CASE NO. 23-6383

IN THE UNITED STATES SUPREME COURT

GUILLERMO ARBELAEZ,

Petitioner,

vs.

STATE OF FLORIDA, ET AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1 Whether the Florida Supreme Court correctly determined this Court's holding in *Hall v. Florida*, 572 U.S. 701 (2014) announced a new procedural rule of constitutional law that does not apply retroactively to those defendants whose judgments and sentences became final before 2014?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

CITATION TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF CASE AND FACTS 2

REASONS FOR DENYING THE WRIT 18

ISSUE I CERTIORARI REVIEW OF THE DENIAL OF POSTCONVICTION RELIEF SHOULD BE DENIED AS THE FLORIDA SUPREME COURT'S FINDING *HALL V. FLORIDA* ANNOUNCED A NEW PROCEDURAL RULE OF LAW THAT IS NOT RETROACTIVE DOES NOT PRESENT ANY MEANINGUL CONFLICT WITH A DECISION OF THIS COURT OR ANY FEDERAL CIRCUIT COURT OR STATE COURT OF LAST RESORT. MOREOVER, ARBELAEZ HAS FAILED TO SHOW THAT *HALL V. FLORIDA* IS DISPOSITIVE OF HIS CASE AS HE RECEIVED TWO PRIOR EVIDENTIARY HEARINGS ON INTELLECTUAL DISABILITY AND WAS UNABLE TO ESTABLISH THAT HE HAS ADAPTIVE FUNCTIONING DEFICITS (RESTATED) 18

A. History leading to the Florida Supreme Ocurt's determination that under federal law *Hall v. Florida* not retroactive to cases on collateral review 19

B. The Florida Supreme Court's decision finding that *Hall v. Florida* is not retroactive does not establish a clear split is state and federal courts and therefore does not warrant certiorari review 22

C. The Florida Supreme Court found that *Hall v. Florida* is not retroactive as it announced a new rule of constitutional procedure; it did not announce a new substantive right 25

D. A favorable ruling here would not afford Arbelaez any relief under *Hall v. Florida* he has had two evidentiary hearings and has failed to prove he suffers from deficits in adaptive functioning 28

CONCLUSION 32

CERTIFICATE OF SERVICE 33

TABLE OF CITATIONS

Page(s)

Cases

Arbelaez v. Sec'y, Fla. Dep't. Of Corr.,
662 Fed. Appx. 713 (11th Cir. 2016), *cert. denied*, 583 U.S. 842 (2017) .... Passim
Arbelaez v. Sec'y, Fla. Dept. of Corr.,
43 F. Supp. 3d 1271 (S.D. Fla. 2014) 7
Arbelaez v. State,
72 So. 3d 745 (Fla. 2011), *cert. denied*, 566 U.S. 954 (2012) .... Passim
Arbelaez v. State,
88 So. 3d 146 (Fla. 2012) 1, 7
Arbelaez v. State,
369 So. 3d 1141 (Fla. 2023) 1, 2, 7
Arbelaez v. State,
626 So.2d 169 (Fla. 1993) .... Passim
Arbelaez v. State,
775 So.2d 909 (Fla. 2000) 1, 6, 7
Arbelaez v. State,
898 So.2d 25 (Fla. 2005) 1, 7, 8, 30
Atkins v. Virginia,
536 U.S. 304 (2002) .... Passim
Beard v. Banks,
542 U.S. 406 (2004) 26
Bobby v. Bies,
556 U.S. 825 (2009) 19
California v. Carney,
471 U.S. 386 (1985) 25
Chaidez v. United States,
568 U.S. 342 (2013) 24
Cherry v. State,
959 So. 2d 702 (Fla. 2007) 20
Edwards v. Vannoy,
141 S. Ct. 1547, 1559-60 (2021) 27
General Talking Pictures Corp. v. Western Electric Co.,
304 U.S. 175 (1924) 31
Hall v. Florida,
572 U.S. 701 (2014) .... Passim
In re Henry,
757 F.3d 1151 (11th Cir. 2014) 26
In re Payne,
722 F. App'x 534 (6th Cir. 2018) 22
Jones v. State,

231 So. 3d 374 (Fla. 2017) 29

Kilgore v. Sec'y, Fla. Dep't of Corr.,
805 F.3d 1301 (11th Cir. 2015) 22, 27
Montgomery v. Louisiana,
577 U.S. 190 (2016) 22
Moore v. Texas (Moore I),
581 U.S. 1 (2017) 24
Moore v. Texas (Moore II),
586 U.S. ----, 139 S. Ct. 666 (2019) 24
Nixon v. State,
327 So. 3d 780 (Fla. 2021) 25
Oats v. Florida,
181 So. 3d 457 (2015) 23
Page v. Arkansas Natural Gas Corp.,
286 U.S. 269 (1932) 31
Payne v. State,
493 S.W.3d 478 (Tenn. 2016) 22
Penry v. Lynaugh,
492 U.S. 302 (1989) 27
Phillips v. Florida,
141 S. Ct. 2676 (2021) 21, 25
Phillips v. State,
299 So. 3d 1013 (Fla 2020) .... Passim
Porter v. McCollum,
558 U.S. 30 (2009) 1, 7
Rice v. Sioux City Mem'l Park Cemetery,
349 U.S. 70 (1995) 28
Rockford Life Ins. Co. v. Illinois Dep't of Revenue,
482 U.S. 182 (1987) 19
Salazar v. State,
188 So. 3d 799 (Fla. 2016) 29
Smith v. Sharp,
935 F.3d 1064 (10th Cir. 2019) 24
State v. Jackson,
157 N.E. 3d 240 (Ohio Ct. App. 2020) 22
State v. Lotter,
311 Neb. 878, 976 N.W.2d 721 (Neb. 2022) 24
Teague v. Lane,
489 U.S. 288 (1989) 25, 26
Thompson v. State,
341 So. 3d 303 (Fla. 2022) *cert. denied sum nom, Thompson v. Florida*, 143 S. Ct. 592 (2023) 25

United States v. Johnston,
268 U.S. 220 (1925) 31
Walls v. State,
213 So. 3d 340 (Fla. 2016) 21
White v. Commonwealth,
500 S.W. 3d 208 .... 22, 23, 25
Williams v. Kelley,
858 F.3d 464 (8th Cir. 2017) 22
Witt v. State,
387 So. 2d 922 (Fla. 1980) 21
Woodall v. Commonwealth,
563 S.W. 3d 1 (Ky. 2018) 23

Statutes

28 U.S.C. § 1257(a) 2
Section 916.106(12), Florida Statutes (2003) 9
Section 921.137(1), Florida Statutes (2001) 18, 20
Section 921.137(1), Florida Statutes (2004) 14, 30

Rules

Florida Rule of Criminal Procedure 3.203 .... 1, 20, 31

CITATION TO OPINIONS BELOW

The decision of which Petitioner, Guillermo Arbelaez ("Arbelaez") seeks discretionary review is reported as *Arbelaez v. State,* 369 So. 3d 1141 (Fla. 2023) which was issued on May 25, 2023, and affirmed the denial of Arbelaez's sixth postconviction motion and denial of his Rule 3.203, Fla. R. Crim. P. motion where he sought relief claiming he was Intellectually Disabled.[1]

To the extent that prior cases are relevant to the issue before this Court the following cases are referenced.

Direct Appeal opinion: *Arbelaez v. State*, 626 So.2d 169 (Fla. 1993), *cert. denied*, 511 U.S. 1115 (1994); **Original postconviction litigation/state habeas petition**: *Arbelaez v. State*, 775 So.2d 909, 912-13, 914-15 (Fla. 2000) (remanded for evidentiary hearing); *Arbelaez v. State*, 898 So.2d 25 (Fla. 2005) (denial of postconviction relief following evidentiary hearing and making findings Arbelaez was not intellectually disabled); **First Successive postconviction litigation**: *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011), *cert. denied*, 566 U.S. 954 (2012) (affirming denial of intellectual disability claims after evidentiary hearing); **Second Successive postconviction litigation**: following. *Arbelaez v. State*, 88 So.3d 146 (Fla. 2012) (affirming denial of relief and finding *Porter v. McCollum*, 558 U.S. 30 (2009) not retroactive); **Federal habeas litigation**: *Arbelaez v. Sec'y, Fla. Dep't. Of Corr.,* 662 Fed. Appx. 713 (11th Cir. 2016), *cert. denied*, *Arbelaez v. Julie Jones, Secretary,*

[1] While the parties and experts at trial and during postconviction litigation referred to "mental retardation," the State will substitute the now recognized term of intellectual disability or ID where direct quotes are not being referenced.

Florida Department of Corrections, 583 U.S. 842 (2017); **Third Successive postconviction litigation/case under review**: *Arbelaez v. State,* 369 So. 3d 1141 (Fla. 2023) (rejecting successive challenge to death sentence claiming intellectual disability and seeking another evidentiary hearing based on *Hall v. Florida*, 572 U.S. 701 (2014), because *Hall v. Florida* found not retroactive in *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla 2020)).

JURISDICTION

Petitioner, Guillermo Arbelaez ("Arbelaez"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida ("State"), accepts as accurate Petitioner's recitation of the Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's determination in *Arbelaez v. State*, 369 So. 3d 1141, 1142 (Fla. 2023) that Arbelaez is not entitled to relief on his successive postconviction motion on his intellectual disability claim as the Florida Supreme Court stated in *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla. 2020) that *Hall v. Florida*, 572 U.S. 701 (2014) does not apply retroactively to cases on collateral review.

The following procedural and factual history is focused on the ID claim. Arbelaez is in custody, under a death sentence, subject to lawful custody pursuant to a valid judgment. He was indicted and convicted by a jury for the February 14, 1988, first-degree murder and kidnapping of five-year old Julio Rivas. The jury recommended death by an eleven-to-one vote for the child's murder, and the judge followed that recommendation. *Arbelaez v. State*, 626 So.2d 169 (Fla. 1993), *cert. denied*, 511 U.S. 1115 (1994).

On direct appeal, the Florida Supreme Court found that Arbelaez and the victim's mother, Graciela Alfara ("Graciela") met at the Cafateria Blanquita where she worked. *Arbelaez*, 626 So. 2d at 170. Over the next few months, they became closer and around January 15, 1988, Arbelaez moved in with Graciela, her two daughters, son Julio Rivas ("Julio"), and cousin; Arbelaez paid Graciela $150 per month for a room he shared with her cousin. *Id.* Shortly thereafter, the relationship turned intimate, but ended when Graciela accused Arbelaez of touching one of her daughter's breasts. *Id.* On February 13, 1988, two days before Arbelaez was to move out of the house according to Graciela, he learned that Graciela had left her work early with another man. Waiting for Graciela to return, Arbelaez watched through the peephole as Graciela kissed her companion good night. *Id.* When she entered the house, Arbelaez accosted her. In response, Graciela claimed not to love Arbelaez and ordered him to leave the next day. *Id.*

The following morning, as Graciela's cousin, Harlam Alfara ("Harlam") was preparing for work he saw Arbelaez and Julio watching television in the living

room. In response to Harlam's question, Arbelaez stated he would not be going to work that day. *Id.* at 171. When Harlam returned to the living room, Arbelaez and Julio were gone. *Id.* "At approximately 7:30 a.m., while Graciela was sleeping in her room, Arbelaez took Julio and left the house." *Id.* at 171. Arbelaez drove to the cafeteria, and leaving Julio in the car, ordered coffee. *Id.* Patrons, Francisca Morgan and Juan Londrian reported that Arbelaez was calm as he related that Graciela was seeing someone else and that he "was going to do something that would assure 'that bitch [meaning Graciela] is going to remember me for the rest of her life.'" *Id.* After driving for a while with Julio in the car, Arbelaez called Graciela, but she refused to talk to him. *Id.* As a result, he took the boy to the Rickenbacker Causeway in Miami, raised the hood of the car to pretend it was disabled, and threw Julio off the bridge into the water 70 feet below in revenge and a way to hurt Graciela for her rejection of Arbelaez's affection. *Arbelaez*, 626 So.2d at 171. Arbelaez then fled to Pedro Salazar's home where he confessed to his friend what he had done to Julio and why he was so motivated. *Id.* Salazar loaned Arbelaez money for a flight to Puerto Rico, which he booked under an assumed name. Ultimately, Arbelaez made his way back to his family home in Columbia. *Id.*

A month later, Detective Cadavid, contacted Arbelaez's family in Medellin, Columbia and was connected to Arbelaez. *Id.* at 171. When the "problem in Miami" was broached, "Arbelaez responded that he knew he was in trouble, but that he could not return to the United States because of a lack of documentation and money." *Id.* at 171-72. The detective offered to assist with proper documentation

and airfare. As a result, the detective contacted FBI liaison officer Rubin Munoz. *Id.* Subsequently, Arbelaez contacted Agent Munoz and admitted he had problems in Miami, that he had left out of fear, but would return to face prosecution as he had caused the death of his girlfriend's child. *Id.* In speaking to Agent Munoz and later to Miami detectives, Arbelaez made detailed, audio and video-taped confessions. *Arbelaez*, 626 So. 2d 172-75. Arbelaez told Agent Munoz, "As a Latin you would understand the best way to get to a woman is through her children." Therefore, Arbelaez admitted "he threw the woman's son off the bridge in order to drown the boy." *Id.*

The medical and forensic testimony corroborated the information Arbelaez gave during his multiple confessions while in Columbia and in Miami. *Arbelaez*, 626 So. 2d 174-75. During the trial, Arbelaez testified on his own behalf admitting to taking Julio, but denying killing him, and instead, offered that the boy fell from the causeway. *Id.* The jury rejected Arbelaez's defense and convicted him of kidnapping and first-degree murder. *Id.* at 175.

In the penalty phase, the defense offered in mitigation that Arbelaez had no significant history of prior criminal activity and had returned from Columbia to Miami voluntarily. *Arbelaez*, 626 So. 2d at 175. Arbelaez called friends to say he was an "honest and hard-working individual who never took narcotics or drank alcohol excessively." *Id.* The defense also presented mental health experts to report that Arbelaez "suffered from chronic epileptic seizures and that his previous anti-convulsion medication, Mysoline, had ceased to be effective" and the replacement

medication had negative side effects, but did not cause depression *Id.* The jury recommended death by an eleven to one vote and the court found three aggravators: (1) cold, calculated and premeditated; (2) heinous, atrocious, or cruel; and (3) homicide was committed during the course of kidnapping. "In mitigation, the trial court found that Arbelaez had no significant history of prior criminal activity and the nonstatutory mitigating circumstance of remorse." *Arbelaez*, 626 So. 2d 175. Upon weighing the sentencing factors, the trial court sentenced Arbelaez to death. *Arbelaez*, 626 So. 2d 175.

Arbelaez appealed his convictions and sentences to the Florida Supreme Court, raising five issues, none of which are relevant here. The Florida Supreme Court affirmed. *Arbelaez*, 626 So.2d at 175-78. On May 23, 1994, this Court denied certiorari. *Arbelaez v. Florida*, 511 U.S. 1115 (1994).

Next Arbelaez filed a motion for postconviction relief in state court. Relevant here, Arbelaez alleged that his penalty phase counsel failed to investigate and present evidence regarding his mental state and background. (PCR1 V.1 at 47-73).[2]

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[2] Referencing the record before the Florida Supreme Court in the multiple appeals.

Original Direct Appeal in SC60-77,668 - "DAR" "DAT" and "DAR-SR" for the record, transcript of proceedings and supplemental record, *Arbelaez v. State*, 626 So.2d 169 (Fla. 1993), *cert. denied*, 511 U.S. 1115 (1994).

First Postconviction Appeal in SC60-89375 - "PCR1" and "PCR1-SR." will refer to the record on appeal and supplemental record on appeal of the summary denial of Arbelaez's original postconviction motion, *Arbelaez v. State*, 775 So.2d 909, 912-13, 914-15 (Fla. 2000).

Second Postconviction Appeal in SC02-2284 - "PCR2" and "PCR2-SR" refer to the record on appeal and supplemental record on appeal in the appeal from the denial after remand for an evidentiary hearing of Arbelaez's initial postconviction motion "PCR2-EX" will refer to the separately paginated portion of the record

There, he alleged that mitigation evidence should have been presented in the form of: (1) he suffered from epilepsy; (2) brain damage; (3) intellectual disability; (4) other mental disorders; (5) he was raised in poverty; (6) that his family was abusive/dysfunctional; and (7) that he had abused drugs during his childhood. *Id.* The state postconviction court summarily denied the motion, (PCR1v.2 at 346-79), however, the Florida Supreme Court remanded for an evidentiary hearing on the claim of ineffective assistance. *Arbelaez,* 775 So.2d a6 912-15.

In the appeal following the denial of relief after an evidentiary hearing, the Florida Supreme Court found, with respect to evidence of intellectual disability ("ID") and organic brain damage, that counsel's performance deficient as far as investigating these issues; that counsel "ignored various red flags" and failed to request a mental health evaluation. *Id.* at 33-34. However, the Florida Supreme

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containing the exhibits admitted at the evidentiary hearing, *Arbelaez v. State,* 898 So.2d 25 (Fla. 2005).

Third Postconviction Appeal in SC05-1610 - "PCR3" and "PCR3-SR" addressed to his motions for relief under Rule 3.203, Fla. R. Crim. P. and under *Atkins v. Virginia,* 536 U.S. 304 (2002) refer to the record on appeal and supplemental record on appeal in the appeal from the summary denial of Arbelaez's second and third postconviction motions, and after remand for an evidentiary hearing. *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011), *cert denied, Arbelaez v. Florida,* 566 U.S. 954 (2012).

Fourth Postconviction Appeal in SC10-1038 - "PCR4" and "PCR4-SR" refer to the record on appeal and supplemental record on appeal in the appeal from the denial of Arbelaez's fifth postconviction motion raising a *Porter v. McCollum,* 558 U.S. 30 (2009) claim. *Arbelaez v. State,* 88 So. 3d 146 (Fla. 2012); Federal Habeas litigation Case No 12-23304-CIV *Arbelaez v. Sec'y, Fla. Dept. of Corr.*, 43 F. Supp. 3d 1271 (S.D. Fla. 2014) and affirming denial of federal habeas petition at *Arbelaez v. Sec'y, Fla. Dep't of Corr.*, 662 F. App'x 713 (11th Cir. 2016).

Fifth State Postconviction Appeal in SC 15-1628 - "PCR5" refers to the record in the appeal of the denial of Arbelaez's sixth motion for postconviction relief which raised a *Hall v. Florida,* 572 U.S. 701 (2014), *Arbelaez v. State,* 369 So. 3d 1141 (Fla. 2023).

Court concluded *Strickland* prejudice was not proven. It found Arbelaez did not demonstrate he was Intellectually Disabled; at best he showed "low intelligence but has a high level of adaptive functioning." *Arbelaez*, 898 So. 2d at 35. While defense expert, Dr. Ruth Latterner, opined that Arbelaez was ID, the trial court rejected her "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.'" *Id.* at 36.

Important to the Florida Supreme Court was that fact "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." *Arbelaez*, 898 So. 2d at 36. The Florida Supreme Court credited the postconviction court's rejection of Dr. Latterner's opinion given her refusal "to consider the possibility that Arbelaez's difficult experiences on death row might have negatively impacted his intellectual functioning and thus his testing results [.]" Consequently, her 1995 findings would not have reflected accurately Arbelaez's condition during the 1991 trial. *Id.* at 36.

As the Florida Supreme Court determined, the trial court found the State's mental health expert, Dr. Ruiz, and defense expert, Dr. Haber, "'conclusively refute[d]'" Dr. Latterner's testimony. *Id.* Countering Dr. Latterner, Dr. Ruiz testified that Arbelaez was not ID and did not suffer from any other mental health

disturbances, although he may have a "borderline level" of ID considering the IQ testing alone. The Florida Supreme Court continued, stating "[h]owever, 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.'***" *Id.* at 36 (emphasis supplied) As the Florida Supreme Court found, Dr. Haber concurred and even if Arbelaez, who has "very limited intelligence" and was close to ID, he has "***adapted to his environment and "appeared to be functioning behaviorally within an adequate range.***" *Id.* at 36 (emphasis supplied)

The Florida Supreme Court found the trial court's assessment/rejection of Dr. Latterner's testimony supported by competent, substantial evidence warranting deference on appeal. And refused to substitute its judgment for that of the trial court on "questions of fact and, likewise, on the credibility of the witnesses and weight to be given to the evidence." *Id.* at 36. In finding *Strickland* prejudice had not been proven, the Florida Supreme Court noted in part that the jury had the benefit of testimony to assess Arbelaez's low intelligence and also was able to consider not only his detailed confessions, but trial testimony, where he claimed the child's death was accidental despite "strong evidence" of strangulation; "[t]he 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." *Id.* at *36.*

Arbelaez also litigated a successive postconviction relief claim based on

Atkins v. Virginia, 536 U.S. 304 (2002). During the ordered evidentiary hearing, additional mental health experts were called. Following the evidentiary hearing, the postconviction court issued a detailed 18-page order addressing the IQ and adaptive functioning prongs. The IQ scores[3] by Dr. Weinstein were rejected as not proven. This was found, not because of the scores obtained, but because of the fact that the defense expert mixed the norming scales[4] and the State's expert, Dr. Suarez, determined the score was invalid because of Arbelaez's malingering. Additionally, Dr. Suarez testified that the IQ results were invalid because the Mexican WAIS-III was given, but the United States' norms were used. (PCR3 6403).

With respect to adaptive functioning, defense expert Dr. Tasse admitted on cross-examination that relying on the recollection of individuals from decades earlier, as Dr. Weinstein did, caused a concern for the accuracy of the information these individuals provided. (PCR3 402-03) He admitted that a further concern about the reliability of the information arose from the fact that the determination that a person with ID might cause a benefit to the person and his family. (PCR3 403-04) Dr. Thomas Oakland, a school psychologist, testified that had been involved in the

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[3] Dr. Weinstein administered the Spanish version of the WAIS-III normed in Mexico, the Bateria Woodcock-Munoz III and the Comprehensive Test of Non-Verbal Intelligence (CTONI) to measure Defendant's intelligence. (PCR3 157, 164) Defendant obtained a full scale IQ of 65 on the WAIS-III; a full scale IQ of 59 on the Woodcock-Munoz; and an IQ of 52 on the CTONI. (PCR3 171-73)

[4] Dr. Suarez stated that it was important to consider culture in evaluating both intelligence and adaptive functioning. (PCR3 897-98) He noted that education had a large influence on IQ score and that the process of norming IQ tests took into account the general education level of the population to whom the tests were to be administered. (PCR3 894-99) He stated that using a norm that did not comport to the test given rendered the score on the test meaningless. (PCR3 894-96, 900).

development of the Adaptive Behavior Assessment Scales ("ABAS"), a test of adaptive behavior. (PCR3 434, 493-94) The test was developed using only United States citizens. (PCR3 495) He stated that the ABAS would only be useful when administered in a foreign country if the foreign country were similar to the United States. He did not believe that it was appropriate to use the ABAS for Columbians. (PCR3 583).

The State presented Dr. Enrique Suarez, a psychologist with a specialization in forensic psychology and neuropsychology, who testified that it was important to look at whether Arbelaez needed support to live a daily life to determine the level of his adaptive functioning. (PCR3 860-78, 884-86) To assess this, Dr. Suarez reviewed documents regarding Arbelaez's life before the crime, police reports about the crime, his confession, witness statements, Department of Corrections records, medical records and the reports of the other experts who had evaluated Arbelaez. (PCR3 888-90) These documents revealed no evidence that Arbelaez had required support to function in his daily life prior to being incarcerated, that he received support while incarcerated, and that he was never suspected of being ID (PCR3 886-87, 891-92) Further, Dr. Suarez stated the result of his other testing indicated that Arbelaez was malingering and were not consistent with the type of false positives associated with ID. (PCR3 994-1000, 1018-20) As such, Dr. Suarez opined that Arbelaez 's true reasoning level was probably in the average range. (PCR3 999)

Dr. Suarez also interviewed Arbelaez, whose appearance and hygiene were appropriate. (PCR3 925-29, 933, 938) During the interview, Arbelaez attempted to

evade questions by feigning memory lapses only to acknowledge the information when pushed, denied artistic ability, later acknowledged it when confronted with evidence of such ability and provided information regarding mental health symptoms inconsistent with real mental illness, which raised further concerns of malingering. (PCR3 939-40, 961-67, 972-74)

Arbelaez showed communication skills inconsistent with ID and provided information about his ability to immigrate to this country, understand currency exchange, live independently, travel independently, obtain employment, housing and means of transportation, progress in his employment, develop social relationships and care for others that was also inconsistent with ID. (PCR3 940-67) He admitted to disliking school and using drugs instead, and the information about his noncompliance with his medication was consistent with manipulation. (PCR3 954, 960) Further, Arbelaez was fluent in Spanish and had learned sufficient English to communicate his needs, which is inconsistent with ID. (PCR3 967-69) Moreover, information that Arbelaez provided was consistent with information from the records Dr. Suarez reviewed. (PCR3 955-56) The information about the planning of the crime and escape thereafter was also inconsistent with ID. (PCR3 974-79) To further assess Arbelaez's present functioning, Dr. Suarez administered the ABAS to prison officials. (PRR3 1001-06) The information he received from these tests and the records review was inconsistent with functioning deficits. (PCR3 988-89, 1002, 1007-08) As a result, Dr. Suarez opined that Arbelaez was not intellectually disabled. (PCT4. 1009).

With respect to the adaptive functioning prong of ID, the trial court found the only defense expert to address Arbelaez's adaptive functioning was Dr. Weinstein who placed "considerable weight" on the ABAS given to Arbelaez's mother and teacher who had taught Arbelaez when he was in sixth grade (some 37 years ago) and rarely saw him after that time and never after he left for the United States, and was pained that he was on death row. (PCR3 36 6403) Dr. Oakland, another defense expert and a developer of the ABAS test, challenged "the validity of the use of the ABAS by Dr. Weinstein." (PCR3 36 6403) The trial court found that "[a]ccording 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." (PCR3 36 6403) Equally important to the trial court was the fact that during Dr. Weinstein's 2007 evaluation of Arbelaez, he made no attempt to determine current adaptive functioning.[5] (PCR3 36 6403). The trial court concluded that merely assessing adaptive behavior before the age of 18 was insufficient to prove ID and improper as it ran counter to Florida's definition of ID which required assessment of current adaptive functioning. (PCR3 36 6403). Based on that

[5] The trial court found:

> 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.

(PCR3 36 6403)

assessment, Arbelaez's ID claim was rejected. (PCR3 36 6403).

The Florida Supreme Court affirmed the denial of relief announcing "Arbelaez did not prove that he has concurrent deficits in adaptive behavior as required by section 921.137(1), Florida Statutes (2004), and Florida Rule of Criminal Procedure 3.203(b)." *Arbelaez*, 72 So.3d at 745.

In his federal habeas litigation addressed to the ID claim, the Eleventh Circuit Court of Appeals recognized that the circuit court, assumed that the IQ prong was met, and reviewed the state court decision on the adaptive functioning deficiency prong alone as had the Florida Supreme Court. *Arbelaez v. Secretary, Fla. Dep't of Corrections*, 662 Fed. Appx. 713, 722-23 (11th Cir. 2016,) *cert. denied*, 583 U.S. 842 (2017). The circuit court recognized the difficulty in assessing adaptive functioning deficits of an incarcerated defendant but found that nothing in *Atkins* or *Hall v. Florida* "speak directly to the methodology for discerning an individual's deficits in adaptive functioning" and as such, the Florida Supreme Court's decision was "beyond any fairminded disagreement." *Arbelaez*, 662 Fed. Appx. at 723. Hence, Arbelaez did not carry his burden and federal habeas relief was denied.

Similarly, Arbelaez's challenge to the state court's factual findings as unreasonable was rejected in his federal habeas review. *Arbelaez*, 662 Fed. Appx. at 723. The circuit court recounted the facts related to adaptive functioning and noted, "[a]s to deficits in adaptive behavior, Dr. Weinstein testified that he did not formally assess Arbelaez's deficits concurrent with the IQ evaluation, although he generally observed some deficits during the evaluation." *Arbelaez*, 662 Fed. Appx. at

718. The Eleventh Circuit also recognized that Dr. Weinstein rejected consideration of Arbelaez's ABAS tests conducted while he was in prison and that this was inapposite to how the state's expert, Dr. Suarez, and trial court appointed expert, Dr. Ruiz, assessed the adaptive functioning prong. The Eleventh Circuit noted that Dr. Suarez considered information from before and during Arbelaez's incarceration, "including formal tests of concurrent adaptive functioning" and opined Arbelaez was not ID. This opinion was reached because Arbelaez: (1) "needed no support to function in his daily life (he was able to drive and run errands and he communicated with others, even in English);" (2) made his way from Columbia to the United States "with relatively little assistance;" (3) "secured employment and performed adequately;" (4) "used an alias at work;" and (5) fled the United States after the kidnapping and murdering of Julio. *Arbelaez*, 662 Fed. Appx. at 718-19. Additionally, the test results Dr. Suarez obtained showed "Arbelaez's reasoning level was probably in the average range." *Id.*

The Eleventh Circuit also considered Dr. Ruiz's testimony. *Id.* Like Dr. Suarez, Dr. Ruiz testified that after interviewing Arbelaez, she did not find Arbelaez intellectually disabled in part "because he reported that he had traveled alone to Venezuela, the Bahamas, Panama, and Jamaica before coming to the United States and had held and performed a variety of jobs before being incarcerated." *Arbelaez*, 662 Fed. Appx. at 718-19. Dr. Ruiz also administered several tests to Arbelaez reviewed background materials/reports which allowed her to conclude "Arbelaez had a borderline intelligence level, no intellectual disability,

and abilities to communicate and live independently that were inconsistent with intellectual disability." *Id.*

The federal court's assumed the IQ prong had been met and focused on the adaptive deficits prong finding Arbelaez could not show the Florida Supreme Court's conclusion that adaptive deficits were not proven was an unreasonable determination of the facts. *Arbelaez*, 662 Fed. Appx. at 724. The Eleventh Circuit Court observed that "[a]lthough Dr. Weinstein made observations of Arbelaez's adaptive behavior during the in-prison evaluation, ***he conceded that he failed to use any formal measure to assess Arbelaez's adaptive functioning concurrent with the IQ testing*.**." This, the court found was in contrast with Dr. Suarez's assessment; such was done both "retrospectively and concurrently with intellectual functioning testing" resulting in a finding that Arbelaez "lacked the requisite adaptive behavioral deficits" necessary to prove ID. *Id.* (emphasis supplied) It was the court's conclusion that "[b]ecause the basis for Dr. Suarez's opinion more closely tracked Florida's definition of intellectual disability, the Florida Supreme Court was entitled to credit Dr. Suarez's opinion over Dr. Weinstein's." *Id.* Consequently, Arbelaez failed to prove entitlement to federal habeas relief. *Id.*

During the pendency of his federal litigation, Arbelaez filed his sixth postconviction motion and contended *Hall v. Florida* required the court to reconsider its prior rejections of the ID claims. He averred *Hall v. Florida* required the States to adopt the ID definition provided by the American Association of Intellectual and Developmental Disabilities and interpret and apply that definition

in accordance with its views on how ID should be used forensically. Arbelaez argued he needed another evidentiary hearing. The State responded that the motion was untimely, successive and that *Hall v. Florida* merely held that it was unconstitutional for Florida to refuse to allow a defendant whose IQ's were above 70 but within the standard error of measure of 70 to present evidence of the other two prongs of ID claims. Because Arbelaez had not been precluded from presenting such evidence, the State asserted that *Hall v. Florida* was inapplicable.

On June 18, 2015, the postconviction court denied the motion and determined that *Hall v. Florida* had not created any new rights and had merely required that courts consider the standard error of measure in determining whether a defendant's IQ score satisfied the first prong of ID. The postconviction court concluded that because Arbelaez had failed to prove the second prong of his ID claim *Hall v. Florida* was inapplicable here. Arbelaez appealed that ruling. The Florida Supreme Court found "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 [v. Florida]* does not apply retroactively. Accordingly, we affirm the circuit court's order summarily denying Arbelaez's successive motion for postconviction relief. *Arbelaez v. State,* 369 So. 3d 1141, 1142 (Fla. 2023), *reh'g denied,* 370 So. 3d 932 (Fla. 2023).

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW OF THE DENIAL OF POSTCONVICTION RELIEF SHOULD BE DENIED AS THE FLORIDA SUPREME COURT'S FINDING *HALL V. FLORIDA* ANNOUNCED A NEW PROCEDURAL RULE OF LAW THAT IS NOT RETROACTIVE DOES NOT PRESENT ANY MEANINGUL CONFLICT WITH A DECISION OF THIS COURT OR ANY FEDERAL CIRCUIT COURT OR STATE COURT OF LAST RESORT. MOREOVER, ARBELAEZ HAS FAILED TO SHOW THAT *HALL V. FLORIDA* IS DISPOSITIVE OF HIS CASE AS HE RECEIVED TWO PRIOR EVIDENTIARY HEARINGS ON INTELLECTUAL DISABILITY AND WAS UNABLE TO ESTABLISH THAT HE HAS ADAPTIVE FUNCTIONING DEFICITS (RESTATED).

Arbelaez asserts that the Florida Supreme Court erred in finding that *Hall v. Florida* announced a new rule of law, but that it was not retroactive to cases on collateral review. *Hall v. Florida* held that a defendant with an IQ score within the standard error of measurement ("SEM") may not be precluded categorically from attempting to prove the other prongs of an ID claim. *Hall v. Florida*, 572 U.S. at 723. Certiorari should not be granted in this case as the Florida Supreme Court correctly determined that *Hall v. Florida* announced a new procedural rule and did not categorically place certain criminal laws and punishments beyond that power of the State, thus, retroactive application was not appropriate to those cases final and on collateral review. That decision does not present any meaningful conflict with a decision of any other state court of last resort or a decision of any federal court of appeals. To the contrary, there is a growing consensus that *Hall v. Florida* is not retroactive to postconviction cases. Moreover, Arbelaez cannot show that *Hall v.*

Florida applies to his case. His reviewing courts assumed the IQ prong was met, provided Arbelaez with evidentiary hearings to prove his ID claim, and determined that Arbelaez failed to prove deficits in adaptive functioning, one of the three prongs necessary to prove ID.

The Florida Supreme Court's opinion did not decide an important question of federal law in a manner that conflicts with a decision of this Court. *See* Sup. Ct. R. 10. This Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). Moreover, this is a highly fact dependent case—facts developed after two evidentiary hearings, which supports the conclusion that Arbelaez obtained any possible benefit of this Court's decision under *Hall v. Florida*. Arbelaez's IQ score was simply not a dispositive factor in this case. Arbelaez does not suffer from deficits in adaptive functioning as required to prove ID. As no compelling reason for review has been offered certiorari should be denied.

A. History leading to the Florida Supreme Court's determination that *Hall v. Florida* is not retroactive to cases on collateral review.

In 2002, while Arbelaez was litigating his original postconviction motion, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). But *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability]" is protected by the Eighth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Instead, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their]

execution of sentences." *Atkins*, 536 U.S. at 317.

Even before *Atkins* was decided, Florida law barred the imposition of death sentences on the intellectually disabled. Fla. Stat. § 921.137 (2001). Following *Atkins*, the Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.203, which allowed prisoners whose sentences had already become final on direct review to seek relief under *Atkins*. *See* Fla. R. Crim. P. 3.203(d)(4) (2004). More than a decade later, this Court considered whether Section 921.137 was unconstitutional to the extent it barred an ID claim based on a strict IQ-score cutoff of 70, even if the claimant's score fell within the test's margin of error. *Hall v. Florida*, 572 U.S. at 722-23. "On its face," the Court noted, "this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Id.* at 711. As this Court saw it, "[n]othing in the statute precludes Florida from taking into account the IQ test's standard error of measurement," and this Court found "evidence that Florida's Legislature intended to include the measurement error in the calculation." *Id.* The Florida Supreme Court, however, had interpreted Section 921.137 to impose a "strict IQ test score cutoff of 70." *Id.* at 711–12 (citing *Cherry v. State*, 959 So. 2d 702, 712–713 (Fla. 2007) (per curiam)). Confined by that reading, this Court concluded that the statute unconstitutionally barred a capital defendant with a score "within the margin for measurement error" from raising a claim of intellectual disability. *Id.* at 712, 724.

In support of that conclusion, this Court noted that "the precedents of this Court," including *Atkins*, "give us essential instruction, but the inquiry must go

further." *Id.* at 721 (citation omitted). Thus, this Court considered the views of the States, the Court's precedent, and the views of medical experts. *Id.* Florida's bright-line IQ cutoff, was held to impermissibly "bar consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 723. At bottom, *Hall v. Florida* requires that States "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724.

Two years later, the Florida Supreme Court held that, ***under state law***, *Hall v. Florida* applied retroactively. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (citing *Witt v. State*, 387 So. 2d 922 (Fla. 1980) (announcing test for applying rule retroactively under Florida law)). The court in *Walls* did not consider whether *Hall v. Florida* applies retroactively under federal law and, as explained below, the court would later recede from that decision in *Phillips v. State*, 299 So. 3d. 1031 (Fla. 2020), *cert. denied, Phillips v. Florida*,141 S. Ct. 2676 (2021).

In *Phillips*, the Florida Supreme Court considered whether *Hall v. Florida* applied retroactively under federal law. It concluded that because "*Hall* announced a new procedural rule, which does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability," it did not. *Id.* at 1022. Instead, it found "*Hall* is similar to other nonretroactive 'decisions [that] altered the processes in which States must engage before sentencing a person to death,' which

'may have had some effect on the likelihood that capital punishment would be imposed' but which did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Id.* (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211–12 (2016)). Receding from *Walls*, the court opined "*Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability." *Phillips*, 299 So. 3d at 1022-23.

B. The Florida Supreme Court's decision finding that *Hall v. Florida* is not retroactive does not establish a clear split in state and federal courts and therefore does not warrant certiorari review.

There is no meaningful split among the lower courts warranting this Court's review. Nearly all the courts that have addressed the retroactivity of *Hall v. Florida* agree with the Florida Supreme Court's conclusion in *Phillips*, and either hold or opine that *Hall v. Florida* does not apply retroactively on collateral review. *See In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (per curiam); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314-15 (11th Cir. 2015); *Payne v. State*, 493 S.W.3d 478, 489-91 (Tenn. 2016); *State v. Jackson*, 157 N.E. 3d 240, 253 (Ohio Ct. App. 2020) (citing the "substantial and growing body of case law that has declined to apply *Hall* . . . retroactively").

Although the Supreme Court of Kentucky has come out the other way, that case does not give rise to the kind of split that calls for this Court's review, nor as explained below a basis for relief for Arbelaez. In *White v. Commonwealth*, 500 S.W. 3d 208 (Supreme Court of Kentucky summarily concluded *Hall v. Florida* "does not

deal with criminal procedure," but imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and that it "must be retroactively applied." *White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *as modified* (Oct. 20, 2016), *and abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W. 3d 1 (Ky. 2018). The court's opinion included only one paragraph addressing the question presented. *Id.* at 215, and that paragraph cited, in passing, just two cases: this Court's decision in *Atkins*, which preceded *Hall v. Florida* and arose on direct review, and thus had no occasion to address whether state courts must apply *Hall v. Florida* retroactively to cases on collateral review; and the Florida Supreme Court's now-rejected view that *Hall v. Florida* applies retroactively as a matter of state law. *See Id.* (citing *Oats v. Florida*, 181 So. 3d 457 (2015), and noting that the Kentucky court's ruling put it "in the company of our sister state Florida which, of course, was the state in which the underlying issue in *Hall* first arose"). Given that the Florida Supreme Court has recently overruled its state law retroactivity ruling and held that *Hall v. Florida* does not apply retroactively as a matter of state or federal law, the Kentucky Supreme Court is no longer "in the company of" the state in which *Hall* arose—and might well be amenable to revisiting its conclusory decision announced in *White*. At a minimum, the Kentucky court should have an opportunity to reconsider—and provide a reasoned basis for—its decision before this Court is asked to resolve a conflict arising out of *White*.

The Tenth Circuit has also discussed whether *Hall v. Florida* is a "new rule,"

but that case did not hold that state postconviction courts are required to apply *Hall v. Florida* retroactively. *Smith v. Sharp*, 935 F.3d 1064, 1084–85 (10th Cir. 2019). Instead, the Tenth Circuit reviewed *de novo* a federal district court's conclusion concerning the propriety of federal habeas relief. *Id.* at 1069, 1085. In assessing that issue, the Tenth Circuit considered whether, under Oklahoma's implementation of *Atkins*, Smith was intellectually disabled because he "ha[d] significant limitations in adaptive functioning in at least two of the nine listed skill areas." *Id.* at 1083. In so doing, the court assessed "whether the Supreme Court's recent applications of *Atkins* 'are novel.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)). The court concluded that *Hall v. Florida*; *Moore v. Texas* (*Moore I*), 581 U.S. 1 (2017); and *Moore v. Texas* (*Moore II*), 586 U.S. ----, 139 S. Ct. 666 (2019) did not state new rules; instead, they applied a general rule set forth in *Atkins*, and so they could not be understood to "yield[] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 1084 (quoting *Chaidez*, 568 U.S. at 348). In other words, the Tenth Circuit did not address the question at issue here, squarely and its statements pertaining to *Hall v. Florida* were not essential to disposition.

Nonetheless, any conflict among the lower courts does not warrant review at this time. In fact, there is a substantial consensus among state and federal courts that *Hall v. Florida* is not retroactive. *State v. Lotter*, 311 Neb. 878, 905, 976 N.W.2d 721, 740 (Neb. 2022) (noting "[m]ost state and federal courts to have considered the question [of Hall v. Florida retroactivity] have concluded that neither Hall nor Moore I announced new substantive rules of constitutional law which must

be applied retroactively to cases on collateral review"). Further percolation would give the lower courts an opportunity to carefully assess the varying arguments that have been advanced for concluding that *Hall v. Florida* applies retroactively. *See, e.g., California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."). In *White*, for example, the Kentucky Supreme Court summarily concluded that *Hall v. Florida* announced a substantive restriction on the State's power to impose capital punishment, without addressing whether *Hall v. Florida* imposed a new rule. *See White*, 500 S.W.3d at 215.

Additionally, to the extent Arbelaez challenges Florida's refusal to apply *Hall v. Florida* retroactively, the State observes that this Court has denied certiorari in cases directly challenging the Florida Supreme Court's retroactivity decision in *Phillips*. *See Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), cert. denied, 141 S. Ct. 2676 (2021); *Nixon v. State*, 327 So. 3d 780, 781 (Fla. 2021), *cert. denied sub nom., Nixon v. Florida*, 142 S. Ct. 2836 (2022); and *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), *cert. denied sum nom, Thompson v. Florida*, 143 S. Ct. 592 (2023).

C. The Florida Supreme Court found that *Hall v. Florida* is not retroactive as it announced a new rule of constitutional procedure; it did not announce a new substantive right.

Certiorari review should be denied as the Florida Supreme Court's decision here is correct that *Hall v. Florida* does not apply retroactively under federal law as announced in *Teague v. Lane*, 489 U.S. 288 (1989). While it is a "new rule," it is a

new rule of procedure, and therefore, not subject to retroactive application. *Hall v. Florida* announced a new procedural rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality op.) (emphasis omitted). As the Eleventh Circuit explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014). As *Hall v. Florida* itself pointed out, while this Court's precedents were instructive, "the inquiry must go further." *Hall v. Florida*, 572 U.S. at 721. As the Eleventh Circuit also observed, "[n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff." *Henry*, 757 F.3d at 1159. Justice Alito's dissent in *Hall v. Florida* (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also supports the conclusion that *Hall v. Florida* announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (indicating that a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." *Hall v. Florida*, 572 U.S. at 725 (Alito, J., dissenting). Yet, the finding of a "new rule" does not end the inquiry; it must be determined whether that rule is substantive or

procedural.

The rule announced in *Hall v. Florida* is not a substantive rule. Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled on other grounds, Atkins v. Virginia,* 536 U.S. 304 (2002)). But *Hall v. Florida* does not forbid criminal punishment for any type of primary conduct; nor does it prohibit any category of punishment for any class of defendants because of their status or offense. While *Atkins* prohibits states from executing intellectually disabled defendants, *Hall v. Florida* requires only certain "procedures for ensuring that states follow the rule enunciated in *Atkins*." *Kilgore*, 805 F.3d at 1314. Specifically, "*Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Id.* A new procedural rule does not apply retroactively. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1559-60 (2021) (recognizing that "some 32 years after *Teague*, . . . no new rules of criminal procedure can satisfy the watershed exception" of *Teague* and be applied retroactively).

By its very terms, *Hall v. Florida* merely requires that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.*, 572 U.S. at 724. In other words,

Florida's IQ cutoff was defective because it was a bright-line cut off and "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," id. at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted)—a classic procedural defect. Given that *Hall v. Florida* announced a new procedural rule and did not bar for the first-time criminal punishment for certain conduct or punishment for a particular class of defendants, certiorari review should be denied.

D. A favorable ruling here would not afford Arbelaez any relief under *Hall v. Florida* as he has had two evidentiary hearings and has failed to prove he suffers from deficits in adaptive functioning.

Even should this Court find *Hall v. Florida* retroactive, Arbelaez cannot prevail in state court. He has received all that *Hall v. Florida* provides, namely, an evidentiary hearing to prove each ID prong. His evidentiary proof was insufficient to prove he currently suffers adaptive deficits. Hence, the question presented is not case-dispositive and does not merit certiorari. *Cf. Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1995) (opining certiorari should not be granted when the question, though "intellectually interesting" is merely "academic").

As noted above, since his first postconviction motion, Arbelaez has been pursuing a claim of intellectually disabled either as mitigation in his ineffective assistance of counsel claim or under *Atkins* to show he is ineligible for the death penalty. Although he received two opportunities to develop evidence supporting his

position, he failed both times, not as a result of his IQ scores, but because he failed to prove he has adaptive functioning deficits.

As a matter of state law, Arbelaez was not entitled to reconsideration of his ID claim after *Hall v. Florida* issued because the Florida Supreme Court has held that a defendant "is not entitled to a new hearing in order to present additional evidence of intellectual disability [if] he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard." *Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017), *cert. denied*, 139 S. Ct. 122 (2018). As noted, a person sentenced to death may prevail under *Atkins* if he meets a three-prong test for intellectual disability: (1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age 18. *See Atkins*, 536 U.S. at 318; *see also Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016). In *Jones*, the defendant received a post-*Atkins* evidentiary hearing in 2006, at which the postconviction court concluded that he "did not meet even one of the three statutory requirements." *Jones*, 231 So. 3d at 375 (quotations omitted). The court therefore denied relief. *Id.* Post-*Hall v. Florida*, Jones sought a new evidentiary hearing, claiming that his above-70 IQ scores were no longer determinative and that he could now meet the first prong. *Id.* He appealed the denial of an evidentiary hearing to the Florida Supreme Court. *Id.* That court affirmed, explaining that "*Hall* does not change the fact that Jones failed to establish that he meets the second or third prong." *Id.* at 376. Because a defendant who "fails to prove any one of these components . . . will

not be found to be intellectually disabled," *Hall v. Florida* was irrelevant to Jones' claim and did not open the door to a new determination as to ID. *Id.*

That rule applies here as well. During the evidentiary hearing on Arbelaez's first postconviction motion and again in 2009 when the postconviction court considered his *Atkins* claim, Arbelaez was permitted to present evidence on all three ID prongs. Of import here, the Florida court concluded that the adaptive functioning prong was not proven, thus, Arbelaez failed to prove ID. *Arbelaez*, 72 So.3d at 745. Post-*Hall v. Florida*, Arbelaez sought yet another opportunity to prove ID. *Hall v. Florida* does not provide Arbelaez a basis for another review, much less a third opportunity to present evidence especially where he has failed to prove adaptive deficits previously. *Hall v. Florida*, at best, precludes that state from denying a defendant the opportunity to present evidence on each ID prong where his IQ is above 70, but falls within the standard error of measurement. Arbelaez was not barred, thus, *Hall v. Florida* does not afford him a third opportunity; state law precludes such a successive attempt. Granting review here to consider *Hall v. Florida*'s retroactivity will not affect the Florida Supreme Court's multiple rulings in *Arbelaez*, 898 So. 2d at 25 and *Arbelaez*, 72 So. 3d at 745 that he failed to prove ID as he did not establish that he suffered from deficits in adaptive functioning.

In affirming the denial of Arbelaez's *Atkins* claim after the 2009 evidentiary hearing, the Florida Supreme Court stated: "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)." *Arbelaez*, 72 So. 3d at 745. Certiorari was denied when the case was presented to this Court previously. *Arbelaez v. Florida*, 566 U.S. 954 (2012). *See also, Arbelaez*, 662 Fed. Apppx. at 722-24, *cert denied*, 583 U.S. 842. Although Arbelaez complains here about the postconviction court's rejection of the IQ prong, the Florida Supreme Court did not rest its 2011 opinion on that factor, nor did it rely on the IQ score in its rejection of the sixth postconviction motion in finding that *Hall v. Florida* is not retroactive. While this Court in *Hall v. Florida* found that the Florida Supreme Court's bright line test for the IQ prong was too strict, such is not impacted here. Not only was Arbelaez afforded an evidentiary hearing to present evidence on each of the three ID prongs, but the denial of relief in 2011 was on his failure to prove concurrent adaptive functioning deficits, not IQ. As such, *Hall* is not implicated in the least, and Arbelaez already received the airing of his claim as required by *Hall v. Florida*.

To the extent he attempts to relitigate factual findings made in *Arbelaez*, 72 So.3d at 745 and discussed in *Arbelaez*, 662 Fed. Apppx. at 722-24 on the adaptive deficits prong, the law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same). Certiorari should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny the petition for certiorari review.

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