingering found on one score and the improper mixing of the Mexican test and United States WAIS data. That determination is not implicated by Hall v. Florida and its progeny. Likewise, the factual findings of lack of adaptive functioning deficits are supported by the record. The evidence was considered in concert and rejection of the ID claim was not based on one prong to the exclusion of the others. This Court should find that Arbelaez had a full and fair airing of his claim and that airing met constitutional muster even though it was conducted prior to the issuance of *Hall v. Florida* and *Walls v. State*. The trial court's summary denial of relief should be affirmed.

CONCLUSION

For the foregoing reasons, the denial of the successive motion for postconviction relief should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by email through the e-portal to: Rachel Day, Esq., dayr@ccsr.state.fl.us, 1 E. Broward Blvd., Suite 444, Ft. Lauderdale, Florida 33301, this 21st day of

November 2016.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2).

Respectfully submitted,

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