

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**

SUPPLEMENTAL 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, 11/09/2016 09:18:54 PM, Clerk, Supreme Court

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Arbelaez's successive motion for postconviction relief which was summarily denied by the trial court. The motion was brought 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. #)” – page number on direct appeal to this Court;

“(PCR. #)” – page number on first postconviction appeal to this Court

“(PCR2. #)” – page number on second postconviction appeal to this Court

“(PCR3. #)” – page number on third postconviction appeal to this Court

“(PCR4. Vol. #, #)” – page and volume numbers on instant appeal to this Court

TABLE OF CONTENTS

PRELIMINARY STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE AND FACTS	3
A. Prior to the <i>Atkins</i> Evidentiary Hearing	3
B. The <i>Atkins</i> Evidentiary Hearing.....	3
i. The IQ Score Evaluation.....	4
ii. The Adaptive Functioning Evaluation	11
iii. The Manifestation of ID before 18 Years Old Evaluation.....	17
C. The Circuit Court’s denial, and this Court’s 2011 Affirmance	17
D. <i>Hall v. Florida</i> and its Progeny	19
ARGUMENT.....	20
A. Mr. Arbelaez is Intellectually Disabled	20
i. Prong One: IQ at 75 or below	20
ii. Prong Two: Concurrent Deficits in Adaptive Functioning and Retrospective Deficits in Adaptive Functioning.....	27
iii. Prong Three: Manifestation of Intellectual Disability before 18 Years Old.....	38
B. If Any Prong is deemed “Relatively Less Strong” than the Others, then <i>Oats</i> is instructive.....	39
CONCLUSION AND RELIEF SOUGHT.....	40
CERTIFICATE OF COMPLIANCE	43
CERTIFICATE OF SERVICE	43

TABLE OF AUTHORITIES

Cases

<i>Arbelaez v. State</i> , 72 So. 3d 745 (2011).....	2
<i>Cardona v. State</i> , 185 So. 3d 514 (Fla. 2016)	1, 21
<i>Furman v. Georgia</i> , 408 U.S. 238, 256 (1972).....	22
<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014).....	1, 2, 19
<i>Hall v. State</i> , No. SC10-1335 (Fla. 2016).....	passim
<i>Hurst v. State</i> , 2016 WL 6036978 (Fla. 2016).....	40
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	40
<i>Oats v. State</i> , 181 So. 3d 457 (Fla. 2015)	passim
<i>State v. Arbelaez</i> , Order, No. F88-5546 (Fla. 11th Cir. Ct. May 14, 2010).	14, 27
<i>Walls v. State</i> , 2016 WL 6137287 (Fla. 2016).....	passim

Other Authorities

AAIDD, <i>User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports</i> , 20 (2012)	28, 29
Edward A. Polloway ed., <i>American Association of Intellectual and Developmental Disabilities</i> (2015).....	4
Frederick, R.I., <i>Validity Indicator Profile Manual</i> (1997).....	8
Greenspan, S. & Olley, J. Gregory, <i>The Death Penalty and Intellectual Disability: Variability of IQ Test Scores</i> ,	4, 21
Keyes, D. & Freedman, D., <i>The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering</i> (2015).....	7, 9, 23, 25
Suen, H.K. & Greenspan, Stephen, <i>Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used With the Mexican WAIS-III in Capital Cases</i> , at 2 (2008).....	5, 21

Rules

Fla. R. Crim. P. 3.2033

SUMMARY OF ARGUMENT

Mr. Guillermo Arbelaez is, and has always been, intellectually disabled. In light of *Hall v. Florida*, 134 S. Ct. 1986 (2014), and this Court's recent decisions in *Hall v. State*, No. SC10-1335 (Fla. 2016), *Walls v. State*, No. SC15-1449 (Fla. 2016), *Oats v. State*, 181 So. 3d 457 (Fla. 2015), and *Cardona v. State*, 185 So. 3d 514 (Fla. 2016), this Court is now able to see that.

The circuit court relied upon a clearly unscientific basis to deny relief contrary to *Hall v. Florida* and its state progeny. All evaluating experts scored Mr. Arbelaez's IQ score below 70. Notwithstanding this, the circuit court concluded that Mr. Arbelaez did not meet his initial burden for the first prong of intellectual disability by discarding language and cultural accommodations that were made on his behalf. This violates *Hall v. Florida*, *Hall v. State*, *Cardona*, and *Walls*.

With regard to Appellee's evaluation on the first prong of intellectual disability, its expert, Dr. Enrique Suarez, opined that Mr. Arbelaez's IQ score, showing him well within the range of those diagnosed as intellectually disabled, could not be correct because he believed Mr. Arbelaez was malingering. These so-called malingering tests administered by Appellee's expert have numerous issues. Put mildly, the evaluation conducted by Dr. Suarez defied clinical standards. The circuit court relied upon Dr. Suarez's opinion of malingering to discredit the

evaluation conducted by Mr. Arbelaez's expert. Therefore, the circuit court relied upon unreliable science and clinical methods that are discordant with unified clinical standards in violation of *Hall v. Florida*, *Hall v. State*, *Oats*, and *Walls*.

The circuit court also failed to interpret the record before it, as the circuit court's holding relies upon a statement of fact that is in clear conflict with the record. Specifically, the circuit court alleged that Mr. Arbelaez's adaptive functioning evaluation was "wholly retrospective" when in fact his expert relied upon DOC prison and medical records, an academic achievement test, and his own observations. Consequently, the circuit court's analysis as to the second prong of intellectual disability is clear error in light of *Hall v. Florida*, *Hall v. State*, *Oats*, and *Walls*.

Finally, to the extent that any credibility determination can be made by a circuit court, a credibility determination should not be made contrary to clinical standards. If so, such a determination would violate *Hall v. Florida* and this Court's decisions in *Hall v. State* and *Walls*.

After the circuit court erred by failing to find Mr. Arbelaez intellectually disabled, this Court affirmed the circuit court's error in *Arbelaez v. State*, 72 So. 3d 745 (2011) by concluding that the second prong was unsatisfied. Accordingly, in light of this Court's recent precedent and the current record on appeal, it is clear that Mr. Arbelaez nearly slipped through the cracks because he is, and has always been,

among those persons who society deems unworthy of death. Mr. Arbelaez is intellectually disabled.

STATEMENT OF THE CASE AND FACTS

A. Prior to the *Atkins* Evidentiary Hearing

After the United States Supreme Court's issuance of *Atkins*, and Florida promulgated Florida Rule of Criminal Procedure 3.203, effective October 1, 2004, Mr. Arbelaez filed a postconviction motion, arguing that he was intellectually disabled. That motion was filed on November 30, 2004. (PCR2. 5-24). The circuit court summarily denied the motion. (PCR2. 58). Mr. 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*.

B. The *Atkins* Evidentiary Hearing

The evidentiary hearing commenced on June 23, 2009. Dr. Ricardo Weinstein, a clinical psychologist and forensic neuropsychologist, testified at Mr. Arbelaez's *Atkins* evidentiary hearing. Dr. Weinstein explained that a clinical diagnosis requires three basic elements: (1) low intelligence typically as measured by an intelligent quotient (IQ) two standard deviations below the mean, (2) concurrent impaired adaptive functioning, and (3) onset before the age of 18. After conducting an extensive evaluation of Mr. Arbelaez, he concluded that Mr. Arbelaez

met the clinical diagnosis for ID. (PCR3. 141-362). Unsurprisingly, Appellee's expert held a contrary opinion.

i. The IQ Score Evaluation

Regarding Mr. Arbelaez's IQ score, Dr. Weinstein determined that Mr. Arbelaez's IQ score is 65, well within the range of IQ scores consistent with an intellectual disability diagnosis. (PCR3. 171). Dr. Weinstein explained that his score was also consistent with Appellee's expert, Dr. Enrique Suarez, who obtained a full scale IQ score of 68.¹ (PCR3. 201). To determine Mr. Arbelaez's IQ score, Dr. Weinstein utilized the Mexican version of the Wechsler Adult Intelligence Scale-III (WAIS-III), which is administered in Spanish, as Spanish is Mr. Arbelaez's native language. The Mexican WAIS-III is "essentially identical to the U.S. version, except that the instructions and items are translated into Spanish." Greenspan, S. & Olley, J. Gregory, *The Death Penalty and Intellectual Disability: Variability of IQ Test Scores* at 145 (citing Edward A. Polloway ed., American Association of Intellectual and Developmental Disabilities (2015)). The Mexican version was administered because there were no other suitable or reliable IQ tests designed for Colombians. **"The technical manual [of the Mexican WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms."** Suen, H.K. & Greenspan,

¹ Dr. Weinstein and Dr. Suarez's scores are also consistent with a full scale IQ score that was determined by Dr. Ruth Latterner in 1995, as she scored Mr. Arbelaez with an IQ of 67. (PCR4. 282).

Stephen, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used With the Mexican WAIS-III in Capital Cases*, (2008) (emphasis added), (PCR4. 3093). However, the Mexican norms are now viewed as unreliable. In order to score Mr. Arbelaez's evaluation while also using the Mexican WAIS-III, Dr. Weinstein employed the American norms of the Mexican WAIS-III due to the clinical standards that professionally obligated him not to use the Mexican norms. Suen, & Greenspan, *Linguistic Sensitivity*, at 2. The Mexican norms lack scientific validity because "subjects with ID were excluded" in the development of the Mexican norms and "because of acknowledged problems in comprising a sample representative of the Mexican population." *Id.* Therefore, because of these and other errors,² the Mexican norms are so flawed in scientific validity that their use likely results in professional ethics violations within the clinical community. *See id.* at 3. (PCR4. 3094-96)

In fact, because of these statistical errors, **the test publishers of the Mexican WAIS-III sent notices that the Mexican norms for the test should not be used and that the U.S. norms[, which have always been an available norm-ing option,] should be used in its place.** Suen, & Greenspan, *Linguistic Sensitivity*, at

² The researchers that uncovered this error with the Mexican norms explained that the problems include: (1) poor or uninterpretable reliability, (2) the lack of a meaningful reference population; (3) the lack of score normalization; (4) lack of representation of certain groups; (5) use of incorrect statistics and calculations; (6) inappropriate use of the true score confidence interval method.

2 (emphasis added); Greenspan, S. & Olley, J. Gregory, *The Death Penalty and Intellectual Disability: Variability of IQ Test Scores*, at 145; (PCR4. Vol. 49, at 162-171) (showing Dr. Weinstein's opinion was based upon this reality). Therefore, according to Dr. Weinstein and the unified opinion on clinical standards, clinicians utilizing the Mexican WAIS-III always apply the U.S. norms in order to comport with the best professional practices.

Appellee's expert, Dr. Suarez, administered the Spanish version of the WAIS-III, normed in Spain to test Mr. Arbelaez's IQ. As stated earlier, Dr. Suarez scored Mr. Arbelaez's IQ to be 68, rendering Mr. Arbelaez's IQ score well within the range of those that are diagnosed as ID. Dr. Suarez opined that this score must be the result of malingering. In attempting to prove his theory of malingering, Dr. Suarez administered the Dot Counting Test, the Validity Indicator Profile ("VIP"), the Minnesota Multiphasic Personality Inventory ("MMPI"), and a "spelling test."

With regard to the Dot Counting Test, Dr. Suarez conceded that the test is only as valid as it is accurately timed, and he further conceded that the timing of the test is only as accurate as the quickness of a test administrator's reflexes to stop the stopwatch. (PCR4. Vol. 57, at 1022-1023). Dr. Weinstein also testified that the validity of the Dot Counting Test depends upon the accuracy of the timing. (PCR4. Vol. 49, at 206-07). However, Dr. Weinstein testified that he noticed Dr. Suarez tended to inaccurately chronicle his timing, as a video of Dr. Suarez's evaluation,

which came with a video chronometer, revealed that Dr. Suarez's timing was different than what he recorded. (PCR4. Vol. 49, at 206-07). Thus, any inaccuracies in Mr. Arbelaez's evaluation made it "very hard" to determine whether Mr. Arbelaez's put forward good effort or something else, as the video chronometer scored Mr. Arbelaez as putting forth good effort but Dr. Suarez's report timed him as putting forth something else. (PCR4. Vol. 49, at 208). According to Dr. Weinstein, therefore, Dr. Suarez's conclusion that Mr. Arbelaez was malingering is clinically inappropriate when, like Mr. Arbelaez, a person's score sits on the cut-off point between a passing score and a failing score. According to Dr. Weinstein, this is especially problematic when, like Mr. Arbelaez, there is evidence of timing inaccuracies. Finally, and further discussed below, the Dot Counting Test's reliability and validity when tested on intellectually disabled persons is clinically viewed as "highly suspect." Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271.

With regard to Dr. Suarez's use of the VIP, Dr. Oakland testified that the VIP "does not detect malingering among persons with [ID]." (PCR4. Vol. 54, at 483). In addition, the clinical community corroborates Dr. Oakland's opinion that the utilization of the VIP to detect malingering in intellectually disabled persons should also be viewed as "highly suspect." Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering* at 271. The

author of the VIP has also specifically warned against the use of that instrument to determine whether a person with an intellectual disability has put forth good effort in cognitive testing. Frederick, R.I., Validity Indicator Profile Manual (1997).

Further, with regard to Dr. Suarez's use of the MMPI to determine any malingering, Dr. Oakland testified that the MMPI is actually "a measure of pathology," meaning "problems that people have" like depression. (PCR4. Vol. 54, at 42-43). Dr. Oakland also explained that "an eighth grade reading level is required" of the individual being evaluated. (PCR4. Vol. 54, at 42-43). As such, according to Dr. Oakland, the MMPI is an inappropriate test for intellectually disabled persons because it requires a reading level that is "too high and its concepts are too advanced" for intellectually disabled persons. (PCR4. Vol. 54, at 42-43). Dr. Weinstein's testimony corroborates that of Dr. Oakland's; However, his testimony further explained that part of why the MMPI is unsuitable for intellectually disabled persons is because the test requires subjects to answer 567 yes or no questions. (PCR4. Vol. 50, at 281). As explained by Dr. Weinstein, one cannot expect intellectually disabled persons "for the most part to be able to sit down and pay attention for 567 items of responses." (PCR4. Vol. 50, at 281). Put simply by Dr. Weinstein:

If it's not a test that has any relevance to [IQ]...[,] it's not a test that has any relevance or information that could provide for adaptive behavior deficits, and it's not a test that you would expect an individual with [an intellectual disability] to be able to take, you don't use it in the [diagnosing] evaluation of [intellectual disability].

(PCR4. Vol. 50, at 282). The unified chorus of clinicians who developed the diagnostic framework for intellectual disability also have stated that the MMPI's usage for intellectually disabled persons is inappropriate.

Although held in significant esteem among many clinical psychologists, **[the MMPI] has nevertheless been determined to be of little or no use in identifying malingering of ID...** [E]ffort and attention are often confused with malingering... In addition, testing that makes little sense to a person may lead the person to answer as quickly as possible to get finished. For instance, **a person whose reading ability is lower than the MMPI requires, or just faced with the prospect of having to answer over 500 yes/no questions, may simply fill out the answer sheet to get done with the test, without reading, understanding, or caring about what the questions are asking.** People with ID are particularly susceptible to this sort of frustration.

Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271-72. Dr. Suarez did not test Mr. Arbelaez's reading, writing, or oral language skills. Dr. Weinstein did, however. Dr. Weinstein evaluated Mr. Arbelaez's reading, writing, and oral language skills by administering the Batteria Woodcock-Munoz. According to Dr. Weinstein, Mr. Arbelaez, consistent with an ID diagnosis, has third grade reading abilities, second grade math abilities, second grade writing abilities, and second grade written expression abilities. (PCR4. Vol. 49, at 177-78); (PCR4. Vol. 50, at 362). Thus, even though Dr. Weinstein supplied him with data that would have indicated that Mr. Arbelaez is not a suitable subject for the MMPI due to Mr. Arbelaez's reading level

and potential ID diagnosis, Dr. Suarez used a test that is well-known to be inappropriate for that population of persons.³

Dr. Sonia Ruiz, who evaluated Mr. Arbelaez in 2001, testified that she spent four hours with Mr. Arbelaez to evaluate him. Her evaluation determined that Mr. Arbelaez's IQ score was somewhere in the lower 70s. She arrived at this figure by administering the Raven Progressive Matrices, an IQ test authored in 1930. The WAIS and the Stanford-Binet are the only accepted tests for determining intellectual functioning in *Atkins* cases. Like Dr. Suarez, Dr. Ruiz also administered the MMPI as a malingering test to Mr. Arbelaez. Although she was aware that Mr. Arbelaez read at or below a fifth grade level, she relied upon her MMPI findings and decided that Mr. Arbelaez was not telling the truth during the evaluation.

It should also be noted that Dr. Weinstein employed his own malingering evaluations by administering tests designed to measure a person's effort. He administered the Test of Memory Malingering, the Rey 50 Item Test, and the

³ Dr. Suarez administered a "spelling test" of his own design by reviewing letters and grievances allegedly written by Mr. Arbelaez in prison. For what purpose, it is unclear. Counsel can only speculate that Dr. Suarez administered this test either to evaluate malingering, to determine academic achievement levels, or to satisfy his own curiosity. Regardless, however, this "spelling test" was not standardized, statistically validated, peer reviewed, published, and has no scientific validity whatsoever. (PCR4. Vol. 57, at 1024-25).

Computerized Assessment of Response Bias.⁴ His evaluations scored Mr. Arbelaez above the cut-off point. He also made his own personal observations throughout. Finally, the consistency between the WAIS and other tests given to Mr. Arbelaez over time suggest that good effort has always been employed by Mr. Arbelaez. As Dr. Tasse stated:

Usually, what we look at is consistency in results [and] consistency in evaluations that have been done. And usually that's a good indicator [that someone is not malingering]... It would be difficult to always get the same score on multiple repetitions on an intelligence test...

(PCR4. Vol. 51, at 392).

ii. The Adaptive Functioning Evaluation

Dr. Weinstein testified that he relied upon DOC prison and medical records, applied the Woodcock-Munoz to assess Mr. Arbelaez's functioning academic skills, and made his own observations throughout the evaluation. (PCR4. Vol. 50, at 265-271); (PCR4. Vol. 49, at 190). Dr. Weinstein elaborated that from prison records he was able to learn about Mr. Arbelaez's epilepsy and the daily reminders he receives to take his medication. His testimony explained that Mr. Arbelaez throws "tantrums" like a four year old child because he sometimes refuses to take his epilepsy medication based upon non-logical bases, such as the color of the pill, who hands it

⁴ Despite its name, as Dr. Weinstein testified, the Test of Memory Malingering is not a test of memory. It is actually a test of effort.

to him, and what time it is delivered to his cell. (PCR4. Vol. 50, at 265-271). According to Dr. Weinstein, this indicates that Mr. Arbelaez does not “have a *full understanding* that he needs to take the medications for the purpose of controlling a very dangerous condition.” (PCR4. Vol. 50, at 265-271) (emphasis added). Dr. Weinstein also revealed his reliance upon prison medical records when he stated that Mr. Arbelaez had to be isolated because of suicidal behaviors. (PCR4. Vol. 50, at 268).

Both his struggles with his medication and the need for isolation further supports Dr. Weinstein’s testimony that Mr. Arbelaez “continues to have emotional issues, [meaning] the ability to control his emotions.” (PCR4. Vol. 50, at 321). Also, the mere fact that Mr. Arbelaez has difficulty reading and writing beyond a third grade reading level, according to Dr. Weinstein, establishes that it “would prevent him from functioning independently without some support [in the real world].” (PCR4. Vol. 49, at 194).

Also of significance, Dr. Weinstein explained that maladaptive behavior, such as the commission of a crime, tends to reveal a deficit in adaptive functioning even though Appellee tried to use the commission of the crime and its surrounding facts as adaptive strengths. (PCR4. Vol. 50, at 340). His source for the opinion that maladaptive behavior tends to reveal an adaptive functioning deficit was the

AAIDD, the leading authority in diagnosing intellectual disability. (PCR4. Vol. 50, at 340).

With regard to other supports and Mr. Arbelaez's past, Dr. Weinstein stated:

Everything that people in the prison system receive [is] support, meaning food, shelter, people cannot live without that. [Incarcerated individuals] don't have to provide it for themselves. That is support. You can't say because that's what everybody gets it's not a form of support. They don't work. The case of Mr. Arbelaez's work was never an issue, but nutrition was an issue, having a place to live was an issue. People had to rescue him from living in his car and take him to his home, and then have to remove him from his home because he was inappropriate in his interactions... [H]e lived in the streets. He lived in his car. He had a history [of needing a highly-structured environment like a prison].

(PCR4. Vol. 50, at 332). Additionally, in conducting his adaptive functioning evaluation, Dr. Weinstein administered a retrospective ABAS-II filled in by Mr. Arbelaez's mother and teacher. (PCR4. Vol. 50, at 295); (PCR4. Vol. 49, at 191). This evaluation required Dr. Weinstein to ask people to recall to the best of their abilities regarding certain adaptive behaviors exhibited by Mr. Arbelaez. (PCR4. Vol. 50, at 295). 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 AAMR. Among the documents that were relied upon to assist in corroborating any deficits that tended to surface in the concurrent adaptive deficits evaluation, Dr. Weinstein testified that he relied upon Colombian school records and medical records. (PCR4. Vol. 49, at 189-90). According to Dr. Weinstein, Mr. Arbelaez.

“didn’t do very well” and recalled that he was “held back” a grade. (PCR4. Vol. 49, at 189-90). According to the circuit court, it acknowledged that Dr. Weinstein also received “consistent information” that Mr. Arbelaez was viewed as “different, shy, withdrawn, could not control his emotions, had tantrums, was slow in learning, had poor personal hygiene, did not play sports because he did not understand the rules, and [exhibited] strange unusual [behaviors]” as a child in Colombia. *State v. Arbelaez*, Order, No. F88-5546, at 6 (Fla. 11th Cir. Ct. May 14, 2010). The circuit court also acknowledged that “Dr. Weinstein also spoke to a number of people in Florida who knew [Mr. Arbelaez] including the mother of people he lived with, several friends, and his employer.” *State v. Arbelaez*, Order, No. F88-5546, at 6 (Fla. 11th Cir. Ct. May 14, 2010). His employer revealed that Mr. Arbelaez worked as a dishwasher and kitchen helper; however, he had “severe limitations in what he could do.” *Id.* The employer interview also revealed that Mr. Arbelaez could not understand that the deductions from his paycheck were the result of taxes. *Id.*

Dr. Suarez and Dr. Ruiz did not speak with anyone that knew Mr. Arbelaez prior to his incarceration. Indeed, neither of Appellee’s experts travelled to Colombia for corroborating testimony. Neither was able to make credibility determinations of Dr. Weinstein’s Colombian interviewees because they did not travel to Colombia. Neither met with anyone that knew Mr. Arbelaez in Miami prior to his incarceration even though their offices were conveniently located in Miami.

Instead, Dr. Suarez and Dr. Ruiz relied upon Mr. Arbelaez's self-reported history to determine whether Mr. Arbelaez suffered from concurrent deficits in adaptive functioning.

Dr. Suarez, distinct from Dr. Ruiz however, administered an additional test. Like Dr. Weinstein, he administered an ABAS. The persons he inquired to determine whether Mr. Arbelaez suffered from concurrent deficits in adaptive functioning were prison staff.

Dr. Oakland, the designer of the ABAS, strongly disapproved of this method. As an initial matter, there is no standardized adaptive behavior measure for people who have been incarcerated for years on death row, according to clinicians, because there is no normative data for a prison population. The ABAS is most commonly used in the school settings and involves subjects under the age of 18. It is desirable that the contact between the informant and the subject be extensive and recent. Instruments like the ABAS are normed "by assessing the skills of people in living in every day community." Dr. Oakland explained:

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. Basically, it refers to the extent to which a person accepts responsibility for their daily behavior [that is] independently displayed.

(PCR4. Vol. 54, at 488). According to Dr. Oakland, adaptive behavior assessments require that there be a "community," as defined by the clinical standards. (PCR4.

Vol. 54, at 578-79). Although Appellee tried to impose Merriam-Webster's definition of a "community" upon Dr. Oakland in order to discredit the clinical position, Dr. Oakland made it clear that a "community" means something else in the context of adaptive functioning evaluations. (PCR4. Vol. 54, at 609). As defined by Dr. Weinstein, a "community" means "the environment in which a person functions, which the person is expected to achieve a certain level of abilities." (PCR4. Vol. 50, at 288). But, according to Dr. Weinstein, that evaluation necessarily requires that the individual is not in a highly-structured environment like a prison. (PCR4. Vol. 50, at 343-44)

Dr. Oakland also testified that assessing adaptive behavior is simply not possible "within the setting similar to death row" because there are so few opportunities to exhibit relevant behaviors. For example, taking a shower or refusing to do so does not indicate an adaptive skill because Mr. Arbelaez is "not in an environment where he could decide when, to what extent, and how frequently he could take a shower." Wearing a prison issued uniform each day does not indicate an adaptive skill because Mr. Arbelaez does not have the option "to select the types of clothing that he wears or perhaps even if he can, whether he is allowed not to wear clothing." He further elaborated that using money is not an adaptive skill because one's "finances are highly restricted" in prison, and the items available for purchase "are so restricted that he has limited option[s] to determine how canteen money may

be used.” Because of these challenges, the ABAS, according to its designer, should not be used to inquire prison staff, as “corrections officers do not have the necessary information about community functioning to [provide] a valid score.” ABAS at 387. Dr. Weinstein also testified to the clinical view that interviewing prison guards was not useful to an adaptive functioning evaluation. (PCR4. Vol. 50, at 266-67),

Dr. Tasse echoed a similar opinion to Dr. Oakland and Dr. Weinstein. He explained that to evaluate adaptive behavior in an incarcerated person a clinician should “look at prison records” but afford “less weight...on prison records because it’s much more restrictive, highly confined, and [a] structured environment where adaptive behavior by definition occurs in a non-structured general community setting.” (PCR4. Vol. 51, at 394).

Notwithstanding the unified clinical opinion that prison guards have little to no value in assisting in the assessment of adaptive functioning, the only persons that Dr. Suarez interviewed were corrections officers. And, his evaluation solely relied upon his usage of the ABAS. Dr. Ruiz made no standardized adaptive functioning evaluation. She merely relied upon her general observations.

iii. The Manifestation of ID before 18 Years Old Evaluation

Because much of the testimony that occurred regarding prong two overlaps with prong three, all relevant facts are stated in other parts of this brief.

C. The Circuit Court’s denial, and this Court’s 2011 Affirmance

The circuit court denied relief. As to prong one, Dr. Weinstein’s decision to apply the U.S. norms, as opposed to the Mexican norms, ultimately became the focal point of the circuit court’s denial of relief. *State v. Arbelaez*, Order, No. F88-5546, at 16 (Fla. 11th Cir. Ct. May 14, 2010).

As to prong two, the circuit court stated that Dr. Weinstein “made *no attempt* to obtain any information regarding [Mr. Arbelaez’s] current adaptive behavior.” *Id.* at 17 (emphasis added). It further stated that Dr. Weinstein “*wholly relied* on the use of a retrospective diagnosis.” *Id.* (emphasis added). The circuit court also stated that Dr. Weinstein “placed *considerable weight* on the [retrospective] ABAS” administered by him. *Id.* at 16 (emphasis added). The circuit court made no mention that a Woodcock-Munoz evaluation assisted in determining Mr. Arbelaez’s deficits in functional academic skills. It made no mention of Dr. Weinstein’s observations or extensive clinical experience to detect behaviors that are typical in intellectually disabled persons. It made no mention that Dr. Weinstein relied on DOC prison and medical records.

The circuit court declined to address prong three. *Id.* at 17. On appeal, this Court affirmed the lower court’s oversight by stating that the second prong of intellectual disability was not satisfied.

D. *Hall v. Florida* and its Progeny

On May 27, 2014, the United States Supreme Court issued its opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Mr. Arbelaez timely filed a Rule 3.851 motion predicated on *Hall v. Florida* on May 8, 2015. Following a case management conference, the lower court summarily denied the motion on June 18, 2015. Briefing was complete and this case was submitted to this Court without oral argument by December 23, 2015.⁵

After *Hall v. Florida*, this Court issued a series of decisions that related to the determination of intellectual disability. *See Oats v. State*, 181 So. 3d 457 (Fla. 2015); *Cardona v. State*, 185 So. 3d 514 (Fla. 2016); *Hall v. State*, No. SC10-1335 (Fla. 2016); *Walls v. State*, No. SC15-1449 (Fla. 2016). Mr. Arbelaez filed a motion for supplemental briefing in light of this Court's September 8, 2016 decision in *Hall v. State*. After Mr. Arbelaez filed his motion for supplemental briefing, this Court issued its opinion in *Walls* on October 20, 2016. *See Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016) ("the *Hall* decision removes from the state's authority to impose death sentences *more than just [IQ quotient disputes]*. We find that *Hall*

⁵ On January 12, 2016, the United States Supreme Court decision in *Hurst v. Florida*. This Court granted Mr. Arbelaez's Motion for Supplemental Briefing in light of *Hurst v. Florida*. Briefing on that issue was completed on March 18, 2016.

warrants retroactive application[.]” (emphasis added). Five days later, this Court granted Mr. Arbelaez’s motion for supplemental briefing. This brief follows.

ARGUMENT

A. Mr. Arbelaez is Intellectually Disabled

i. Prong One: IQ at 75 or below

The circuit court denied Mr. Arbelaez relief as to prong one because it found Dr. Weinstein’s utilization of the American norms, which has always been an option for the Mexican WAIS-III, “not credible.” *State v. Arbelaez*, Order, No. F88-5546, at 16 (Fla. 11th Cir. Ct. May 14, 2010). This was clear error.

In *Cardona*, this Court unambiguously held that Florida courts cannot discard language and cultural accommodations as unreliable. *Cardona*, 185 So. 3d at 526-27. This Court’s recent decision in *Walls* means that Mr. Arbelaez receives the benefit of *Cardona*. See *Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016) (“the *Hall* decision removes from the state’s authority to impose death sentences *more than just [IQ quotient disputes]*. We find that *Hall* warrants retroactive application[.]” (emphasis added)). Contextually, this Court found no error in

permitting at least three language and cultural accommodations for Ms. Cardona.⁶ In Mr. Arbelaez’s case, the expert employed two language and cultural accommodations. Specifically, Dr. Weinstein utilized the Mexican WAIS-III for a Colombian national and applied the American norms to that examination.⁷ (PCR4, Vol. 49 at 162-171). Thus, Ms. Cardona was quantitatively and qualitatively more accommodated than Mr. Arbelaez, as her experts arguably should have utilized the Mexican or Puerto Rican IQ scoring tests.

Certainly, Mr. Arbelaez’s test scores should be compared to the U.S. population—and not the Mexican population—because Mr. Arbelaez is not

⁶ The first accommodation was that Ms. Cardona’s experts utilized the American WAIS because a Cuban equivalent does not exist, notwithstanding that arguably suitable IQ tests were developed in Puerto Rico and Mexico. *See Cardona v. State*, 185 So. 3d 514, 526 (Fla. 2016). Second, Ms. Cardona’s experts translated the American WAIS from English to Spanish, notwithstanding that such a procedure was acknowledged to potentially compromise the validity of her score. *Id.* Third, Ms. Cardona’s experts employed the American norms of an IQ test to a person of Cuban descent.

⁷ The Mexican WAIS-III is “essentially identical to the U.S. version, except that the instructions and items are translated into Spanish.” Greenspan, S. & Olley, J. Gregory, *The Death Penalty and Intellectual Disability: Variability of IQ Test Scores*, at 145 (citing Edward A. Polloway ed., American Association of Intellectual and Developmental Disabilities (2015)). However, researchers discovered that statistical and sampling errors were made when [the Mexican WAIS-III’s] norms were constructed. *Id.* Thereafter, the test publishers of the Mexican WAIS-III sent notices that the Mexican norms should not be used and that the U.S norms, which have always been a norm-ing option, should be used in its place. *Id.* *See also* PCR4 Vol. 49, at 162-171 (showing Dr. Weinstein’s opinion was based upon this reality); Suen, & Greenspan, *Linguistic Sensitivity*, at 2.

Mexican. Additionally, he spent some of his adult life in this country. Moreover, the American norms should be applied to Mr. Arbelaez because the American norms reflect the population Mr. Arbelaez is compared to for *Atkins* purposes. Accordingly, if Ms. Cardona can be so greatly accommodated, then Mr. Arbelaez should be equally accommodated.⁸ More importantly, the circuit court appeared to espouse the position that Dr. Weinstein should have applied the Mexican norms even though they are known to be unreliable and that the American norms are clinically preferred. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what the consensus within the medical community believes, not unscientific and unsound diagnostic methods).

In light of Cardona and Walls, Mr. Arbelaez carried his initial burden because Dr. Weinstein and Dr. Suarez both scored Mr. Arbelaez below 70, and the norm-ing choice, which was the only basis to deny on prong one, cannot be discarded.⁹ With

⁸ Without the benefit of Cardona being retroactive, it tends to implicate the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring) (“The high service rendered by the ‘cruel and unusual’ punishment clause of the Eighth Amendment is...to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups”).

⁹ Appellee’s expert, Dr. Ruiz, also scored Mr. Arbelaez within the range of persons that have an Intellectual disability diagnosis even with her unreliable and invalid test, as she scored him in the lower 70s range. *See Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016) (finding *Hall v. Florida* retroactive). Dr. Latterner’s unrefuted IQ score also scored Mr. Arbelaez within a range consistent with Dr. Suarez and Dr. Weinstein.

regard to whether Appellee rebutted this presumption depends on whether this Court concludes that Dr. Suarez's so-called malingering tests were reliable and valid.

As discussed above, however, the clinical community has a unified voice that the so-called malingering tests have no place in the evaluation of intellectually disabled persons. As explained in Dr. Dennis Keyes' article:

the Dot Counting Test, the VIP, and the MMPI... 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 [in intellectually disabled persons] have indicated that **their reliability and validity are highly suspect.**

Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271 (internal citations omitted) (emphasis added). In fact, the use of instruments like the Dot Counting Test, the VIP and the MMPI have tendencies to produce false-negatives and false-positives, meaning these tests identified people as intellectually disabled when they were not and identified those with intellectual disabilities as malingerers. Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271.

One of the reasons that intellectually disabled persons may be identified as malingerers on these tests is that people with intellectual disabilities "prefer to

endorse psychiatric symptoms, rather than be uncovered as having ID. Out of context and with limited information, this may look like malingering on a [test like the Dot Counting Test, the VIP, and the MMPI]. *Id.* at 271-72.

Dr. Suarez used all three of these tests to assess whether Mr. Arbelaez was malingering. This defies clinical standards. First, the mere fact that he relied on those three tests when they should not have been administered to a potentially intellectually disabled person should invalidate his evaluation altogether. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what the consensus within the medical community believes, not unscientific and unsound diagnostic methods). Second, Dr. Oakland testified that the VIP “does not detect malingering among persons with [ID].” (PCR4. Vol. 54, at 483). The author of the VIP has also specifically warned against the use of that instrument to determine whether a person with an intellectual disability has put forth good effort in cognitive testing. Frederick, R.I., *Validity Indicator Profile Manual* (1997). As such, Dr. Suarez’s VIP evaluation should be invalidated because it is inconsistent with clinical standards. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what the consensus within the medical community believes, not unscientific and unsound diagnostic methods).

Third, Dr. Suarez administered the MMPI to an individual that he had reason to believe could not read at the required reading comprehension level. Such a practice invalidates Dr. Suarez's examination. As stated by Dr. Dennis Keyes:

a person whose reading ability is lower than the MMPI requires, or just faced with the prospect of having to answer over 500 yes/no questions, may simply fill out the answer sheet to get done with the test, without reading, understanding, or caring about what the questions are asking. People with ID are particularly susceptible to this sort of frustration.

Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 272 (internal citations omitted) (emphasis added). This fact makes it clear that intellectually disabled persons are a vulnerable population to this test. Mr. Arbelaez's experts alerted the circuit court to such an erroneous reliance. (PCR4. Vol. 54, at 42-43); (PCR4. Vol. 50, at 281). Dr. Suarez's administration of the MMPI is all the more striking because Dr. Suarez did not conduct a standardized evaluation to assess Mr. Arbelaez's reading comprehension before administering the test. All of this should invalidate Dr. Suarez's MMPI evaluation because he did not adhere to clinical standards.¹⁰ *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what

¹⁰ For the same reasons that Dr. Suarez's evaluation is invalidated, Dr. Ruiz's evaluation is also invalidated because she primarily relied upon the MMPI.

the consensus within the medical community believes, not unscientific and unsound diagnostic methods)

Finally, with regard to Dr. Suarez's utilization of the Dot Counting Test, the examination not only lacked reliability and validity because this test was used but also possessed issues with how Dr. Suarez recorded the timing of the test and with the conclusion reached by him. As stated earlier and as conceded by Dr. Suarez, the Dot Counting Test is only as accurate to the extent that the test administrator's reflexes are quick enough to stop a stopwatch. Because of the video chronometer on Dr. Suarez's taped evaluation, Dr. Weinstein was able to testify that the timing jotted down by Dr. Suarez was inaccurate. Remedying this inaccuracy would have placed Mr. Arbelaez as someone that was putting forth good effort, whereas Dr. Suarez's figures identified Mr. Arbelaez as putting forth something else. Thus, the administration of this test also lacks reliability because it cannot be said that Dr. Suarez accurately administered the test. More importantly, and as explained by Dr. Weinstein, Dr. Suarez's conclusion was problematic when, like Mr. Arbelaez, an individual's score sits right on the cut-off point. Put simply, his scientific opinion defied clinical standards because, even assuming the Dot Counting Test was reliable and valid, the score was too close for a clinician to call. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what the consensus

within the medical community believes, not unscientific and unsound diagnostic methods).

Consequently, all that remains of Appellee's assertion that prong one is not satisfied are its experts IQ scores, which both place Mr. Arbelaez among those persons that are intellectually disabled, and an unscientific belief that Mr. Arbelaez somehow must be malingering. Accordingly, Mr. Arbelaez carried his initial burden, and Appellee failed to rebut.

ii. Prong Two: Concurrent Deficits in Adaptive Functioning and Retrospective Deficits in Adaptive Functioning

a. Introduction

On September 8, 2016, this Court issued its decision in *Hall v. State*, clarifying that a retrospective analysis as to the second prong of intellectual disability cannot be prohibited. *See Hall v. State*, No. SC10-1335, at 16 (Fla. 2016). This Court also concluded that Mr. Hall satisfied the second prong of intellectual disability because his expert had access to DOC records, which was proof that Mr. Hall's expert conducted a current and retrospective evaluation. *Id.* at 17. In reaching this decision, this Court also concluded that not interviewing prison staff does not *per se* amount to a wholly retrospective adaptive functioning evaluation.¹¹ *See id.* at 17. This is

¹¹ The circuit court based its conclusion that Mr. Arbelaez did not satisfy the second prong of intellectual disability, in part, because Mr. Arbelaez did not use prison staff testimony, as no lay witnesses would qualify to testify as to Mr. Arbelaez's concurrent deficits in adaptive functioning. *See State v. Arbelaez*, Order, No. F88-5546, at 17 (Fla. 11th Cir. Ct. May 14, 2010) (“[A]ll the testimony

because, as Mr. Arbelaez argued in his initial brief, an adaptive functioning evaluation is nearly impossible in a prison setting, as prisons represent the “antithesis of the environment in which adaptive functioning can be displayed.” *See id.* at 16 (quoting Transcript of Evidentiary Hearing, Record on Appeal Vol. 48 at 4681, *State v. Williams*, No. 93-003005CF10A (Fla. 17th Cir. Ct. Sept. 21, 2012). *See also* PCR4, Vol. 51 at 394, 399 (showing Dr. Tasse explained the highly restrictive nature of prisons). The American Association on Intellectual Disability has also held this stance. *Hall*, No. SC10-1335, at 16. Furthermore, this Court acknowledged that the task of conducting a purely concurrent adaptive functioning evaluation becomes all the more impossible when defendants have spent most of their adult lives incarcerated.¹² *Id.* at 15. An “adaptive behavior” is “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.” *Hall v. State*, No. SC10-1335, at *7 (Fla. 2016) (quoting Fla. Stat. § 921.137). There must be at least two deficits in the following areas: communication, self-care, home living,

presented by Defendant’s *lay witnesses* focused on [the time frame prior to the crime].) (emphasis added).

¹² Additionally, circumstances of the crime or “street smarts” should not be relied upon to negate the existence of adaptive deficits because maladaptive behavior is inherently an adaptive deficit. *See AAIDD, User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports*, 20 (2012).

social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.¹³ *Jones v. State*, 966 So.2d 319, 327 (Fla. 2007).

To comport with the medical community's current understanding of intellectual disability, **courts cannot rely upon perceived adaptive strengths in order to negate adaptive deficits.** *See* AAIDD 2010 Manual at 17 (“Adaptive skill limitations often coexist with strengths in other adaptive skill areas”) (emphasis added). This is because the second prong does not contain an expressed or implied balancing test. AAIDD 2010 Manual at 47 (“[I]n the process of diagnosing ID, significant limitations in conceptual, social, or practical adaptive skills [are] *not outweighed* by the potential strengths in some adaptive skills”) (emphasis added). *See also* (PCR4 Vol. 50, at 267) (“[Perceived strengths are] not relevant for the diagnosis of mental retardation [b]ecause the issue is not what the individual *can* do... [it is what] the individual *cannot* do.”) (emphasis added).

¹³ The specific deficits discussed here are listed in the DSM-IV TR which was the current version of the manual at the time of the evidentiary hearing. While the current DSM-V has revised its discussion of adaptive deficits, the deficits displayed by Mr. Arbelaez would still be considered as demonstrative of ID.

b. Communication

“Communication generally refers to both the display of needed receptive and expressive vocabulary skills. And [it refers to] other ways in which communication [occurs], both our needs to understand others and to engage socially with others as well.” (PCR4. Vol. 54, at 489-90). As stated earlier, the retrospective assessment uncovered that Mr. Arbelaez was shy, withdrawn, and threw tantrums while he was in Colombia. With regard to a concurrent assessment, Dr. Weinstein’s administration of the Woodcock-Munoz to Mr. Arbelaez also supports that Mr. Arbelaez has deficits in communication skills. According to Dr. Weinstein, Mr. Arbelaez, consistent with an ID diagnosis, possesses a third grade reading level, second grade math abilities, second grade writing abilities, and second grade written expression abilities. (PCR4. Vol. 49, at 177-78); (PCR4. Vol. 50, at 362). Because Mr. Arbelaez’s communication skills are as developed as a child’s skills, he has concurrent deficits in his ability to understand and engage socially with others. Dr. Weinstein also relied upon DOC prison and medical records to conclude that Mr. Arbelaez has difficulty controlling his emotions, as those records tend to indicate that he throws tantrums to express his frustrations about the color of his epilepsy medication. *See Hall v. State*, No. SC10-1335, at 16 (Fla. 2016) (showing Hall’s expert relied upon DOC prison and medical records to justify that a concurrent assessment was made).

Another example, in response to a priest scolding him, Mr. Arbelaez would express his feelings by poisoning himself with rat poison. (PCR4. Vol. 54, at 640). This occurred on multiple occasions. (PCR4. Vol. 54, at 640).

Accordingly, because a standardized instrument supports the existence of this adaptive deficit, prison records were relied upon, and all of the Colombian interviewees corroborate that deficits existed retrospectively, Mr. Arbelaez clearly has deficits in his ability to communicate.¹⁴

c. Self-Care

Self-care refers to “those activities that require us to bathe, to [use the] toilet, to dress ourselves. In other words, [the ability] to take care of our person.” (PCR4. Vol. 54, at 491). With regard to a concurrent assessment, one cannot be fully conducted because the prison is so highly structured that it determines the times and frequency by which inmates may exhibit the behaviors related to bathing and grooming. However, the mere fact that Mr. Arbelaez refuses to take his medication based on reasons like its color and what time it is delivered to him reveals the existence of a self-care deficit in the present because he cannot fully appreciate the

¹⁴ Further, according to the testimony of Amparo Arbelaez, she explained that Mr. Arbelaez would “climb on the roof and throw himself down to notify” them that their mother was coming. (PCR4. Vol. 55, at 641). This further demonstrates that Mr. Arbelaez has deficits in his ability to communicate with others.

consequences of refusing his medication. More importantly, because Dr. Weintein learned of this by relying upon DOC prison and medical records, Mr. Arbelaez's expert clearly made a concurrent assessment. *See Hall v. State*, No. SC10-1335, at 16 (Fla. 2016) (showing Hall's expert relied upon DOC prison and medical records to justify that a concurrent assessment was made).

Retrospectively speaking, Mr. Arbelaez also had difficulties remembering to take his epilepsy medication, as Mr. Arbelaez never took his medication without his mother's attentiveness. (PCR4. Vol. 55, at 640). Mr. Arbelaez's poor hygiene prior to his incarceration is also a fact that was relied upon by Dr. Weinstein, meaning a retrospective assessment supports the existence of a self-care deficit. Dr. Weinstein also relied upon the fact that Mr. Arbelaez used to live in a car in making his determination that Mr. Arbelaez is intellectually disabled.

According to testimony at the evidentiary hearing, Mr. Arbelaez's appearance at church while he was in Colombia was described as "disheveled" and "very dirty." (PCR4. Vol. 55, at 634). In Colombia, Mr. Arbelaez would not only attend church in the clothes that he slept in but also did not change his clothes often. (PCR4. Vol. 55, at 634-35). The fact that Mr. Arbelaez tried to poison himself on multiple occasions after being scolded by a priest also relates to his ability to care for himself. (PCR4. Vol. 54, at 640). Finally, Mr. Arbelaez often forgot to brush his teeth. (PCR4.

Vol. 55, at 638). Mr. Arbelaez, therefore, has demonstrated the existence of deficits in his ability to care for his own person concurrently and retrospectively.

d. Use of Community Resources

Use of community resources “refers to engaging in one’s community so as to use the resources within that community.” (PCR4. Vol. 54, at 490). It could mean any community resources such as public transportation, public schools, and libraries. (PCR4. Vol. 54, at 490). A concurrent assessment on this adaptive skill cannot be done within the confines of a prison because a prison is not a community. Retrospectively, it is clear that there were deficits in his use of community resources because, despite having the opportunity to go to school, Mr. Arbelaez did not complete the equivalence of a high school education. As such, Mr. Arbelaez has established that he possesses deficits in the adaptive behavior regarding use of community resources.

e. Functional Academic Skills

“Functional academics refers to the application of knowledge that we require in school in order to do the activities that are required of [people] as adults.” (PCR4. Vol. 54, at 491).

A retrospective assessment reveals that Mr. Arbelaez had challenges with his functional academic skills. For instance, as explained above, Mr. Arbelaez had poor grades and was held back while he was a student in Colombia. In addition, while in Colombia, Mr. Arbelaez could not accurately or reliably manage money when he

sold beer and soda at soccer games with his brothers. Put bluntly, Mr. Arbelaez cannot make change. (PCR4. Vol. 55, at 536). As detailed at the evidentiary hearing:

Juan Manuel[, Mr. Arbelaez’s brother,] would search [Mr. Arbelaez]. He would hit him with a belt and would strike him hard, and would [do so] very hard because he did not have money, and he would shake him up because he did not bring the money [earned at the stadium].

(PCR4. Vol. 55, at 536). Indeed, when directly asked whether Mr. Arbelaez could make change, his sister testified that customers “would fool him.” (PCR4. Vol. 55, at 536).

With regard to a concurrent assessment, Dr. Weinstein administered a standardized test—the Woodcock-Munoz. By doing this, Dr. Weinstein was able to show that Mr. Arbelaez possesses a third grade reading level, second grade math abilities, second grade writing abilities, and second grade written expression abilities. (PCR4. Vol. 49, at 177-78); (PCR4. Vol. 50, at 362). Consequently, the mere fact that he functions at such a poor reading, writing, and mathematical level illustrates that he has deficits in his functional academics because Mr. Arbelaez would not be able to function very well in the real world without community support.

f. Work

“Work would be assessed only for those persons who are engaged in work.” (PCR4. VOL 54, at 492). The work adaptive behavior refers to a person’s abilities “to know their assigned work activities, to do that work independently, and [to do

so] at higher levels, and to assume responsibility for supervising the work of others.” (PCR4. VOL 54, at 492). Obviously, Mr. Arbelaez cannot conduct a concurrent assessment as to this adaptive behavior. Death row inmates do not work. Retrospectively, there is a strong showing that Mr. Arbelaez had deficits in his ability to work. While he was in Miami, Mr. Arbelaez’s worked as a dishwasher.

As explained above, while in Colombia, Mr. Arbelaez could not make change, as customers would “fool him.” (PCR4. Vol. 55, at 536).

Accordingly, Mr. Arbelaez was good at a narrow set of jobs, namely jobs that were not complex, were repetitious in nature, did not involve exchanging of money, and did not place him within a supervisory role. Because Mr. Arbelaez was unable to handle more complicated tasks, and required supervision for more challenging tasks, he has shown that he has deficits in his work skills.

g. Health and Safety

“Health and safety refers to taking responsibility [for] themselves.” (PCR4. Vol. 54, at 491). As explained earlier, Mr. Arbelaez had a history of forgetting to take his medication in Colombia on days where his mother forgot to remind him, he had epileptic seizures. Additionally, as stated earlier, Mr. Arbelaez would throw himself from the roof to notify his siblings that his mother was arriving at the house. These facts therefore show that Mr. Arbelaez had deficits in his health and safety

adaptive functioning behavior while he was in Colombia. Because Dr. Weinstein relied upon them in making his assessment, they were established.

The concurrent assessment involved Dr. Weinstein relying upon DOC prison and medical records to show that Mr. Arbelaez does not fully appreciate the consequences of not taking his medication, as he refuses to take his pill based on its color, the time it is brought to him, or who delivers it. Therefore, this demonstrates that Mr. Arbelaez has concurrent deficits in his ability to take responsibility for his health and safety, as Dr. Weinstein learned of this fact by using prison records. *See Hall v. State*, No. SC10-1335, at 16 (Fla. 2016) (showing Hall's expert relied upon DOC prison and medical records to justify that a concurrent assessment was made).

h. Conclusion for Prong Two

With regard to Mr. Arbelaez's initial burden, Dr. Weinstein clearly conducted a concurrent adaptive functioning evaluation. First, Dr. Weinstein administered the Woodcock-Munoz to evaluate Mr. Arbelaez's reading and writing levels, which in turn affect (1) his academic ability to function in the real world and (2) his ability to communicate.

Second, Dr. Weinstein relied upon DOC prison and medical records. *See Hall v. State*, No. SC10-1335, at 16 (Fla. 2016) (showing Hall's expert relied upon DOC prison and medical records to justify that a concurrent assessment was made). As evidence that he actually relied upon such records, Dr. Weinstein was able to recall

from prison records that Mr. Arbelaez had to be isolated due to suicidal behaviors. Dr. Weinstein also recalled from DOC medical records that Mr. Arbelaez will sometimes refuse to take his epilepsy medication based upon non-sensical reasons, such as the color of the pill, when it is delivered, and who brings it to him. According to Dr. Weinstein, Mr. Arbelaez's occasional refusal to take his medication revealed that Mr. Arbelaez was unable to fully appreciate the consequences of his actions with regard to taking his epilepsy medication. Thus, the refusal to take his medication in turn affects whether Mr. Arbelaez has deficits in (3) health/safety and (4) self-care. As explained earlier, Dr. Weinstein also described this behavior as throwing "tantrums," which were part of the DOC medical records, and expressed that Mr. Arbelaez had difficulty controlling his emotions, which in turn relate to (5) his ability to communicate. Finally, Dr. Weinstein made his own observations throughout the evaluation while he was with Mr. Arbelaez, showing that a concurrent assessment was made.

As explained in Mr. Arbelaez's initial brief and as shown in this brief's facts section, Appellee's adaptive functioning evaluation was improper because it entirely relied upon present information, and no testimony was obtained by people that knew Mr. Arbelaez prior to his immigration. This method of evaluation defied clinical standards because capital defendants have so few opportunities to exhibit the

relevant behaviors in prison. *Hall v. State*, at *7 (“Evaluating the adaptive behavior of an individual who has spent much of his adult life incarcerated can be difficult”).

Further, Appellee’s reliance on prison staff testimony has little to no value compared to the sort of evaluation that Dr. Weinstein performed. Dr. Suarez used a test in a way that is contrary to its intended use, rendering it meaningless compared to the extensive and intensive evaluation that Dr. Weinstein conducted. More importantly, Dr. Oakland, the designer of the instrument used by Dr. Suarez, explained that Dr. Suarez’s so-called adaptive functioning evaluation was invalid in light of the guesses made by the prison staff. (PCR4. Vol 54). Consequently, because Appellee received an abundance of guesses on the questionnaires provided to prison staff, Appellee paid an expert to conduct a test that is scientifically meaningless. Put simply, Appellee never conducted an adaptive functioning evaluation. Thus, Appellee failed to rebut. Accordingly, Mr. Arbelaez has demonstrated the existence of concurrent deficits in adaptive behaviors. *Hall v. State*, at *7.

iii. Prong Three: Manifestation of Intellectual Disability before 18 Years Old

To satisfy this prong, all that is required of a capital defendant is to show that the intellectual disability manifested before the age of eighteen. *Oats v. State*, 181 So.3d 457, 469 (Fla.2015) (holding that Fla. Stat. § 921.137(1) requires only that intellectual disability be demonstrated to have manifested prior to age eighteen, not that it be diagnosed). Due to the nature of how prong two was assessed by Dr.

Weinstein and how it is analyzed in this brief, Mr. Arbelaez relies upon the record and much of the same evidence that was mentioned in other parts of this brief. Upon doing so, this Court would hold that Mr. Arbelaez’s intellectual disability manifested prior to the age of eighteen.

**B. If Any Prong is deemed “Relatively Less Strong”
than the Others, then *Oats* is instructive**

This Court, consistent with the current diagnostic framework, recognized that when courts review intellectual disability claims a finding of intellectual disability may be warranted even if one prong is “relatively less strong” because the standard is inherently “interdependent.” *Oats v. State*, 181 So.3d 457, 467-68 (Fla. 2015). As applied to Mr. Arbelaez, due to the interdependent nature of the current diagnostic framework, this Court must afford leniency to Mr. Arbelaez if this Court deems that one prong is “relatively less strong.”¹⁵ *See id.* This Court’s recent decision in *Walls* means that Mr. Arbelaez receives the benefit of *Oats*. *See Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016) (“the *Hall* decision removes from the state’s authority to impose death sentences *more than just [IQ quotient disputes]*. We find that *Hall* warrants retroactive application[.]”) (emphasis added).

¹⁵ Mr. Arbelaez does not assert that any of the evidence presented in postconviction establishes that one prong is less strong than any of the others. However, to the extent that any are less strong, Mr. Arbelaez is entitled to relief pursuant to *Oats*.

CONCLUSION AND RELIEF SOUGHT

Mr. Arbelaez is intellectually disabled. Mr. Arbelaez would have carried his initial burden but for the circuit court discarding his expert's test on the basis of the language and cultural accommodations used by Dr. Weinstein. *See Cardona v. State*, 185 So. 3d 514, 526-27 (Fla. 2016); *Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016) (“the *Hall* decision removes from the state’s authority to impose death sentences *more than just [IQ quotient disputes]*. We find that *Hall* warrants retroactive application[.]”) (emphasis added). Appellee could not rebut Dr. Suarez and Dr. Ruiz’s assertions that Mr. Arbelaez was malingering because the tests used, how they were administered, and the conclusions reached lacked validity and reliability within the clinical community. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (showing that this Court relies upon what the consensus within the medical community believes, not unscientific and unsound diagnostic methods). Capital defendants deserve more than just a good faith hunch. After all, “death is different.” *See, e.g., Hurst v. State*, 2016 WL 6036978, at *15 (Fla. 2016) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). For that reason, even with the flawed tests used by Dr. Suarez and Dr. Ruiz, Mr. Arbelaez satisfies the first prong of intellectual disability because every expert’s evaluation places his IQ within the range of IQs consistent with a diagnosis of intellectual disability.

With regard to the second prong, Mr. Arbelaez satisfied his burden. Dr. Weinstein relied upon prison records, conducted the Woodcock-Munoz, and made his own personal observations throughout. He also interviewed people that knew Mr. Arbelaez prior to incarceration, both domestically and abroad. Thus, a concurrent and retrospective assessment was conducted by Dr. Weinstein, and those findings demonstrate deficits in more than two adaptive behaviors. *Hall v. State*, at *6 (clarifying that a retrospective assessment is permitted and remanding for a life sentence because the expert relied upon medical records and other retrospective information); *Walls v. State*, 2016 WL 6137287, at *6. In addition, Dr. Weinstein's methods were approved of by leading experts in the clinical field. Appellee's adaptive functioning assessment was so lacking in validity that its results are meaningless. Mr. Arbelaez, therefore, satisfied the second prong of intellectual disability. Finally, because much of the evidence as to prong two relates to prong three, Mr. Arbelaez has demonstrated that his intellectual disability *manifested* prior to the age of eighteen. *Oats v. State*, 181 So.3d 457, 469 (Fla. 2015) (emphasis added).

Based on the foregoing, Mr. Guillermo Arbelaez requests that this Court issue an order granting his motion and find him intellectually disabled, vacate his death sentence, and remand to sentence him to life in prison. In the alternative, he requests

this case be remanded for an evidentiary hearing on any issue this Court deems appropriate.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Supplemental Brief has been produced in a 14 point Times New Roman type, a font that is not proportionally 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 Office of the Attorney General, Rivergate Plaza, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 at capapp@myfloridalegal.com on this 9th day of November 2016.

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

/s/ Bryan E. Martinez
BRYAN E. MARTINEZ
Staff Attorney
Florida Bar No. 0119286