No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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GUILLERMO OCTAVIO ARBELAEZ,

*Petitioner,*

v.

STATE OF FLORIDA, ET AL.,

*Respondent*.

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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CAPITAL CASE

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December 22, 2023

## INDEX TO APPENDIX

# APPENDIX A

369 So.3d 1141 (Mem)
Supreme Court of Florida.

Guillermo Octavio ARBELAEZ, Appellant,
v.
STATE of Florida, Appellee.
Guillermo Octavio Arbelaez, Petitioner,
v.
Ricky D. Dixon, Etc., Respondent.

No. SC2015-1628, No. SC2018-0392
|
May 25, 2023

An Appeal from the Circuit Court in and for Miami-Dade County, Diane Valentina Ward, Judge, Case No. 131988CF0055460001XX, And an Original Proceeding – Habeas Corpus

**Attorneys and Law Firms**

Suzanne Keffer, Capital Collateral Regional Counsel, and Todd Scher, Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant/Petitioner

Ashley Moody, Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, Florida, for Appellee/Respondent

**Opinion**

PER CURIAM.

Guillermo Octavio Arbelaez, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive motion for postconviction relief, which was filed under Florida Rules of Criminal Procedure 3.851 and 3.203. Arbelaez also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

In 1991, a jury convicted Arbelaez of first-degree murder and kidnapping. We affirmed Arbelaez's convictions and sentence of death on direct appeal. *Arbelaez v. State* (*Arbelaez I*), 626 So. 2d 169 (Fla. 1993). We upheld the denial of his initial motion for postconviction relief on all but one claim, which we remanded for an evidentiary hearing. *Arbelaez v. State* (*Arbelaez II*), 775 So. 2d 909 (Fla. 2000). We upheld the denial of his second postconviction motion after the evidentiary hearing and denied his petition for a writ of habeas corpus. *Arbelaez v. State* (*Arbelaez III*), 898 So. 2d 25 (Fla. 2005).

In 2004, Arbelaez filed his third postconviction motion, in which he raised an intellectual disability claim under Florida Rule of Criminal Procedure 3.203 and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). We reversed the denial of his intellectual disability claim and remanded for an evidentiary hearing. *Arbelaez v. State* (*Arbelaez IV*), No. SC2005-1610 (Fla. order Nov. 14, 2006). We upheld the denial of his fourth postconviction motion after an evidentiary hearing. *Arbelaez v. State* (*Arbelaez V*), 72 So. 3d 745 (Fla. 2011). We also upheld the denial of his fifth postconviction motion. *Arbelaez v. State* (*Arbelaez VI*), 88 So. 3d 146 (Fla. 2012).

In May 2015, Arbelaez filed his sixth postconviction motion under Florida Rules of Criminal Procedure 3.851 and 3.203. Within his motion, Arbelaez sought relief based on *Hall v. Florida* (*Hall*), 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), and *Atkins*. In June 2015, the circuit court issued an order summarily denying Arbelaez's intellectual disability claim in light of this Court's decision in *Arbelaez V*. This appeal followed. While Arbelaez's postconviction case was pending in this Court, this Court permitted Arbelaez to file supplemental briefing in light of *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hall v. State* (*Hall v. State*), 201 So. 3d 628 (Fla. 2016). Arbelaez subsequently filed a petition for a writ of habeas corpus in which he claimed that ***1142** chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied under the United States and Florida Constitutions.

First, Arbelaez is not entitled to postconviction relief based on his intellectual disability claim. As this Court stated in *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla. 2020), *Hall* does not apply retroactively. Accordingly, we affirm the circuit court's order summarily denying Arbelaez's successive motion for postconviction relief.

Second, Arbelaez is not entitled to *Hurst* relief because the jury unanimously found that Arbelaez was guilty of kidnapping Julio Rivas. *See* *State v. Poole*, 297 So. 3d 487, 508 (Fla. 2020) ("The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree

murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* [536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)] and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *Arbelaez I*, 626 So. 2d at 174 ("[T]he jury found Arbelaez guilty of kidnapping and the first-degree murder of Julio Rivas.").

This Court has consistently rejected as without merit the claim that chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied. *See, e.g.*, *Thomas v. Jones*, SC2017-2268, 2018 WL 3198373, at *1 (Fla. June 29, 2018) (unpublished order); *Rodriguez v. Jones*, SC2018-0352, 2018 WL 1673423, at *1 (Fla. Apr. 6, 2018) (unpublished order); *Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017); *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017). Arbelaez's arguments do not compel departing from our precedent. Consequently, we deny Arbelaez's petition for a writ of habeas corpus.

Any rehearing motion containing reargument will be stricken. It is so ordered.

MUÑIZ, C.J., and CANADY, COURIEL, GROSSHANS, and

FRANCIS, JJ., concur.

LABARGA, J., dissents with an opinion.

SASSO, J., did not participate.

LABARGA, J., dissenting.

In light of my dissent in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and holding that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), does not apply retroactively), I dissent to the majority's decision to the extent that it affirms the summary denial of Arbelaez's successive motion for postconviction relief.

**All Citations**

369 So.3d 1141 (Mem), 48 Fla. L. Weekly S88

End of Document

# APPENDIX B

370 So.3d 932 (Mem)
Supreme Court of Florida.

Guillermo Octavio ARBELAEZ, Appellant(s)
v.
STATE of Florida, Appellee(s)
Guillermo Octavio Arbelaez, Petitioner(s)
v.
Ricky D. Dixon, etc., Respondent(s)

SC2015-1628, SC2018-0392
|
August 24, 2023

Lower Tribunal No(s).: 131988CF0055460001XX

**Opinion**
The "Motion for Rehearing" filed by the Appellant/Petitioner is hereby denied.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.

LABARGA, J., concurs with an opinion.

SASSO, J., did not participate.

LABARGA, J., concurring.
I continue to adhere to my dissent in *Arbelaez v. State*, 369 So.3d 1141 (Fla. May 25, 2023), wherein I reaffirmed my dissenting view in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), and my belief that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), applies retroactively.

However, I agree that Arbelaez has not established a basis for this Court to grant rehearing. Consequently, I have voted to deny rehearing.

A True Copy

Test:

John A. Tomasino

Clerk, Supreme Court

**All Citations**

370 So.3d 932 (Mem), 48 Fla. L. Weekly S158

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# APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY

CRIMINAL DIVISION

CASE NO: F88-5546

THE STATE OF FLORIDA,
Plaintiff,

JUDGE DIANE WARD

vs.

GUILLERMO ARBELAEZ,
Defendant.
_____/

**ORDER DENYING SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITHOUT EVIDENTIARY HEARING**

THIS CAUSE having come before this Court on June 18, 2015 on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence filed on May 8, 2015, and after reviewing the pleadings, considering arguments of counsel and being otherwise fully advised on the premises, it is hereby

ORDERED AND ADJUDGED that the motion is DENIED without an evidentiary hearing.

Defendant contends he is intellectually disabled pursuant to *Hall v. Florida*, 134 S.Ct. 1986 (2014). He seeks another evidentiary hearing on the issue.

*Hall v. Florida*, 134 S.Ct. 1986 (2014) does not create a new right. The effect of the opinion is that the courts must consider the statistical error margin in determining IQ. It has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning.

Defendant does not have deficits in adaptive functioning. *Arbelaez v. State*, 72 So.3d 745 (Fla. 2011). He is not intellectually disabled. *Hall* does not apply.

DONE and ORDERED in chambers in Miami-Dade County, Florida this 18th day of June 2015.

DIANE WARD
Circuit Judge

Copies furnished:
Penny Brill, Esq., Office of the State Attorney
Sandra Jaggard, Esq., Assistant Attorney General
Rachel Day, Esq. and Elizabeth Stewart, CCRC-South

# APPENDIX D

72 So.3d 745 (Table)
Unpublished Disposition
This unpublished disposition is
referenced in the Southern Reporter.
Supreme Court of Florida.

Guillermo Octavio ARBELAEZ, Appellant(s)
v.
STATE of Florida, Appellee(s).

No. SC10–1038.
|
Sept. 19, 2011.

**Opinion**

***1** Guillermo Octavio Arbelaez filed a successive postconviction motion in which he raised claims based on *Atkins v. Virginia,* 536 U.S. 304 (2002). The postconviction court denied the motion after an evidentiary hearing. We hereby affirm the postconviction court's denial of relief. Arbelaez did not prove that he has concurrent deficits in adaptive behavior as required by section 921.137(1), Florida Statutes (2004), and Florida Rule of Criminal Procedure 3.203(b).

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

**All Citations**

72 So.3d 745 (Table), 2011 WL 4361599

# APPENDIX E

ICCAttorney
ICCSAO

# M02-1283

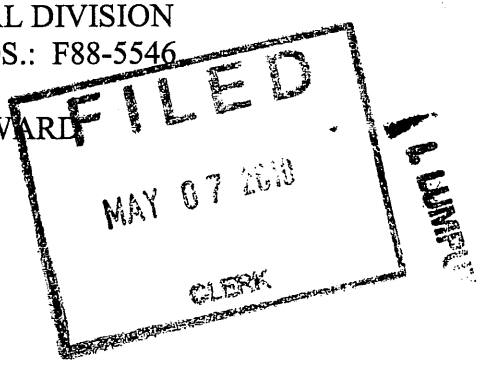
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY

CRIMINAL DIVISION
CASE NOS.: F88-5546

THE STATE OF FLORIDA,
Plaintiff
vs.

JUDGE WARD

GUILLERMO OCTAVIO ARBELAEZ,
Defendant
_____/




**ORDER DENYING DEFENDANT'S MOTION TO VACATE SENTENCE BASED UPON MENTAL RETARDATION PURSUANT TO FLA. R. CRIM. P. 3.203**

**THIS MATTER** is before the Court upon Defendant's Motion to vacate his sentence based upon his claim of mental retardation pursuant to Fla. R. Crim. P. 3.203. The Court held an evidentiary hearing on June 23-26, on July 15-17, and on July 20-21, 2009. The Court having reviewed the motion, the testimony and exhibits presented at the evidentiary hearing, the written closings arguments of the parties, the court file along with all evidence presented at trial and during prior post conviction motions, the applicable case law, and having been otherwise fully advised in the premises, **FINDS** as follows:

The procedural history of this case is as follows:

a. On February 9, 1991, Defendant was convicted of first-degree murder and kidnapping of Julio Rivas.
b. On March 4, 1991, a jury by a vote of 11 to one, recommended that he be sentenced to death.
c. On September 23, 1993, the Florida Supreme Court affirmed Defendant's conviction and sentenced. *See Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993).
d. The Defendant filed a motion for post conviction relief raising twenty-three claims. This court summarily denied Defendant's post conviction relief motion on October 18, 1996. This order was affirmed as to all but one claim. The claim that trial counsel was ineffective during the penalty phase was reversed and remanded for an evidentiary hearing by the Florida Supreme Court. *See Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).
e. On September 15, 2002, this court denied the post conviction relief motion after conducting an evidentiary hearing. Defendant appealed the order to the Florida Supreme Court.
f. On November 30, 2004, while this court's previous order was still pending before the Florida Supreme Court, Defendant filed a Motion to Vacate Judgment and Sentence requesting a hearing to prove his mental retardation

RECORDED

and ineligibility for the death penalty pursuant to the new Fla. R. Crim. P. 3.203. The State filed a motion to strike the motion.

g. On January 27, 2005, the Florida Supreme Court affirmed the order denying post conviction relief and denied a habeas corpus petition. *See Arbelaez v. State,* 898 So. 2d 25 (Fla. 2005). The Court did not consider the motion to request a determination of mental retardation under Fla.R.Crim.P. 3.203 at that time.

h. On August 5, 2005, this court summarily denied post conviction relief and granted State's motion to strike Defendant's Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850/3.851 filed on November 30, 2004. Defendant appealed that order to the Florida Supreme Court.

i. In an unpublished order, Florida Supreme Court remanded this matter for an evidentiary hearing regarding the claim that Defendant is mentally retarded. *Arbelaez v. State*, 950 So. 2d 413 (Fla. 2006).

Factually, "Arbelaez was convicted in 1991 of first-degree murder and kidnapping in the death of Julio Rivas, the five-year-old son of his former girlfriend, Graciela Alfara. The child died on February 14, 1988, after being strangled and thrown off Key Biscayne's Powell Bride into the water seventy feet below. The cause of death was asphyxia resulting from both strangulation and drowning. After committing the crime, Arbelaez fled to his family's home in Medellin, Colombia. He later returned to Florida, however, and gave full confessions on audiotape and videotape. Arbelaez admitted that, on the night before the murder, he saw his former girlfriend kissing another man. Deciding that 'the best way to get to a woman is through her children,' he murdered her son." *Arbelaez*, 898 So. 2d at 30.

This court held an evidentiary hearing on June 23-26, on July 15-17, and on July 20-21, 2009, in accordance with the order of the Florida Supreme Court to determine Defendant's mental retardation claim. At the hearing Defendant argues two claims. First, that it is the State's burden to prove beyond a reasonable doubt that Defendant is not mentally retarded or, in the alternative, the highest burden that can be constitutionally imposed is preponderance of the evidence. Second, that Defendant is mentally retarded and not subject to the death penalty.

## CLAIM I

## THE STATE MUST PROVE BEYOND A REASONABLE DOUBT DEFENDANT IS NOT MENTALLY RETARDED. IN THE ALTERNATIVE, THE HIGHEST BURDEN THAT CAN BE CONSTITUTIONALLY IMPOSED IS PREPONDERANCE OF THE EVIDENCE.

Defendant in this claim challenges the clear and convincing burden of proof requirement set forth in §921.137(4), Fla. Stat., for the court to find mental retardation. First, he argues that it is the State's burden to prove that he not mentally retarded beyond a reasonable doubt. He bases this argument on his premise that the absence of mental retardation is an element of capital first degree murder which the State must prove to the

jury beyond a reasonable doubt. Defendant claims that *Atkins v. Virginia,* 536 U.S. 304 (2002) and *Ring v. Arizona*, 536 U.S. 584 (2002) indicate that due process and the Eighth Amendment require a jury to make the decision as to his mental retardation beyond a reasonable doubt, therefore placing the burden of proof upon the State.

The court finds this argument is without merit and procedurally barred as Defendant has previously raised this same claim in the appeal of his previous post conviction motion. In rejecting Defendant's *Ring* and *Adkins* claim the Florida Supreme Court stated:

> For purposes of efficiency, however, we note that Arbelaez's *Ring* and *Atkins* claims would certainly fail on the merits. Contemporaneously with the conviction for first-degree murder, the jury also convicted Arbelaez of kidnapping. *Id.* at 911. That conviction became the basis for one of the aggravating factors the trial court found. *See Arbelaez*, 775 So.2d at 912. This Court has repeatedly dismissed arguments under *Ring* where one of the aggravating factors is a previous or contemporaneous conviction. *See, e.g., Kimbrough v. State,* 886 So.2d 965 (Fla.2004); *Douglas v. State*, 878 So.2d 1246 (Fla.2004); *Doorbal v. State*, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).
>
> Arbelaez cannot feed *Atkins* through *Ring*. He contends that, after *Atkins*, the absence of mental retardation is now an element of capital murder that, under *Ring*, the jury must consider and find beyond a reasonable doubt. We have rejected such arguments. *See Bottoson v. Moore*, 833 So.2d 693 (Fla.2002) (rejecting the defendant's *Atkins* claim on the ground that the trial judge had found the defendant not to be mentally retarded). Other state supreme courts have reached the same conclusion. *See, e.g., Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 619-21 (2003); *Russell v. State*, 849 So.2d 95, 148 (Miss.2003); *State v. Williams*, 831 So.2d 835, 860 n. 35 (La.2002). Arbelaez has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded.

*Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005).

Defendant next argues that the clear and convincing burden of proof requirement set forth in §921.137(4), Fla. Stat, is unconstitutional. He claims the highest burden which can be constitutionally imposed upon him is preponderance of the evidence. This court made findings, as set forth below, that Defendant failed to prove that he is mentally retarded under either standard of proof. Therefore, this court does not find it necessary to address the constitutionality of the statue.

## CLAIM II

## DEFENDANT IS MENTALLY RETARDED AND IS NOT ELIGIBLE FOR THE DEATH PENALTY

Defendant claims he is mentally retarded, therefore, he is ineligible for the death penalty under *Atkins* and §921.137, Fla. Stat. At the evidentiary hearing Defendant presented three expert witnesses to support his claim and the State presented two expert witnesses in rebuttal. Defendant also presented live testimony of lay witnesses: Vincent Soler, Jorge Salazar, Martha Aguelles, Amparo Arbelaez, Flor Arboleda, Jerome Lee, Henry Walker and John Flaherty. Additional Defense testimony was present through deposition from Katrin Banks, Sandra Martinez, and Tomas Tabares. The testimony of the expert witnesses is summarized as follows:

**Dr. Ricardo Weinstein**

Ricardo Weinstein, a psychologist, testified as a Defense expert regarding Defendant's mental retardation. He testified that mental retardation is a developmental disability which is determined by subaverage intellectual functioning, concurrent deficits in adaptive behavior and onset before the age of 18. He stated to determine whether a person is mentally retarded, he administers an IQ test to evaluate the first element, to determine the second element he administers an instrument to persons who can provide information about the functioning of the individual, and he reviews records to determine onset before age 18. In making his assessment, Dr. Weinstein met with Defendant to evaluate him on March 28 and 29, 2007. He interviewed Defendant and administered a number of tests. He also spoke to Defendant's family, friends and employers. Finally, he reviewed a number of records.

Dr. Weinstein explained that general intelligence is the ability to learn from experience, that is, to think. He stated that IQ is assessed by the use of standardized testing. In order to determine Defendant's IQ, Dr. Weinstein administered three tests: the Mexican version of the WAIS-III because it is in Spanish, the Batteria Woodcock-Munoz (Woodcock), and the Comprehensive Test of Non-Verbal Intelligence (CTONI). Dr. Weinstein determined that on the WAIS-III Defendant obtained a verbal score of 66, a performance score of 69 and a full scale IQ score of 65. On the Woodcock he found Defendant's full scale IQ to be 59 and an IQ of 52 on the CTONI. Dr. Weinstein also reviewed the test results finding a full scale IQ score of 68 obtained by the State's expert, Dr. Suarez, which he testified were consisted with his test results. It was Dr. Weinstein's opinion the standardized testing shows Defendant's intellectual functioning is subaverage meeting the first requirement in making a diagnosis of mental retardation.

Dr. Weinstein testified for a person to be considered to be of subaverage intellectual functioning, the WAIS-III score needs to be two standard deviations below the mean of one hundred. A standard deviation is 15 points so the IQ score must be 70 or below. He chose to use the version of the WAIS-III normed in Mexico because Spanish is Defendant's native language. He found Defendant's IQ to be 65 using this test. He

explained that IQ tests must be normed which consists of giving the test to a representative sample of the population at large that it is intended to be used with. He testified that even though the version of the WAIS-III he gave Defendant has its own norms, he used United States norms when scoring the test. He explained he did this because you must always use the norms of the population with which you want to compare the person. He also stated there were problems with the Mexican norms because the results do not give you statistically reliable scores. He explained the standard error of measurement is considered to be plus or minus 5 points, but if you go to the score of 70 on the Mexican tables the range of IQ listed is from 55 to 103.

Dr. Weinstein opined that the IQ score of 59 Defendant received on the Woodcock was similar to the WAIS-III results of 65. He explained that he based this on the Flynn effect which states that IQ scores increase over time. The Flynn effect requires that you look at the year the test was normed and for every year between the normed date and testing date you add three points. The Woodcock was normed in 2006. Defendant was administered it in 2007, so you would expect the IQ score to be three points higher. Dr. Weinstein's explanation of the difference between the CTONI score and the WAIS-III score is that the CTONI does not give a full scale IQ but tests a very narrow area of function.

Dr. Weinstein stated that malingering is always a consideration in the forensic context and must be tested for either formally or informally. To determine if Defendant was putting forth good effort, Dr. Weinstein gave him the TOMM, Rey 15 Item test and Computerized Assessment of Response to Bias. He determined that Defendant put forth consistent and good effort in everything he was asked to do. Dr. Weinstein was critical of the three tests used by Dr. Suarez to determine Defendant was malingering. First, he stated the MMPI should not have been used because it is not designed to test effort. Additionally, the MMPI is not suitable to use for a person who is mentally retarded. He also believed Dr. Suarez's use of the Validity Indicator Profile (VIP) was an inappropriate test of malingering to use on Defendant. He stated this is because the manual says not to use it with people with mental retardation due to a false positive result of good effort. Dr. Weinstein did acknowledge that there was nothing in the record to show Defendant had ever been diagnosed with mental retardation. Finally, he testified the results Dr. Suarez received on the dot counting test were inaccurate due to faulty timing. This test uses cards containing a random number of dots. The test is timed using a stopwatch to determine to how quickly a person gives an answer. Dr. Weinstein based his determination that Dr. Suarez's timing was inaccurate by re-timing the test using the time shown on the run clock on the videotape. He determined Defendant was putting forth good effort by his re-timing of the test.

Dr. Weinstein stated he did not formally assess Defendant's present adaptive behavior deficits in prison. He did not consider information given by Defendant during the interview in assessing present deficits behavior because mentally retarded persons are not reliable reporters due to masking of their disabilities. He stated he did consider present deficits informally based on how Defendant performed on a test of academic

achievement. However, he conceded that adaptive behavior is how a person functions in the real world not based on the results of a test.

Dr. Weinstein testified that the only way to asses Defendant's adaptive behavior deficits is to talk to people who know him well and how he functions in the community; this includes family, teachers, friends, and employers. He defined community to mean the environment in which a person functions on a daily basis. He would not include a prison to be a community because it is highly structured which acts as a support. He explained that he did not use prison guards because they did not know Defendant well or how he functions in the real world. The issue is what Defendant *cannot* do, not what he *can* do. Only weaknesses are considered in assessing current adaptive deficits. He insisted the evaluation of adaptive behavior deficits requires a retrospective evaluation because mental retardation is a life long condition.

In conducting his retrospective evaluation, Dr. Weinstein traveled to Columbia and met with Defendant's mother, siblings, priests, a teacher, and several friends. He said he received consistent information that Defendant was 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 rules, and did strange unusual things. He acknowledged that all of the people he spoke to in Columbia had no information as to Defendant's present adaptive behavior as they had little or no contact with him since he came to the United States. Dr. Weinstein used the Adaptive Behavior Assessment Scales (ABAS) with Defendant's mother and teacher. The scores were more than two standard deviations below mean. He stated that some skills tested by the ABAS are applicable to Columbia, but some things are not culturally the same.

Dr. Weinstein also spoke to a number of people in Florida who knew Defendant including the mother of people he lived with, several friends and his employer. Defendant's employer from Tony Roma's told Dr. Weinstein that Defendant worked as a dishwasher and kitchen helper. Defendant was described as a hard working and very responsible employee, but had severe limitations in what he could do. The employer said Defendant could not understand why tax was taken out of his pay and that he left Tony Roma's because immigration was looking for him. Additionally, Dr. Weinstein reviewed a large number of records. He said the most helpful were school records from Columbia which indicated Defendant was held back in several grades. He reviewed medical records which showed Defendant was treated for epilepsy. He did not review the police reports, Defendant's confession, or consider the events surrounding the crime because he does not consider them relevant to the issue of mental retardation. He stated crime was an unusual event which shows maladaptive behavior.

Dr. Weinstein's opinion is that Defendant has concurrent adaptive behavior deficits based upon the material he reviewed, the interviews he conducted, the ABAS given to Defendant's mother and teacher, and his clinical judgment. He testified Defendant's deficits which support his conclusion are limits in academic skills, limited employment skills, limited social skills in that Defendant is gullible and naïve, difficulty

in understanding instructions, poor abstract reasoning, history of not taking epilepsy medication, and hygiene issues which he learned to take care of in his late teens.

Dr. Weinstein reviewed Dr. Suarez's report but found nothing in it that would change is opinion. He stated Dr. Suarez's use of the ABAS to assess adaptive functions given to various prison guards was inappropriate because the literature say not to use it with prison guards. He also found the number of guesses marked by the guards to be a problem. He stated that when more than three guesses are marked in any section an interview should be conducted to determine why guessing is taking place. He also noted Dr. Suarez did not do a retrospective evaluation.

To determine whether Defendant's mental retardation had its onset before age 18, Dr. Weinstein relied on his interviews with the people who knew Defendant as a child in Columbia. He testified that these interviews showed that many deficits were present. He believed that the people he interviewed remembered Defendant well even though those memories were decades old.

**Dr. Marc Tasse**

Marc J. Tasse, a psychologist and an associate professor at the University of South Florida, testified as a Defense expert. He never evaluated Defendant and has no opinion whether he is mentally retarded. He stated that Florida's definition of mental retardation is the same as the clinical definition. Dr. Tasse stated that mental retardation is a functional diagnosis which is usually made in school age children. It is his opinion that mental retardation is a life long condition, but they can learn and improve especially during childhood. When making the assessment in adults, when there is no history of retardation, he stated a retrospective analysis is necessary to determine whether onset was before age 18.

Dr. Tasse testified that intellectual functioning refers to a person's ability to reason, think, solve problems, and learn for experiences. Generally, the WAIS or the Stanford-Binet are the best IQ tests to determine intellectual functioning. He stated that it is important to evaluate intelligence in accordance with a person's language and culture. He said that anyone can do more poorly on an IQ test. What must be looked at is if there is good effort made and consistency of results with other testing. He testified IQ and behavior deficits are fairly consistent over a person's lifetime. He stated if a person has a lot of education or training there may not be a correlation between past behavior deficits and present adaptive behavior.

Dr. Tasse's opinion is that adaptive behavior is how a person learns skills and behaviors in response to expectations and demands of the community. It is related to one's age and culture. It is recommended that a standardized instrument be used in assessing adaptive behavior. He stated community is defined as society in everyday life. This is how the scales and norms are created for standardized testing. He said there are no norms for prison populations so it is virtually impossible to assess present adaptive functioning on a person when in prison. Because prison, by definition, is not in society

or a community, he stated a retrospective assessment is recommended for the time prior to incarceration when they last were in the community. He testified that reviewing records can also give useful information as to adaptive behavior. He stated he would review prison records, but he would give these less weight because of the restrictive setting.

Dr. Tasse testified when doing a retrospective analysis there is a concern about family members remembering from long ago. The longer the time frame the less reliable the information. He stated it is important to obtain information from multiple sources to see if the information is validated by convergence. It was his opinion that the reliability of the source must also be ascertained, especially if the finding of mental retardation may be a benefit to the person or his family.

Dr. Tasse stated that criminal behavior is adaptive skill deficits; this is because we expect people to obey rules. There is no relationship between being mentally retarded and criminal acts. He stated because we expect people to obey rules, criminal acts are considered adaptive deficits.

**Dr. Thomas Oakland**

Thomas Oakland, an educational psychologist, testified as a Defense expert. He did not evaluate Defendant and offered no opinion as to his mental retardation. Dr. Oakland testified that one of his areas of expertise is in adaptive behavior. He defined adaptive behavior as the extent to which a person accepts responsibility for his daily behavior, independently displays behavior and responds to the needs of others. He stated it is critical to assess adaptive behavior when assessing mental retardation. He indicated that there are ten skill areas which are considered: communication, community use, functional academics, home living, health and safety, leisure, self care, self direction, social, and work.

Dr. Oakland testified he is one of the developers of the ABAS, which is a measure of adaptive behavior. The ABAS was developed for use and normed in the United States. He indicated it was not normed on persons in prison because it is too restrictive for a person to function independently. The ABAS takes into account the ten skill areas and provides scores for each of the areas. These sub-scores lead to a general composite score. He stated that the ABAS is used in assessing a variety of disabilities not just mental retardation. There are a number of ABAS forms; one is designed to be used with adults.

He explained ABAS respondents must be selected from persons who have knowledge of and have had frequent extended contact the person being assessed. It is also important that the contact be recent. The form should be explained by the evaluator. There is a guess box which is to be used on each question if the behavior in question has never been observed. When there are three or more guesses in any area, the evaluator should talk to the person to resolve the guessed items. The adult ABAS form can be self administered. Dr. Oakland testified that he had actually used the ABAS with a death row

inmate who he was evaluating, although he did not consider this use to be an actual administration of the ABAS.

Dr. Oakland reviewed Dr. Suarez's report and testing. He testified that he was not assessing adaptive behavior in this case, but reviewing the use of the ABAS to see if it was properly used. He stated Dr. Suarez's use of ABAS was faulty. The ABAS is not designed for use in prison and no measure was designed for this use. Dr. Oakland reviewed the ABAS forms which Dr. Suarez had prison personnel complete. He went through each of the ABAS forms indicating they each contained a large number of guessed items. It is Dr. Oakland's opinion that these ABAS forms were invalid because the persons completing them did not have enough information or knowledge regarding Defendant's behaviors. He acknowledged that he had asked a prison guard to do an ABAS form on a death row inmate. Although, he indicated he found it was helpful on how the person acts within the prison setting, it did not tell him how the person would act outside. He believes that it is impossible to assess adaptive functioning of a person on death row.

Dr. Oakland was also critical of Dr. Suarez's use of the VIP and MMPI as tests to detect malingering. He stated that while the VIP is a test of malingering; it is not suitable for people with mental retardation. He indicated that the MMPI is a measure of pathology which requires an eighth grade reading level. This reading level is too high for people with mental retardation and the concepts are too advanced.

Dr. Oakland testified that he does not agree with Florida law in assessing adaptive behavior in the prison setting, so he does not follow it. Instead, he agrees with the DSM-IV in defining mental retardation which requires concurrent deficits or impairment in present adaptive functioning. His believes that "concurrent deficits in adaptive functioning" means deficits that existed prior to age 18. He disagrees that the terms "concurrent" and "present" mean now.

Dr. Oakland testified that a prison cannot be classified as a community. He stated that nothing in Defendant's present setting can inform him as to Defendant's adaptive functioning, and that arriving at a score on the ABAS from prison guards' observations was useless. Dr. Oakland said that if a behavior was not listed in the ABAS form it was not relevant and could not be considered in a formal assessment of adaptive behavior. He also indicated the ABAS could not be used in Columbia because it was normed in United States and should only be used in other countries that are similar.

In response to this court's questions, Dr. Oakland stated that in assessing Defendant's adaptive behavior, the last 20 years cannot be considered, the crime cannot be considered, his behavior before and after the crime cannot be considered, and that only Defendant's behavior before the age of 18 should be considered.

**Dr. Enrique Suarez**

Enrique Suarez, a psychologist specializing in forensic and neuropsychology, testified as a State's expert. He stated that Florida's definition of mental retardation was consistent with the definition contained in DSM-IV. He indicated that the requirement that adaptive behavior be determined concurrent means within the same time frame as the IQ testing: in the present.

Dr. Suarez evaluated the Defendant on July 15, 2008. He spent over six hours with Defendant, who was completely cooperative, goal oriented, not inappropriate in any way, and attentive the whole time. At the time he knew Defendant had been in prison since 1988. In preparation he reviewed documents regarding Defendant's life before he was in jail, police reports, Defendant's confession, witness statements, medical records, records from the Department of Corrections, and reports from other experts who had evaluated Defendant. He stated it was important to look at Defendant's pre-prison adult life because it allows him to correlate information. This also indicated what type of supports he may have had which is significant because it gives a good idea if mental retardation was present. He found no evidence that Defendant had supports in pre-prison adult life or any extraordinary support in the prison system.

Dr. Suarez administered the Spanish version of the WAIS-III normed in Spain to test Defendant's IQ. He used this test because of Defendant's language. He stated an IQ score means nothing if you cannot compare it to a population. It is his opinion that using the United States norms on a test not normed here violates the norming process. He explained how you use the norms is important because of the differences in education is taken into account in the norming process. He stated that education has the most effect on IQ scores. He noted that culture must also be taken into account in assessing both IQ and adaptive behavior. He believes there is a greater correlation between the culture of Spain and South America. The use of the Mexican norms is not appropriate because of its large indigenous population. Dr. Suarez found Defendant's full scale IQ to be 68 using the WAIS. He noted that there was an odd scattering of subtest scores. Defendant scored in the low average range on the subtests for vocabulary and arithmetic, usually the most difficult for mentally retarded persons. On the subtest for digit span, information and comprehension Defendant scored in the borderline range. Defendant scored in the extremely low range on the similarities subtest.

Dr. Suarez also administered the CTONI to Defendant because it is a non-verbal test. It tests abstract reasoning and is not contaminated by education or dependent on language. This test requires the solving of visual puzzles.

Dr. Suarez explained that he devised a spelling test to give to Defendant by taking forms written by Defendant contained in Department of Corrections' records. He administered the test by saying the word, putting it in a sentence, repeating the word and asking Defendant to write it down. He stated he gave this test to see if Defendant had the language skills to complete the MMPI.

Dr. Suarez testified it is important when giving IQ tests to determine whether the person is putting for good effort because these tests have no validity scores and are taken at face value. He stated malingering, not putting forth best effort, must be looked at proactively. He stated when testing in the forensic arena there is a great incentive for the person not to do their best. To determine if Defendant was putting forth his best effort, Dr. Suarez administered several tests: the dot counting test, the VIP, and the MMPI.

Dr. Suarez explained that the dot counting test is a symptom validity test to determine best effort. It is a very easy test that anyone can do which consists of showing groups of dots on a card. The person is timed on how long they take to count the dots. Dr. Suarez used a stopwatch accurate to hundredths of a second. The test is scored based on the time taken and accuracy of the answer.

Dr. Suarez testified he gave the VIP as another test of effort. He explained on each item of the test there are two choices, one is always right and one is always wrong. This test is computer scored because of the complex statistical manipulations required in scoring it.

Dr. Suarez stated the MMPI is a test of personality and psychological functioning. It is a lengthy test which requires a great deal of reading. He devised a spelling test using words from letters and documents purportedly written by Defendant to see if he could have written them in making a determination whether the Defendant had the ability to read the test. In addition, Dr. Suarez looked at Defendant's educational level and his use of language during the interview in determining that he had the ability to read the test. He felt the MMPI was an important test because mental state can affect IQ performance and the test also provides information about effort.

Dr. Suarez stated the VIP and dot counting test tell you how much weight should be given to the WAIS. He stated the results of Defendant's VIP test showed a suppressed profile which is evidence of malingering. He believed the VIP was an appropriate test even though the manual stated it should not be used with a person with retardation. He explained the manual also states a suppressed profile is evidence of malingering even if the test subject was actually retarded. Dr. Suarez concluded the WAIS was probably invalid due to Defendant's malingering. He believed that Defendant's IQ probably fell in the average range.

Dr. Suarez testified Defendant appeared well nourished, alert, responsive, well groomed and his hygiene was fine. The Defendant was able to give him a full and detailed life history covering both his youth in Columbia, his life in the United States, and the circumstances both before and after the murder. Defendant described how he was able to finance his travels to the United States when he was in his early 20's by lying to a priest in order to obtain the money. The Defendant made financial arrangements to travel illegally with a group of immigrants to the United States, and arrived with no resources, family or friends. He was able to adapt to the new culture and language, all of which is inconsistent with a mentally retarded individual who would require supports in order to survive in a new culture.

The Defense sited Defendant's employment at menial jobs as evidence of his mental retardation, however Dr. Suarez noted that the fact that his early employment may have been menial labor was not indicative of mental retardation but consistent with a person coming to the United States without proper immigration documents or professional skills. Defendant was able to obtain employment shortly after arriving in the United States, often working at more than one job at a time. He progressed to a job at a hotel where he was entrusted with keys, and his responsibility was to receive and distribute merchandise to other employees. His stated job history, especially his last job, was inconsistent with the types of deficits associated with retardation.

Dr. Suarez also considered Defendant's use of an alias to disguise his true identity from immigration authorities while he lived in the United States and, later, to enable his flight from the United States to avoid law enforcement in this case, as inconsistent with a person who is mentally retarded. He used one alias in order to obtain employment in the United States to avoid immigration authorities, another alias to flee the United States after the homicide in order to travel to Puerto Rico undetected, then used his real name to travel on to Columbia using his Columbian passport. His use of aliases indicated a high level of abstract thinking.

Defendant was also able to secure a means of transportation while living in the United States, progressing from a bicycle, to a moped, to a Dodge truck and finally to a Volvo which he used to drive to work and run errands. He was able to obtain a driver's license. Defendant said he provided financial support to the victim's mother and siblings, took the children to school, shopped for the family, did household tasks, and arranged for household repairs, such as changing the locks in the house and hiring repairmen.

Defendant completed the sixth grade in Columbia, then dropped out of school. He admitted to Dr. Suarez that he dropped out school because he did not like school and preferred hanging out with his friends and using drugs. Dr. Suarez stated he was able to corroborate most of what Defendant told him by other sources with only minor inconsistencies. Dr. Suarez found no evidence that Defendant had ever been hospitalized in the United States for mental problems, although he had been seen for his epilepsy. The Defendant was able to relate the names and strengths of his epilepsy medications. Although he claimed he experienced audio, visual and olfactory hallucinations, Dr. Suarez found these claims to be inconsistent with legitimate reports of hallucinations and further evidence of malingering.

Dr. Suarez stated Defendant admitted he can speak and understand English, but mixes Spanish words in. He confirmed with DOC staff that Defendant was able to communicate his needs to them in English. Dr. Suarez found Defendant to be perfectly fluent in Spanish. His opinion is that Defendant's ability to learn a second language is not consistent with retardation.

Dr. Suarez reviewed letters Defendant had written while in prison requesting medical attention or other needs. He also reviewed Defendant's artwork posted on a

website by the Canadian Coalition Against the Death Penalty. Defendant's webpage, where he was soliciting pen pals for social correspondence, included drawings made by using carbon paper to trace pictures. According to Dr. Suarez, they showed excellent tracing and good use of color, shading and hues.

Dr. Suarez also considered the circumstances of the crime, including Defendant's account during the interview and his review of the police reports and case file. He found the evidence of Defendant's plan to commit the crime as relevant to his use of adaptive behaviors. According to Defendant's post-arrest statement to the police, he told people he was going to do something that day to cause her (the child's mother) to remember him for the rest of her life; he left his car at his friend's home because he intended to leave the country; he borrowed money from friends to finance his travels; he arranged and paid for public transportation by taxi and international travel on airplanes; he used an alias to avoid detection. The level of planning was inconsistent with an individual who was mentally retarded.

Dr. Suarez stated assessing adaptive behaviors is the key to determining mental retardation because a person can have a low IQ but have no impairments. Dr. Suarez used the ABAS with certain DOC personnel who knew Defendant to learn information about his present adaptive functioning. Even though he recognized that there were problems using this standardized instrument, he used ABAS qualitatively. He stated he told the DOC personnel to estimate Defendant's ability to do behaviors based on comparable behavior they had seen. The ABAS forms gave him information from the only people who saw Defendant function on a daily basis. He stated that because adaptive functioning should be relatively stable, he corroborated Defendant's present functioning with information gathered from other sources regarding his pre-prison adult functioning. Dr. Suarez opined that based on Defendant's present activities, pre-prison activities, and records that Defendant has no deficits in adaptive behavior.

Dr. Suarez stated Florida Law requires more than an IQ test and a retrospective evaluation of adaptive behavior before age 18. His understanding is that the first and second prongs must be demonstrated in the present before you look at the period before age 18. He did not look to the period before 18 because he found the first two legal requirements did not exist. He stated that based upon the totality of the circumstances, his opinion is that Defendant is not mentally retarded.

**Dr. Sonia Ruiz**

On November 15, 2001, in response to a court order Dr. Sonia Ruiz, a forensic psychologist, evaluated Defendant for mental disorders including mental retardation. She testified that she spent about four hours with Defendant, about half was an interview.

Dr. Ruiz testified that in determining whether Defendant is mentally retarded she used the definition of retardation contained in the DSM and Florida Statute. She stated that adaptive behavior is more important than the IQ score in determining mental retardation. This is because IQ test scores are influenced by many factors including

motivation and educational level. Motivation is a problem in evaluating a person who is in jail because they have something to gain by not doing their best.

She stated that during the interview Defendant was cooperative, logical, conversed in a normal manner and had organized thoughts. He told Dr. Ruiz that he left Columbia at 18 or 19 traveling to Venezuela, the Bahamas, and Jamaica before coming to Miami in 1980. Defendant told her that he had lived on his own and had two or three jobs at a time. In his last job he had the keys to the hotel where he was in charge of opening up, receiving goods and distributing them to the cooks and bartenders. Defendant was able to discuss his epilepsy including his past and present medications. Dr. Ruiz stated she found Defendant's statements were consistent with past information he provided in his confession and to Dr. Castiello. Dr. Ruiz opined that Defendant's independent international travel, his work history (especially in his last job), and his ability to live on his own in this country were inconsistent with being mentally retarded.

Dr. Ruiz administered the Bender Gestalt, Raven's Progressive Matrices and the MMPI in Spanish to Defendant. On the Raven's test Defendant scored in the lowest percentile which represents a boarder line IQ of 70 to 75. She chose to use this test rather than the WAIS or Standard-Binet because she was concerned with practice effect, since Defendant had already been given the WAIS. Additionally, she testified the Mexican version of the WAIS tends to score IQ about 10 points lower. She chose the Raven's because it is less culturally biased than the other tests. The MMPI has validity scales to show if a person is being truthful. Defendant's performance on the MMPI was invalid because of the type of answers he gave. The Bender Gestalt is a screening device to determine mental disorders. Defendant showed no sign of the type of errors that are typical of someone with retardation.

It is Dr. Ruiz's opinion that Defendant was not mentally retarded based on her testing and all the information received.

## LEGAL STANDARD

Mental Retardation is defined in §921.137(1), Fla. Stat. and Fla. R. Crim. P. 3.203.

> [T]he term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means 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.

This definition is consistent with that found in *Atkins v. Virginia,* 536 U.S. 304, 309. (2002).

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.,* at 42-43.

The three elements which Defendant must prove by clear and convincing evidence are: 1) substantial subaverage intellectual functioning, 2) existing concurrent deficits in adaptive behavior and 3) manifestation before age 18. §921.137, Fla. Stat. Florida law defines the first element of mental retardation as an IQ under 70. *Zack v. State*, 911 So. 2d 1201 (Fla. 2005); *Cherry v. State*, 959 So. 2d 702 (Fla. 2007). The Florida Supreme Court has found that the definition of concurrent contained in the second element means occurring at the same time as the IQ score determination and that a retrospective diagnosis is insufficient to prove this element. *Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 325 -327 (Fla. 2007). The third element requires that the first two elements must have first become evident before the age of 18. *Jones, Supra.* The lack of proof on any one of these three elements would result in a defendant not being found to suffer from mental retardation. *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009).

## FINDINGS OF FACT

The only Defense expert to evaluate Defendant and provide an opinion as to his mental retardation was Dr. Weinstein. In determining Defendant's general intellectual functioning, Dr. Weinstein administered the WAIS-III normed in Mexico, receiving a full scale IQ score of 65. He used the scoring scales for the WAIS normed in the United States because he believed Defendant should be compared against the population where he now lived. Dr. Weinstein did not use the Mexican norms because he said the results do not give statistically reliable scores.

Defendant on the WAIS-III administered by Dr. Suarez received a full scale IQ score of 68. Dr. Suarez believed this IQ score to be invalid based on Defendant's malingering and that his true IQ was in the average range. Defendant went to great lengths to discredit the testing methods of Dr. Suarez in determining that Defendant was malingering. However, it is Defendant's burden to prove his IQ is under 70. He has failed to do so.

The court finds Dr. Weinstein's the use of the United States norms, rather than those intended for the Mexican WAIS, to be problematic. Dr. Weinstein himself stated IQ tests must be normed, explaining this consists of giving the test to a representative sample of the population with whom it is intended to be used. Dr. Suarez stated IQ norming takes into account a person's culture and level of education. He stated by using norming data that is not applicable to the test given the norming process is violated, rendering the results meaningless.

The court finds Dr. Weinstein's determination of Defendant's IQ to be 65 is not credible. His use of norming data other than that intended for the test given invalidates the results. Therefore, Defendant has failed to prove the first element that his IQ is under 70, not only by clear and convincing evidence, but also by the preponderance of the evidence.

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

conceded that she was a friend of Defendant's sister, was pained by the fact that he was facing the death penalty and wanted to help him.

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

Defendant argues that a proper assessment of adaptive behavior involves a retrospective analysis of an individual prior to age 18. Defendant presented evidence through all three of his experts that this is the only proper way to assess adaptive behavior. Both Dr. Weinstein and Dr. Oakland insisted that the requirement that behavioral deficits be concurrent with subaverage intelligence means before age 18. They disagree with Florida's legal interpretation that deficits in adaptive behavior must exist in the present: at the same time as the IQ testing. In making these arguments Defendant urges this court to ignore Florida Supreme Court's decisions by which it is bound.

This court finds that Defendant's reliance solely on a retrospective evaluation is not in compliance with the Florida Supreme Court's holdings in *Phillips* and *Jones* that found this type of evaluation is not sufficient to prove deficits in current adaptive behavior. Defendant made no effort whatsoever to present any evidence to show that he had present adaptive behavior deficits occurring contemporaneously with the determination of his IQ. Therefore, he has failed to meet his burden that he has deficits in adaptive behavior by either standard to proof.

As Defendant has failed to prove either of the first two elements required to find that he is mentally retarded, this court finds it unnecessary to address the third element's requirement of onset before age 18.

## CONCLUSION

Defendant has not proven by either clear or convincing evidence or by the preponderance of the evidence that he is mentally retarded. There is no valid IQ score below 70, nor was there any proof presented that Defendant has present deficits in adaptive functioning.

**WHEREFORE**, it is **ORDERED AND ADJUDGED** that Defendant's motion to vacate his sentence of death based upon his mental retardation is **DENIED.**

**DONE AND ORDERED** in open court at Miami-Dade County, Florida, this 7th day of May, 2010.

DIANE WARD
Circuit Court Judge

Copies furnished to:
Penny H. Brill, Assistant State Attorney
Sandra S. Jaggard, Assistant Attorney General
Rachel L. Day, Assistant CCRC South Attorney

I CERTIFY that a copy of this order has been furnished to the MOVANT, GUILLERMO OCTAVIO ARBELAEZ by mail this 18th day of JUNE, 20 10.

Deputy Clerk

CLERK CIRCUIT AND COUNTY COURTS IN GOD WE TRUST DADE COUNTY, FLORIDA

# APPENDIX F

950 So.2d 413 (Table)
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Guillermo Octavio Arbelaez
v.
State

NO. SC05-1610
|
November 14, 2006

**Opinion**

Disposition: Remanded.

**All Citations**

950 So.2d 413 (Table)

# APPENDIX G

cc: DEFENDANT cc: APPEALS cc: L. CAMPBELL, ESQ. ATTORNEY GENERAL'S OFFICE
cc: CCRC cc: TODD G. SCHER, ESQ.
cc: SALLY WEINTRAUB, ESQ. SAO



IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,
Plaintiff,

CRIMINAL DIVISION
CASE NO: F88-5546

vs.

GUILLERMO OCTAVIO ARBELAEZ,
Defendant.
_____/

**ORDER SUMMARILY DENYING POST CONVICTION RELIEF AND GRANTING STATES' MOTION TO STRIKE DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO RULE 3.850/3.851**

THIS MATTER is before the Court on Defendant's Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850/3.851. The Court having reviewed the motion, the court file, the applicable law, and having been otherwise fully advised in the premises, **FINDS** as follows:

Defendant's Motion to Vacate Judgment and Sentence was filed on November 30, 2004 requesting a hearing to prove his mental retardation and ineligibility for the death penalty pursuant to new Fla. R. Crim. P. 3.203. The State filed a motion to strike Defendant's motion.

The history of this case is as follows:

a. On February 19, 1991, Defendant was convicted of first-degree murder and kidnapping of Julio Rivas.
b. On March 4, 1991, a jury by a vote of 11 to one, recommended that he be sentenced to death.
c. On September 23, 1993, the Florida Supreme Court affirmed Defendant's conviction and sentence. *See Arbelaez v. State*, 626 So.2d 169 (Fla. 1993).
d. This court summarily denied post conviction relief motion on October 18, 1996. This order was reversed and remanded for an evidentiary hearing by the Third District Court of Appeal. *See Arbelaez v. State*, 775 So.2d 909 (Fla. 2000).
e. On September 15, 2002, this court denied the post conviction relief motion after conducting an evidentiary hearing. Defendant appealed the order to the Florida Supreme Court.
f. On January 27, 2005, the Florida Supreme Court affirmed the order denying post conviction relief and denied a habeas corpus petition. *See Arbelaez v. State*, 898 So.2d 25 (Fla. 2005). The Court did not consider the motion to request a determination of mental retardation under Fla. R. Crim. P. 3.203 at that time.

Factually, "Arbelaez was convicted in 1991 of first-degree murder and kidnapping in the death of Julio Rivas, the five-year-old son of his former girlfriend, Graciela Alfara. The child died on

February 14, 1988, after being strangled and thrown off Key Biscayne's Powell Bridge into the water seventy feet below. The cause of death was asphyxia resulting from both strangulation and drowning. After committing the crime, Arbelaez fled to his family's home in Medellin, Colombia. He later returned to Florida, however, and gave full confessions on audiotape and videotape. Arbelaez admitted that, on the night before the murder, he saw his former girlfriend kissing another man. Deciding that 'the best way to get to a woman is through her children,' he murdered her son." *Arbelaez*, 898 So. 2d at 30.

**CLAIM I**

**MR. ARBELAEZ'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

Defendant alleges the death penalty is unconstitutional in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). He again alleges that he is mentally retarded. Defendant admits in his motion he previously presented testimony in an evidentiary hearing on this issue.

The State, in its Motion to Strike, alleged that Defendant failed to comply with Rule 3.203(d)(4)(E). On or before October 1, 2004, he had a pending appeal of the order denying post conviction relief in the Florida Supreme Court. He failed to file a motion in the Florida Supreme Court to relinquish jurisdiction to the circuit court for a determination of the mental retardation claim within 60 days from October 1, 2004. The 60 days expired in December of 2004. At the *Huff* Hearing held on July 20, 2005, counsel for Defendant noted that the rule states "may" seek relinquishment, not the mandatory shall.

The State also contends that Defendant's counsel also failed to include a "certification by counsel that the motion was made in good faith and on reasonable grounds to believe that the prisoner is mentally retarded," in contravention of Fla. R. Crim. P. 3.203(d)(4)(A). At the *Huff* Hearing, counsel explained that he believes the way the rule reads, the certificate of good faith is applicable if the motion for relinquishment was filed.

The State also contends defendant failed to include copies of the opinions from the experts who allegedly evaluated him pursuant to Fla. R. Crim. P. 3.203(c)(3). At the *Huff* Hearing, Defendant explained that since the *Atkins* claim is based on the testimony of Dr. Latterner, and the State is aware of the content of the testimony, there is no reason to attach a report.

The State did concede at the *Huff* hearing that even if the claims they made in regard to failure to comply with Fla. R. Crim. P. 3.202 are correct, it would not be grounds for the court to deny the motion with prejudice. In the interests of justice, the court will address the merits of the claims raised.

The issue of whether Defendant is mentally retarded was raised in his previous motion for postconviction relief and addressed by the Florida Supreme Court. At the *Huff* hearing, counsel for Defendant argued he is entitled to an evidentiary hearing based up footnote 2 in the recently decided

*Arbelaez*, 898 So. 2d at 43, n.2.

As noted by the Florida Supreme court:

> **Arbelaez did not demonstrate at the evidentiary hearing that he suffers from mental retardation, organic brain damage, or any other major mental illness aside from epilepsy.**
>
> Arbelaez's strongest evidence of mental health mitigation is that he is of low intelligence (but has a high level of adaptive functioning) and that he was hospitalized with severe depression before moving to the United States (but was never treated or hospitalized for depression during the decade before the murder). This evidence is not strong enough to shake our confidence in the outcome. Arbelaez has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Valle,* 778 So.2d at 966.
>
> At the evidentiary hearing, Arbelaez presented evidence that he is mentally retarded. Dr. Ruth Latterner, a neuropsychologist who evaluated him after his direct appeal, testified that he suffers not only from epilepsy, but also from mental retardation and organic brain damage. She testified that Arbelaez has a full-scale IQ score of 67, placing him in the range of "educable mentally retarded," and that his language skills place him between a first- and a third-grade level. These conditions, she testified, "pre-existed" her evaluation. Dr. Latterner was the only expert witness who testified unambiguously that Arbelaez has mental retardation or organic brain damage.
>
> The trial court rejected Dr. Latterner's testimony as having "little if any evidentiary value as it is refuted by other mental health professionals and other evidence, and is otherwise wholly unbelievable." The court emphasized that Dr. Latterner admitted on cross-examination that, in reaching her finding of mental retardation, she looked only at testing results and "refuse[d] to consider" Arbelaez's ability to adapt to his surroundings, even though section 916.106(12), Florida Statutes (2003), defines mental retardation as necessarily including "deficits in adaptive behavior." The court also emphasized that Dr. Latterner refused to consider the possibility that Arbelaez's difficult experiences on death row might have negatively impacted his intellectual functioning and thus his testing results. If they had, the court implied, then Dr. Latterner's findings from 1995 would not accurately reflect Arbelaez's mental condition at the time of the penalty phase in 1991.
>
> The trial court found that the testimony of two other mental health professionals, Dr. Sonia Ruiz and Dr. Haber, "conclusively refute[d]" that of Dr. Latterner. Dr. Ruiz, a clinical psychologist who evaluated Arbelaez at the State's request in 2001, testified that Arbelaez has no mental retardation or "any major thought disturbance [or] psychosis whatsoever." She acknowledged that Arbelaez's testing performances, if analyzed independently, revealed a "borderline level of mental retardation." However, unlike Dr. Latterner, Dr. Ruiz also considered Arbelaez's ability to adapt to

his surroundings. She testified that Arbelaez's "adaptive level of functioning was quite high [so] that you cannot label him as mentally retarded." This assessment was echoed, to some extent, by Dr. Haber, who testified for the defense that Arbelaez has "very limited intelligence" and is at least "close" to being "mildly mentally retarded," but also acknowledged that Arbelaez had adapted to his environment and "appeared to be functioning behaviorally within an adequate range." In fact, Dr. Haber admitted that she "would not have thought about an IQ test" based on her brief pretrial evaluations in 1988 and 1989.

The trial court's decision to assign greater weight to the comparatively modest assessments of Dr. Ruiz and Dr. Haber than it assigned to the uncorroborated findings of Dr. Latterner was based on competent, substantial evidence and thus warrants deference on appeal. *Sochor,* 883 So.2d at 781. This Court "will not substitute its judgment for that of the circuit court on questions of fact and, likewise, on the credibility of the witnesses and weight to be given to the evidence." *Id.*

Because Arbelaez failed to present competent, substantial evidence that he suffers from mental retardation or major mental illness, his claim now rests upon the uncontested evidence of his low intelligence and his struggles with depression in Colombia, including his suicide attempts. Arbelaez contends that this evidence might have altered the outcome of his penalty phase. We disagree. The jury heard plenty of evidence from which to arrive at a rough estimate of Arbelaez's low intelligence level. Arbelaez testified during the guilt phase of the trial and claimed that the boy's death was an accidental drowning, despite the strong physical evidence of strangulation. The State discredited Arbelaez's testimony by introducing a videotaped confession in which Arbelaez recounted the facts of the crime in detail, making it clear that the crime was both premeditated and deliberate. The jury therefore knew that Arbelaez had enough intelligence to plan and remember the details of the murder, as well as enough intelligence to concoct a patently false story to explain the boy's death. In fact, counsel appealed to the jury during the penalty phase's closing argument to reflect on what Arbelaez's testimony revealed about his intellectual limitations: "[A]sk yourself ... what was [Arbelaez's] emotional or mental age . . . You were able to listen and observe the man describing what he said he did."

*Arbelaez v. State*, 898 So. 2d at 35-36 (emphasis added).

Additionally, in the order denying Defendant's previous Motion for Postconviction relief, attached in the State's response as exhibit 1, Judge Rothenberg describes in detail the testimony received during the evidentiary hearing on the issue of mental retardation and her findings, which were affirmed by the Florida Supreme Court.

Defendant contends that he is entitled to a new evidentiary hearing based on the previous testimony of Dr. Latterner. That is his sole basis for relief under this claim. Yet an evidentiary hearing was

held during which she testified. Her testimony was rejected by the trial court and the Florida Supreme Court found no error with this conclusion.

Even if the testimony of Dr. Latterner is taken as true, Defendant's claim is still lacking in merit. Dr. Lattterner reached her conclusions based only on Defendant's I.Q. The Supreme Court noted the definition of mental retardation:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

*Atkins*, 536 U.S. at 309.

It is clear that Defendant does not meet the definition of mental retardation in *Atkins, supra* or § 916.106(12), Fla. Stat. (2003), as he does not have any deficits in adaptive behavior.

The claim is both refuted by the record and procedurally barred as it has been previously raised. *Stewart v. State*, 801 So. 2d 59 (Fla. 2001)

## CLAIM II

**THE PROCEDURE PROVIDED BY FLA. R. CRIM. P. 3.203, VIOLATES THE SIXTH, EIGHTH AND THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES AND FLORIDA CONSTITUTIONS.**

Defendant alleges that the procedures to determine mental retardation in Fla.R.Crim.P. 3.203 are unconstitutional. However, because the trial court and the Florida Supreme Court have previously determined that Defendant is not mentally retarded, this claim is not ripe.

Even if the claim was ripe, it is lacking in merit. The burden of proof is found in § 921.137(4), Fla. Stat. The statute and the rule are consistent with the requirement in A*tkins*. The State noted at the *Huff* hearing that while the statute calls for a preponderance of the evidence standard, at the previous evidentiary hearing, the court utilized the clear and convincing burden of proof standard, which is a lower burden for the defendant to meet.

Fla. R. Crim. P. 3.0203 defines mental retardation in the same manner as the American Psychiatric Association found above in *Atkins*. The definition found in § 921.137, Fla. Stat., is also consistent with the definition found in *Atkins*. It defies logic that the rule is unconstitutional based on *Aktins* when it uses the same definition.

The evidence in the record and noted in the sentencing order is uncontroverted that Defendant does not have any limitations in adaptive functioning. He does not meet the definition of mentally retarded, as stated in *Atkins*, upon which he relies.

*Ring* claims are equally unavailing. *Ring* does not preclude a judge from serving in the role of sentencer. In his concurrence, Justice Scalia wrote:

> What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life- or- death decision to the judge may continue to do so–by requiring a prior jury finding an aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."

*Ring*, 122 S.Ct. at 2445 (Scalia, J. concurring).

Florida's sentencing scheme is consistent with this. The jury determines during the penalty phase the aggravating factors and makes a recommendation to the trial court, who ultimately decides life or death.

Additionally, the *Ring* claim was raised in his previous motion for postconviction relief and the Florida Supreme Court found that Defendant cannot feed *Atkins* through *Ring*. *Arbelaez*, 898 So.2d at 43.

As noted above, Defendant has previously litigated the issue of mental retardation and it has been determined by both the trial court and the Florida Supreme Court that he is not mentally retarded. As he does not meet the definition found in *Atkins*, there can be no sentencing error for failing to take mental retardation into consideration.

**CLAIM III**

**MR. ARBELAEZ IS MENTALLY RETARDED AND THEREFORE HIS EXECUTION IS FORBIDDEN BY SECTION 921.137, FLA. STAT. (2001), AND BY ATKINS V. VIRGINIA, 536 U.S. 304 (2002).**

As noted in detail in Claim I, Defendant does not meet the definition of mentally retarded. He does not suffer from any limitations in adaptive functioning, as previously found by the trial court and the Florida Supreme Court.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's successive Motion is **DENIED**, as it is lacking in merit, refuted by the record, and procedurally barred as previously raised.

**DONE AND ORDERED** in chambers this 5 day of August, 2005 in Miami-Dade County, Florida.

**DIANE WARD**
CIRCUIT COURT JUDGE

Copies furnished to:

Guillermo Octavio Arbelaez, Defendant
Todd G. Scher, Esq.
Leslie Campbell, Esq., Attorney General's Office
Sally Weintraub, Esq., State Attorney's Office

I CERTIFY that a copy of this order has been furnished to the Movant, GUILLERMO OCTAVIO ARBELAEZ, this 11th DAY OF AUGUST, 2005.

DEPUTY CLERK