

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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Law of the Case Assertion and Related Arguments 1

i. “More than fundamental fairness and a clear manifest injustice” 1

ii. Addressing Appellee’s Related Arguments as to Prong One 4

iii. Addressing Appellee’s Related Argument as to Prong Two 10

B. Mr. Arbelaez Established his IQ 11

C. Mr. Arbelaez has Adaptive Functioning Deficits 14

D. Oats is Instructive 17

E. Due Process Implications 20

CONCLUSION 22

CERTIFICATE OF COMPLICANCE 23

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Cardona v. State, 185 So. 3d 514 (Fla. 2016) passim

Cherry v. State, 959 So. 2d 702 (Fla. 2007) 1, 2, 7, 23

Cleveland Bd. Of Ed. v. Loudermill, 470 U.S. 532 (1985).....22

Furman v. Georgia, 408 U.S. 238 (1972).....5

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

Hall v. State, 2016 WL 4697766, (Fla. 2016)..... passim

Hayes v. State, 94 So. 3d 452 (Fla. 2012).....7

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....22

Oats v. State, 181 So. 3d 457 (Fla. 2015) passim

Thompson v. State, No. SC15-1752, Slip Op. (Fla. 2016).....1, 2

Walls v. State, 2016 WL 6137287, (Fla. 2016)..... passim

Wright v. State, No. SC13-1213, Slip Op. (Fla. 2016)10

Other Authorities

Brown, Tenielle R., *The Affective Blindness of Evidence Law*, 89 Denv. U. L. Rev.
47.....6

Edward A. Polloway ed., American Association of Intellectual and Developmental
Disabilities (2015).....8

Greenspan, S. & Olley, J. Gregory, *The Death Penalty and Intellectual Disability:
Variability of IQ Test Scores*,8

Suen, H.K. & Greenspan, 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*, at 2 (2008).....8, 13

ARGUMENT

A. Law of the Case Assertion and Related Arguments

i. “More than fundamental fairness and a clear manifest injustice”

Appellee relies upon *Thompson* to assert that Mr. Arbelaez is not entitled to relief pursuant to the law of the case doctrine. Specifically, Appellee relies upon the fact that the lower court did not rely upon *Cherry* to deny Mr. Arbelaez relief on the first prong of intellectual disability. Appellee also relies upon perceived issues with Dr. Weinstein’s evaluation of the second prong. To the extent that Appellee believes Mr. Thompson’s claim is unlike Mr. Arbelaez’s claim because the IQ quotient is not at issue here, Mr. Arbelaez agrees. The first prong of intellectual disability was not denied based upon the numerical IQ quotient. Indeed, Appellee and Mr. Arbelaez’s experts scored Mr. Arbelaez’s IQ quotient below 70, meaning *Cherry* was never an issue for him. Thus, Mr. Arbelaez’s situation is distinct from Mr. Thompson’s because *Thompson* concerns the unconstitutional application of the bright line rule that was at issue in *Cherry*. See *Thompson v. State*, No. SC15-1752, Slip Op. (Fla. 2016).

But to the extent that Appellee relies upon *Thompson* for the purpose of arguing that the law of the case doctrine applies in this case because *Cherry* was never at issue in Mr. Arbelaez’s case, Mr. Arbelaez strongly disagrees and directs this Court to its own opinion in support. *Walls v. State*, 2016 WL 6137287, at *8 (Fla. 2016) (“**More than fundamental fairness and a clear manifest injustice,**

the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied.”) (emphasis added). As a result, the law of the case is overcome.

Even if such an analysis were required, *Thompson* is actually similar to Mr. Arbelaez’s case in that a manifest injustice would result if he were not afforded the benefit of *Hall v. Florida* and *Walls*. Undeniably, *Hall v. Florida* did more than overturn this Court’s decision in *Cherry*. For instance, the Court stated:

If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.

Hall v. Florida, 134 S.Ct. 1986, 1999 (Fla. 2014). Throughout the opinion in *Hall v. Florida*, the Court emphasized that because the *Atkins* decision relied upon the medical community’s standards, the determination of intellectual disability for *Atkins* purposes must be “informed by the medical community's diagnostic framework.” *Id.* at 2000. By examining the medical community’s standards, the Court reasoned that Florida’s interpretation of intellectual disability was unconstitutional because it ran afoul with “the unanimous professional consensus.” *Id.* (quoting Brief for American Psychological Association et al. as *Amici Curiae*, at 15). The Court also noted that the State and its amici never cited to any source to disprove Mr. Hall’s argument that Florida’s IQ cutoff was inconsistent with the

unanimous consensus of the medical community. *Id.* at 2000. *See also 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). Consequently, *Hall v. Florida* is clear—state courts cannot snub the medical community’s professional consensus. Therefore, because the lower court ignored the medical community’s unified consensus with regard to Mr. Arbelaez’s evaluation, which is discussed in all of his briefs and demonstrated by the record, Mr. Arbelaez may confidently rely upon *Hall v. Florida* and *Walls* even though the IQ quotient is not at issue here. As such, a manifest injustice would result.

Additionally, a manifest injustice would result solely on the basis of this Court’s precedent. This Court held that *Hall v. Florida* applies to more than just disputes over the IQ quotient. *See Walls v. State*, 2016 WL 6137287, at *6 (Fla. 2016). Therefore, cases like *Cardona*, *Oats*, and *Hall v. State*, which all afforded relief on the basis of whether the medical community’s standards were ignored, also demonstrate that a manifest injustice would transpire if Mr. Arbelaez’s death sentence remained intact when Dr. Weinstein’s evaluation was consistent with the unified professional consensus. *Hall v. State*, 2016 WL 4697766, at *8 (Fla. 2016) (recognizing that “based on a consensus within the medical community” the

interpretation of the third prong means whether the disability manifested prior to age eighteen, not that it was diagnosed).

Accordingly, aside from the fact that this Court has already stated that the risk of executing intellectually disabled persons uniquely “trumps any other considerations” because it is a risk greater “than fundamental fairness and a clear manifest injustice,” manifest injustice would result if *Hall v. Florida* and the other intervening cases were not applied to Mr. Arbelaez. This is because *Hall v. Florida* and its progeny have been applied to others retroactively and retrospectively.¹ In sum, Appellee appears to misunderstand that this Court has already decided that the law of the case doctrine is no longer at issue.

ii. Addressing Appellee’s Related Arguments as to Prong One

As to the first prong, Appellee asserts that the lower court’s determination that Dr. Weinstein’s expert evaluation was “not credible” somehow indicates that the trial court made a factual credibility determination. Although Appellee relies upon the general proposition that circuit courts often have a “superior vantage point” in making credibility determinations of factual witnesses over this Court’s ability to do

¹ This Court already afforded Mr. Freddie Hall, a 1978 crime, and Mr. Oats, a 1981 crime, the benefit of *Hall v. Florida*. This demonstrates that this Court has applied *Hall v. Florida* retroactively and retrospectively. Mr. Arbelaez, a 1988 crime, is therefore constitutionally entitled to the benefit of *Hall v. Florida* and its progeny. *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”).

so, this is not a case involving the credibility of a factual witness. Dr. Weinstein was an expert witness in an *Atkins* proceeding. This means that circuit courts cannot deem an expert as “not credible” in the same manner that factual witnesses are deemed not credible when the expert’s methods were consistent with the medical community’s unified consensus. *See Hall v. Florida*, 134 S. Ct. at 2000.

If circuit courts were permitted to make the same kind of credibility determination of experts as they do of non-expert witnesses, a fidgety expert or one suffering from a speech impediment might be deemed not credible even though the actual content of her testimony is consistent with medical standards. *E.g., generally*, Brown, Tenielle R., *The Affective Blindness of Evidence Law*, 89 Denv. U. L. Rev. 47 (“Jurors assess credibility based on subtle physical cues—stutters, stares, and fidgets—and on not so subtle cues, like conflicting stories.”). Such a practice also runs the risk of lower courts rubberstamping that a capital defendant’s expert witness was not credible to avoid a thorough review of a defendant’s meritorious arguments. Capital defendants deserve more than a trial judge’s gut feeling that the science does not quite add up. *See Walls v. State*, 2016 WL 6137287, at *8 (Fla. 2016) (“the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied.”).

In turn, Appellee’s assertion that such a credibility determination was appropriate dissolves or must dissolve in the wake of *Hall v. Florida* and this Court’s subsequent progeny. Further, credibility determinations do not stand where the record and scientific community clearly establish a fact to the contrary. *See Cherry v. State*, 959 So. 2d 702, 709 (Fla. 2007), *overturned on other grounds by Hall v. Florida*, 134 S. Ct. at 2000, (stating that “credibility of the witnesses and the weight to be given to the evidence” cannot fall short of competent, substantial evidence). *Cf. Hayes v. State*, 94 So. 3d 452, 435 (Fla. 2012).

To bolster its argument that a valid credibility determination was made, Appellee cites to its own expert who disapproved of Dr. Weinstein’s use of the American norms. But, circuit courts cannot rely upon lone wolves in the medical community to make credibility determinations. *See Hall v. Florida*, 134 S. Ct. at 2000 (quoting Brief for American Psychological Association et al. as *Amici Curiae*, at 15). Such a practice defeats the purpose of *Atkins*. *See id.* With regard to the manner in which Dr. Weinstein determined Mr. Arbelaez’s IQ score, Appellee relies upon the lower court’s holding that his method was “not credible” and “problematic.” The record, the unified medical consensus, and this Court’s intervening precedent demonstrates otherwise. The Mexican WAIS-III was designed

to permit the use of either Mexican norms or American norms.² The medical community is unified in the position that the American norms can be utilized and should be utilized over the option of using the Mexican norms due to statistical errors in the Mexican norms and professional ethics obligations in favor of the American norms. That information was briefed thoroughly in Mr. Arbelaez's supplemental initial brief and initial brief before this Court.³ In addition, Mr. Arbelaez is not Mexican and is being compared to persons subject to Florida's capital sentencing laws. Thus, the American norms should be used because it is extraneous whether a Colombian national is considered intellectually disabled in Mexico when evaluating

² 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, 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.

³ Interestingly, like the State in *Hall v. Florida*, Appellee never cited a medical source to disprove that Dr. Weinstein's use of the American norms was inconsistent with the unified medical community's consensus. *See Hall v. Florida*, 134 S. Ct. at 2000. Even if it did, however, Mr. Arbelaez asserts that he would still establish the first prong of intellectual disability due to the sheer weight of the consensus and this Court's holding in *Cardona*.

whether he is intellectually disabled under the United States' Eighth Amendment. If Mr. Arbelaez is being compared to the American population when evaluating whether he fits into the class of persons identified as intellectually disabled, the American norms must be used.

Finally, because this Court recently clarified that language and cultural accommodations cannot be discarded for lack of credibility, Dr. Weinstein's evaluation cannot be viewed as "not credible" or "problematic." This is because the selection of the test and the choice to use the American norms over the Mexican norms were accommodations made for an individual whose native country lacks a suitable IQ test. *See Cardona v. State*, 185 So. 3d 514 (Fla. 2016). Also with regard to the first prong, Appellee relies upon its expert's evaluation that Mr. Arbelaez was

somehow malingering to achieve his low IQ test score.⁴ In response, Mr. Arbelaez rests upon his supplemental initial brief, his initial brief, and the record to rebut the assertion that the so-called “malingering tests” provide any inferable information—other than that it squandered state resources—when those tests were administered

⁴ To the extent that this Court may look to *Wright*, Mr. Arbelaez notes that, unlike Mr. Tavares Wright’s recent denial of relief, Mr. Arbelaez relied upon expert testimony and unified professional consensus to show that Dr. Suarez’s so-called “malingering” tests are “highly suspect” when administered on intellectually disabled persons. *See Wright v. State*, No. SC13-1213, Slip Op. (Fla. 2016). Further, unlike Mr. Wright, Mr. Arbelaez’s IQ scores consistently fell within a narrow range that is typical of an intellectual disability diagnosis. *See id.* at 21 (showing Mr. Wright consistently scored at 75 or above). Because of the consistency of Mr. Arbelaez’s scores, and unlike Mr. Wright, Mr. Arbelaez can rely upon expert testimony that explained that the challenge of consistently remaining within the same IQ range reveals that Mr. Arbelaez did not fake a low IQ score. (PCR4. Vol. 51, at 392). Therefore, although the State’s expert in *Wright* concluded that “one can malingering and fake a low IQ, [but] one cannot fake a higher IQ,” Mr. Arbelaez’s situation is distinguishable because Mr. Arbelaez does not have a high IQ score at any point in his life and his scores consistently fall within a narrow range indicating an intellectual disability diagnosis. (PCR4. Vol. 51, at 392) (“The more we have scores that are in the same range the more difficult it would be to kind of always consistently, failed items to always be in the same range of score. It would be difficult to always get the same score on multiple repetition on an intelligence test for example.”).

on intellectually disabled persons.⁵ *See, e.g.*, Second Supplemental Initial Brief, at 23-27.

iii. Addressing Appellee’s Related Argument as to Prong Two

Appellee relies upon the language from the lower court’s order that is the subject of this appeal. Namely, Appellee asserts that Dr. Weinstein performed a “wholly retrospective” evaluation when in fact the record shows he performed a concurrent assessment and a retrospective assessment at all stages of his adaptive functioning evaluation (i.e. the evaluation of the second prong). This was argued and demonstrated in the initial brief and the supplemental initial brief. In the wake of *Hall v. Florida* and its state progeny, this Court is now able to see that Dr. Weinstein’s evaluation was always concurrent—whenever possible—and retrospective for its corroborating effect and where concurrent assessment was not possible. *See Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016) (discussing the challenges of conducting a concurrent assessment in prison settings and permitting retrospective assessments). *See also* (PCR4. Vol. 51, at 392) (“Usually, what we look at is consistency in results, consistency in evaluation that have been done. And

⁵ Among the problems with the so-called “malingering tests” are that all of them are considered “highly suspect” when administered on intellectually disabled persons, they lack validation, one of them should not have been administered to a person with a reading and writing level as low as Mr. Arbelaez’s unrefuted reading and writing levels, the reliability of how one of the tests was conducted is at issue, and the opinion of Dr. Suarez goes beyond what the medical community would opine when one score yielded a borderline score. *See, e.g.*, Second Supplemental Initial Brief, at 23-27.

usually that's a good indicator that we're getting a good reliable...adaptive functioning [evaluation].").

B. Mr. Arbelaez Established his IQ

Appellee asserts that *Cardona*, which held that language and cultural accommodations cannot be discarded for lack of credibility, is not implicated in this case. This obviously fails the laugh test. The Mexican WAIS-III, administered in Spanish, was selected for the very reason that Mr. Arbelaez is a Spanish-speaking person of Colombian descent. That in itself is a language and cultural accommodation. If Mr. Arbelaez was born and raised in this country, he probably would not have required a language accommodation, meaning it would have been conducted in English. Because the Mexican WAIS-III was selected among all other tests as the most culturally appropriate Spanish-language option by his expert, due to the fact that there are no suitable IQ tests in Colombia, it necessarily required the application of another cultural accommodation. Namely, it required the application of the American norms. As stated in the supplemental initial brief, had Dr. Weinstein applied the Mexican norms to the Mexican WAIS-III, his evaluation would have been meaningless due to the statistical anomalies in the Mexican norms. Such an evaluation might have also subjected him to an ethical violation. Thus, because the American norms were still a clinically viable option for clinicians, according to the technical manual of the Mexican WAIS-III, he applied the American norms as an accommodation. *See, e.g.,* Suen, H.K. & Greenspan, 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) (“**The technical manual [of the Mexican WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms.**”) (emphasis added).

Appellee, to his credit, observes that the same exact accommodations that were afforded to Ms. Cardona were not applied for Mr. Arbelaez. This is because Ms. Cardona is a Cuban national whereas Mr. Arbelaez is a Colombian national. Any person with the slightest familiarity with Cuban and Colombian culture knows that there are significant differences between the two. Accordingly, the accommodations that might be afforded to a Cuban national will likely have some differences than those afforded to a Colombian national.

The specific difference that Appellee relies upon is that *Cardona* did not involve what it calls “mixing.” As an initial matter, “mixing” is not a term used in the medical community. Instead, Dr. Weinstein simply utilized a clinically acceptable norm-ing alternative, which is approved of in the technical manual of the Mexican WAIS-III. According to Appellee, because the use of equally valid norm-ing alternatives were not employed in *Cardona*, Mr. Arbelaez cannot rely on *Cardona*. Obviously, if Mr. Arbelaez were denied relief because his evaluation was not identical to Ms. Cardona’s evaluation, then this Court would espouse a non-clinical diagnostic framework in violation of *Atkins* and *Hall v. Florida*. *Cardona v.*

State, 185 So. 3d 514, 526 (Fla. 2016) (relying upon *Hall v. Florida* to hold that Ms. Cardona’s Cuban background required a culturally suitable test, as that is the medical consensus).

The very nature of a language or cultural accommodation means that the modification is individualized for that person’s circumstances, not that the modification is uniform. Therefore, by Appellee’s logic, Appellee appears to suggest that all Spanish speakers should receive the exact same language and cultural accommodations that were administered by Ms. Cardona’s experts or else a language and cultural accommodation was never administered at all. Surely, this is not what this Court intended when it decided *Cardona*. *Cardona v. State*, 185 So. 3d 514, 526 (Fla. 2016) (relying upon the fact that Ms. Cardona was a Spanish-speaking woman of Cuban descent, not that she spoke Spanish, and discussing the selection of which test was most suitable due to her Cuban background).

More importantly, it is irrelevant that the circuit court found the use of the Mexican WAIS-III in conjunction with American norms “problematic” or that Appellee parades that language as if it were somehow controlling before this Court. Cases like *Cardona*, *Walls*, and *Hall v. Florida* clarify that a circuit court must above all focus on the consensus of the medical community before any other inquiry is made by it. *Hall v. Florida*, 134 S.Ct. at 2000 (quoting Brief for American Psychological Association et al. as *Amici Curiae*, at 15).

The circuit court never held that Dr. Weinstein’s use of the American norms was improper because it was distinct from the medical community’s standards. Nor could the circuit court validly hold so because the medical community’s voice is clear in that Dr. Weinstein’s methods were completely acceptable.⁶ Put another way, Appellee asks that its lone wolf be afforded impenetrable credibility and deference against the arsenal of clinical opinion favoring Mr. Arbelaez. Appellee’s source for its perceived entitlement—that its expert should be given this impenetrable deference—is its own expert. No other source. Just its expert and the circuit court that had a gut feeling about it. In sum, Appellee’s supplemental answer brief on this prong is wholly irrelevant and borders on the absurd.

C. Mr. Arbelaez has Adaptive Functioning Deficits

Unified clinical standards must usurp a lower court’s unscientific hunch when it comes to all stages of diagnosing intellectual disability. *See Hall v. Florida*, 134 S.Ct. at 2000 (quoting Brief for American Psychological Association et al. as *Amici Curiae*, at 15). *See also Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016) (relying upon professional consensus as to the second prong).

Appellee relies upon the circuit court’s order, which states that “the testimony of Dr. Oakland equally challenges the validity of the use of the ABAS by Dr.

⁶ With regard to Dr. Suarez’s so-called “malingering test,” Mr. Arbelaez relies upon the supplemental initial brief, the initial brief, and the record to support that any deference afforded to those tests results in a violation of *Hall v. Florida* and its state progeny.

Weinstein.” This is not supported by the record. As its support, the circuit court cited to the fact that the ABAS should *typically* be administered on persons that have frequent and recent contact with the individual being evaluated because the ABAS is designed for persons not in a highly-structured environment like a prison. Aside from the fact that Mr. Arbelaez’s teacher had sufficient contact to be deemed frequent, the circuit court dismissed the information from her because it was not recent contact.

Circuit courts cannot dismiss retrospective assessments so long as there is also a concurrent assessment. *See Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016). This Court acknowledged the clinical challenges of diagnosing intellectual disability in incarcerated persons. *Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016). Particularly, this Court conceded the difficulties of evaluating concurrent deficits in adaptive functioning when an individual lives in the “antithesis of the environment in which adaptive behavior can be displayed.” *See id.* (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)). Before *Hall v. Florida*, this Court could not fully perceive that challenge. Therefore, if Dr. Weinstein’s retrospective use of the ABAS renders Mr. Arbelaez’s second prong unsatisfied, it has the power of denying all *Atkins* claims in Florida, as there would be no standardized instrument that could be administered to evaluate an inmate’s deficits in adaptive functioning.

Further, because prison visits are monitored in a highly-structured environment, and the frequency of those visits are regulated, it would be impossible for any layperson to speak to a capital defendant's deficits in adaptive functioning.

The circuit court and Appellee espoused a view that only prison guards could speak to 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 presented by Defendant’s *lay witnesses* focused on [the time frame prior to the crime].”) (emphasis added). Again, because prison is the antithesis of where adaptive functioning can be displayed, and prison visits are unlikely to be long, frequent, or recent for most capital defendants, the circuit court and Appellee promote a Catch-22. Specifically, because the government has placed them in a highly-structured environment, intellectually disabled capital defendants would rarely exhibit deficits in their adaptive functioning to laypersons in order to demonstrate to prove to the government that they are ineligible for death. This inflexible approach is in clear conflict with *Hall v. State*. *See Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016) (satisfying the second prong because Mr. Hall’s expert had access to DOC records in conjunction with a retrospective assessment even though Mr. Hall’s expert did not speak to prison guards).

Mr. Arbelaez relies upon his supplemental initial brief, the initial brief, unified professional consensus, and the record to assert that the second prong was always

satisfied. Specifically, Dr. Weinstein conducted a concurrent and retrospective evaluation. Thus, contrary to Appellee's assertions, there were no evidentiary failings as to the second prong. Instead, the lower court ignored that the record clearly demonstrates that a concurrent and a retrospective assessment, consistent with best professional standards, was administered by Dr. Weinstein. *Hall v. State*, 2016 WL 4697766, at *7 (Fla. 2016) (satisfying the second prong because Mr. Hall's expert had access to DOC records in conjunction with a retrospective assessment). *See also* Second Initial Supplemental Brief, at 27-38.

D. *Oats* is Instructive

Appellee asserts that *Oats v. State*, 181 So. 3d 457 (Fla. 2015) is distinguishable due to procedural distinctions between *Oats* and this case. This is an irrelevant distinction. In *Walls*, this Court afforded relief to Mr. Walls even though it had already decided that he was not intellectually disabled in a prior successive postconviction motion. *Walls v. State*, 2016 WL 6137287, at *4 (Fla. 2016). Therein, this Court cited to *Oats* in order to accurately apply *Hall v. Florida* to Mr. Walls' appeal. This Court stated:

It is clear that although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled.

Id. at 6. Therefore, because this Court afforded a "holistic review" to Mr. Walls' second successive postconviction motion on an intellectual disability claim, and this

holistic approach was in reference to the cited “interrelated nature” of intellectual disability review, Mr. Walls clearly was afforded the benefit of *Oats*. *See id.* Consequently, Mr. Arbelaez, who similarly challenges this Court’s previous determination that he is not intellectually disabled in a successive postconviction motion, is entitled to the benefit of *Oats*’ understanding that the prongs are to be interpreted in a flexible manner. *See id.*

Appellee also relies upon factual determinations that are distinct between *Oats* and this case. Any differences in the factual determinations between the two cases are similarly irrelevant. It does not matter that Mr. Oats did not have a circuit court rely upon so-called “malingering” tests that are viewed as “highly suspect” by the unified professional consensus. It does not matter that Mr. Oats was not afforded a language and cultural accommodation that the circuit court found as “not credible” even though the accommodation is acceptable by the unified professional consensus. It also does not matter that Mr. Oats did not have a circuit court, contrary to the actual record before that court, find that there were no concurrent deficits in adaptive functioning. Indeed, while factual variations may have an effect on the result of a case, factual variations do not alter the criteria that courts must apply in each case before them. Thus, the factual variations between Mr. Oats’ case and this case do not alter the fact that relief must be afforded should any prong be deemed relatively

less strong than the others.⁷ *Walls v. State*, 2016 WL 6137287, at *4 (Fla. 2016) (quoting *Oats v. State*, 181 So. 3d at 467-68 (Fla. 2015) for the proposition that *Hall v. Florida* “changed the manner” in which intellectual disability is considered, as all prongs are evaluated ““because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted.””).

In addition, Mr. Arbelaez directs this Court’s attention to Appellee’s supplemental answer brief for the purpose of showing that Appellee never tackled the merits of how *Oats* and *Hall v. State* would apply to Mr. Arbelaez’s claim. Instead, as Appellee’s table of authorities indicates, *Hall v. State* was cited solely for the purpose of referencing Mr. Arbelaez’s arguments in his supplemental initial brief. With regard to its handling of Mr. Arbelaez’s reliance on *Oats*, Appellee’s table of authorities similarly reveals that it primarily cited to *Oats* for the purpose of referencing Mr. Arbelaez’s brief. This is not legal argumentation. The only section that mildly resembles a legal argument with regard to *Oats* or *Hall v. State* is Appellee’s general statement that there are procedural and factual variances between *Oats* and this case. This lackluster tactic was clearly chosen by Appellee because the circuit court’s summary denial of the 3.851 at issue does not comport with *Hall v. State* or *Oats*.

⁷ Mr. Arbelaez maintains that all prongs are strongly and clearly established.

For the reasons stated above, in Mr. Arbelaez’s supplemental initial, and in his initial brief, Mr. Arbelaez asserts that *Hall v. Florida* and its progeny demonstrate that the circuit court erred. Specifically, it erred in its rejection of the American norms’ application to the Mexican WAIS-III, its reliance on Dr. Suarez’s so-called “malingering” tests, and its finding that the adaptive functioning evaluation was “wholly retrospective.” This was contrary to the unified professional consensus and the record, meaning it was contrary to *Hall v. Florida* and its progeny. See *Hall v. Florida*, 134 S.Ct. at 2000 (quoting Brief for American Psychological Association et al. as *Amici Curiae*, at 15).

Therefore, Appellee’s assertions in its supplemental answer brief have been refuted. Because the circuit court’s errors strengthen Mr. Arbelaez’s claim on all prongs, *Oats* is instructive should any prong be found relatively less strong than the others by this Court.

E. Due Process Implications

Throughout its supplemental answer brief, Appellee asserts that Mr. Arbelaez is not entitled to relief because he was afforded a full and fair hearing. The right to due process entails “notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The circuit court’s order, and the Appellee’s argument before this Court in defense of the circuit court’s order, violates the basic bedrock constitutional imperative that courts must

afford litigants a meaningful opportunity to be heard. Indeed, this Court so held in *Huff v. State*, 622 So. 2d, at 983 (“The essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgement is rendered. We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard.”) (internal quotations and citations omitted.).

When the circuit court summarily denied Mr. Arbelaez’s claim based on *Hall v. Florida*, it did not understand the proper scope and breadth of the United States Supreme Court’s decision. This is significant to this claim because this Court already clarified that *Hall v. Florida* did more than just overturn *Cherry*’s bright line IQ cutoff. Thus, because there is no question that the circuit court did not have the benefit of this Court’s decisions in *Hall v. State*, *Oats*, *Cardona*, and *Walls*, Mr. Arbelaez was not meaningfully heard at the circuit court level, as it did not understand *Hall v. Florida*.

Finally, there is no question that Mr. Arbelaez’s experts testified prior to *Hall v. Florida* and its state progeny. Therefore, Mr. Arbelaez’s experts were never meaningfully heard by the circuit court because their scientific testimony, which would have been supported by *Hall v. Florida* and its progeny, was discarded on unscientific grounds. As a result, Appellee’s argument that Mr. Arbelaez was meaningfully heard shatters in light of the fact that *Hall v. Florida* provided the

circuit court an opportunity to remedy its earlier mistake. After all, as this Court stated, *Hall v. Florida* did more than just settle IQ quotient disputes. 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]*”). Consequently, Mr. Arbelaez was not meaningfully heard at the circuit court level when he made an *Atkins* claim nor was he meaningfully heard when he presented this *Hall v. Florida* claim.

CONCLUSION

For the foregoing reasons, the denial of the successive motion for postconviction relief should be reversed and remanded for the imposition of a life sentence. In the alternative, this case should be remanded for an evidentiary hearing on any issue this Court finds appropriate.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing supplemental reply 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. Proc. 9.220 and 9.100(1).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been filed through the electronic filing portal and likewise provided to Leslie T. Capbell, Assistant Attorney General, at capapp@myfloridalegal.com on this 28th day of November 2016.

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