

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1610

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA,
(Criminal Division)

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PRELIMINARY STATEMENT

Appellant, Guillermo Octavio Arbelaez, was the defendant at trial and will be referred to as the "Defendant" or "Arbelaez". Appellee, the State of Florida, will be referred to as the "State". References to the records will be as follows:

Direct appeal - "TR"

Postconviction record (summary denial) in case number SC 89375 - "PCR1"

Postconviction record (following an evidentiary hearing) in case number SC03-2284 - "PCR2"

Postconviction record for the instant appeal in case number SC05-1610 - "PCR3"

Any supplemental trial record will be identified by the letter "S" preceding the appropriate reference and

Arbelaez's initial brief - "IB"

Each will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On September 23, 1993, this Court affirmed Arbelaez's conviction and sentence for the kidnapping and first-degree murder of Julio Rivas finding:

Arbelaez met Graciela Alfara at the Cafeteria Blanquita where she worked as a waitress. Over the period of several months, Arbelaez and Graciela became acquainted and sometime around January 15, 1988, Arbelaez moved into a house shared by Graciela, her two teenage daughters, five-year-old son,

and nineteen- year-old cousin. Arbelaez paid Graciela \$150 a month rent for a room he shared with her cousin. Shortly after moving into the home, Arbelaez and Graciela became intimate. This relationship, however, soon ended after Graciela accused Arbelaez of touching one of her daughters on the breast. According to Graciela, she told Arbelaez to move out of the house by February 15, 1988. In contrast, Arbelaez indicated that he and Graciela were to be married on February 15, 1988.

On February 13, 1988 ... Graciela, however, had left [work] with another man. Arbelaez drank a beer and then went home to wait for Graciela to return. Close to midnight, Graciela returned home and kissed her companion good night as Arbelaez watched from a peephole in the door. As Graciela entered the house, Arbelaez grabbed her by the arm and started an argument. Graciela told Arbelaez that she did not love him and that he should move out the next day....

That next morning around 7 a.m., Graciela went ... past Arbelaez without speaking to him. After waking Harlam, Graciela went back to sleep. ...Arbelaez and Julio Rivas, Graciela's five-year-old son, watched television in the living room. ... At approximately 7:30 a.m., while Graciela was sleeping in her room, Arbelaez took Julio and left the house.

Arbelaez drove his car to the Cafeteria Blanquita for a cup of coffee. While Julio remained in the car, Arbelaez ordered a cup of coffee from the waitress, Francisca Morgan. Morgan testified that Arbelaez appeared calm and normal. Arbelaez joined his friend Juan Londrian and drank the coffee. Londrian also testified that Arbelaez appeared calm and normal. As they drank their coffee, Arbelaez told Londrian that Graciela was seeing another man, and he stated that he was going to do something

that would assure "that bitch is going to remember me for the rest of her life." Londrian understood that Arbelaez was referring to Graciela by that statement.

... At approximately 10:15 a.m., Arbelaez stopped his car at a convenience store in Key Biscayne and called Graciela to speak with her. ... but Graciela refused to speak with Arbelaez. Arbelaez then drove to the crest of the Powell Bridge on the Rickenbacker Causeway and stopped, exited his car, and lifted the hood, pretending that the car had broken down. He called to Julio, grabbed the boy by the arms, and threw the child off the bridge into the water seventy feet below. Arbelaez quickly closed the hood and fled the scene. He abandoned his car in a Coral Gables neighborhood and ran to the home of a friend, Pedro Salazar, and his family.

Arbelaez confessed to Pedro Salazar that he "shook" the child and "squeezed the boy's neck." He also told Pedro that he had thrown the child off a bridge because he wanted revenge against the child's mother. While Arbelaez was speaking with him, Pedro noticed a scratch on Arbelaez's neck. The Salazars loaned Arbelaez some money and drove him to the airport where he bought an airline ticket to Puerto Rico under an assumed name. After arriving in Puerto Rico, Arbelaez contacted his family in Colombia for money. His family wired him some money, and Arbelaez returned to Colombia.

On February 14, 1988, at approximately 3 p.m., a security officer for a high-rise located on Brickell Avenue spotted a child floating in the water. ... Graciela identified the dead child as her five-year-old son, Julio Rivas. At that time, Graciela also informed the police that Arbelaez could not be found.

On February 15, 1988, Martinez found

Arbelaez's car abandoned in Coral Gables near the Salazars' home. ... The damage [inside the car] was consistent with something coming into contact with the panel. On February 18, 1988, an arrest warrant was issued for Arbelaez; however, the police could not find Arbelaez.

On March 16, 1988, Martinez asked Detective Cadavid to contact Arbelaez's family in Medellin, Colombia, because Cadavid was from Medellin and spoke the local dialect. Cadavid called [and] ... identified himself again as a detective in the City of Miami Police Department in the United States and stated that he needed to speak to Arbelaez about a problem in Miami. 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. Cadavid offered to help with proper documentation through the American Embassy in Bogota, Colombia, and to provide Arbelaez airfare to the United States. ... Arbelaez gave Cadavid another phone number where he could be reached in the future.

... Cadavid called the American Embassy in Bogota. Cadavid spoke with Federal Bureau of Investigation Agent Rubin Munoz ... about arranging for Arbelaez to obtain the proper documentation in order to leave Colombia. After speaking with Munoz, Cadavid called Arbelaez back and spoke with Arbelaez's brother. ... Arbelaez's brother indicated that Arbelaez would return to the United States as soon as he could obtain proper documentation and a plane ticket. The brother also told Cadavid that Arbelaez suffered from chronic epileptic seizures and had been through psychiatric treatment in Colombia when he was eighteen to twenty years old. Cadavid then gave Arbelaez's brother a phone number for Arbelaez to call Munoz at the American Embassy in Bogota. ...

On March 24, 1988, Martinez contacted

Arbelaez ... and told him that there was a warrant for his arrest for the homicide of Julio Rivas. ...

Arbelaez telephoned Munoz in Bogota following his conversation with Martinez. ... Arbelaez further told Munoz that he had caused the death of his girlfriend's son. He explained that he had been living with the mother of the child and that he and the woman had planned to get married. Arbelaez stated that he had an argument with the child's mother after seeing her kiss another man, and the mother told Arbelaez that she did not love him. Arbelaez then told Munoz, "As a Latin you would understand the best way to get to a woman is through her children." Thus, Arbelaez stated, he threw the woman's son off the bridge in order to drown the boy.

...

... Finally, Arbelaez telephoned and stated that he had the proper documentation for the trip to the United States. Martinez purchased the ticket and arranged for it to be transferred to the airport in Colombia. Arbelaez picked up his ticket at the airport in Colombia and boarded the plane for Miami alone, unaccompanied by any law enforcement agents.

On April 11, 1988, at approximately 1 p.m., Arbelaez arrived in Miami. Martinez identified himself and assisted Arbelaez through customs. Upon exiting customs, Martinez arrested Arbelaez for the homicide of Julio Rivas and read him his *Miranda* rights in Spanish. Martinez ascertained that Arbelaez had a sixth-grade education.... Martinez asked Arbelaez if he had taken his medication for epilepsy that day and whether he felt any disorientation. Arbelaez indicated that he had taken the medication, but was not disoriented. Arbelaez also indicated that he wanted to

make a statement and that he did not want an attorney present.

... During the car ride out of the airport, Arbelaez admitted to throwing the child off the bridge. Martinez asked Arbelaez to show him the exact location and Arbelaez agreed. ... Arbelaez directed Martinez to the Rickenbacker Causeway, told him to make a U-turn on the high bridge and count four posts and then stop. Arbelaez stated that on the day of the murder he had stopped there, raised the hood in order to pretend that he was stranded, and then threw the child off the bridge. Martinez then drove Arbelaez to the police station.

At the police station.... Following the pre-interview, Arbelaez made an audio-taped sworn statement ... [after which] ... Martinez asked Arbelaez if he would consent to giving a videotaped statement. Arbelaez consented and immediately recorded a videotaped statement in which he again acknowledged his Miranda rights and waived them. In both statements, Arbelaez indicated that he killed the child as a plan of revenge against Graciela. Arbelaez was then jailed.

At trial, the State introduced into evidence Arbelaez's audio-taped and videotaped statements given to the police as well as his statements to Pedro Salazar, Munoz, and Martinez. The State further presented testimony from Graciela about her relationship with Arbelaez in which she disputed Arbelaez's claim that they were going to get married. The State also entered the expert testimony of an oceanographer who stated the currents and weather conditions on February 14, 1988, would have carried a body, like the child's body, from the Powell Bridge to the area where the child's body was found.

Finally, the State entered the medical

examiner's testimony about the injuries he observed on the child's body. The medical examiner testified that the child's neck had a large bruise and a pinpoint hemorrhage in the left eye consistent with an attempted strangulation. Further, the child's lungs were not only hyperinflated and congested with blood, but the airways also had a considerable amount of frothy material, air mixed with fluid. The medical examiner concluded that the cause of death was asphyxia resulting from both strangulation and drowning. The medical examiner also testified that the child's body had a large bruise on the right leg and numerous bracket-shaped and rectangular-shaped bruises on the left side of the child's body. The child's face and forehead also had numerous linear abrasions consistent with it being knocked or pressed into something. Finally, the medical examiner testified that the bruises and abrasions were recent and occurred while the child was alive, but sometime near the time of death. Graciela testified that the child did not have these injuries on the morning of his death.

Arbelaez testified on his own behalf that he was thirty-three years old at the time of trial, that he was from Medellin, Colombia, and that he worked at a hotel as a dishwasher. He also testified that he was an epileptic and that he sometimes took medication for his condition. According to Arbelaez, he moved in with Graciela and her family and he provided her with financial support because he loved her and wanted to marry her. He testified in conformity with his statements given to the police that he had an argument with Graciela on February 13, 1988, because she kissed another man.

Arbelaez's testimony differed from his statements given to the police about the events on the date of the murder. He testified that he left Graciela's house on February 14, 1988, with the child and went

to inform his boss at the hotel that he would not be working that day. He admitted to telling Londrian that Graciela would be sorry, but that he meant he would "beat" Graciela and her male friend if they were together again. He testified that after he left the cafeteria he started to go to work but he turned the car around and decided to return the child home. On the way back to the house, the car developed mechanical problems on the bridge and stopped. He got out of the car, raised the hood and "forgot" about the child. As he looked under the hood, he heard a scream and saw the child floating in the water. He stated that he fled because he thought, "Since I had the problem with her the previous night, they're going to think that I did it." Arbelaez testified that after he left the bridge he drove to Coral Gables and abandoned the car. He stated that before he abandoned the car he tore the dashboard of the car apart because he was "disgusted with it all."

On cross-examination, Arbelaez testified that Martinez "lied" and tricked him into confessing to the murder by promising him work in jail. Arbelaez also testified that Pedro Salazar and Munoz lied about his statements that he killed the child. After Arbelaez's testimony, the defense rested.

On February 19, 1991, the jury found Arbelaez guilty of kidnapping and the first-degree murder of Julio Rivas.

At the penalty phase of the trial, the State presented no additional witnesses and made argument based upon the evidence from the guilt phase of the trial. The defense first presented testimony by Martinez that Arbelaez had no significant history of prior criminal activity and that he returned to the United States voluntarily. The defense also presented the testimony of Arbelaez's friends, Juan Londrian, Pedro Salazar, Adelfa Salazar, and Marta Salazar. Londrian

and the Salazars testified that Arbelaez was an honest and hard-working individual who never took narcotics or drank alcohol excessively. Finally, the defense presented the medical testimony of Dr. Raul Lopez, a neurologist who treated Arbelaez for an epileptic attack in 1984. Dr. Lopez testified that Arbelaez suffered from chronic epileptic seizures Tests run on Arbelaez indicated that he had not been taking his medication as instructed. Dr. Lopez specifically testified that the medication that he had prescribed did not have the side effect of depression. Following Dr. Lopez's testimony, the defense rested.

The jury recommended a death sentence by a vote of eleven to one. The trial judge found the following aggravating circumstances: 1) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; 2) the homicide was especially heinous, atrocious, or cruel; and 3) the homicide was committed while the defendant was engaged in a kidnapping. In mitigation, the trial court found that Arbelaez had no significant history of prior criminal activity and the nonstatutory mitigating circumstance of remorse. The trial judge weighed the aggravating and mitigating circumstances and sentenced Arbelaez to death.

Arbelaez v. State, 626 So. 2d 169, 170-75 (Fla. 1993) (footnotes omitted).

Following the direct appeal, Arbelaez sought postconviction relief. His original motion was filed on August 15, 1995. An amended motion was filed on July 31, 1996 with the State responding on August 12, 1996 (PCR1 V1 12-124, 136-262; SPCR1 V1

28-143). On October 18, 1996, the trial court denied relief summarily (PCR1 V1 346-79). This Court affirmed that ruling, including the rejection of Arbelaez's request for the discharge of Judge Rothenberg. However, the issue of penalty phase counsel's effectiveness was remanded for an evidentiary hearing:

... as to Arbelaez's claim that trial counsel was ineffective during the penalty phase of his trial for failing to present expert testimony as to his epilepsy and other mental health mitigation and for failing to introduce evidence of his family history of abuse.

Arbelaez v. State, 775 So. 2d 909, 912 (Fla. 2000). More specifically, this Court wrote in the subsequent appeal after the remand:

We remanded this case for an evidentiary hearing to determine whether Arbelaez's trial counsel, Reemberto Diaz, was ineffective during the penalty phase of trial in his investigation and **presentation of mitigation evidence concerning three issues**: (A) Arbelaez's epilepsy, (B) **his "other mental health mitigation," including possible mental retardation**, and (C) his "family history of abuse" in Colombia.

Arbelaez v. State, 898 So.2d 25, 31 (Fla. 2005) (emphasis supplied)

The required evidentiary hearing was held in January, 2002 and an appeal followed the denial of relief.¹ The appellate

¹On appeal from the denial of postconviction relief following an evidentiary hearing this Court: (1) affirmed the denial of the defense motion to recuse the trial court; Arbelaez

issues raised and rejected previously, which are central to the instant appeal, involve counsel's effectiveness in developing/presenting mental mitigation of "possible mental retardation" and Atkins v. Virginia, 536 U.S. 306 (2002). In determining that there was no prejudice arising from counsel's handling of the mental health mitigation, this Court found in pertinent part:

... 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

v. State, 898 So.2d 25, 41-42 (Fla. 2005) (2-a) affirmed the denial of postconviction relief finding counsel's representation was neither deficient nor prejudicial with respect to presenting Arbelaez's epilepsy as mitigation; (2-b) agreed that postconviction relief was not required with respect to Arbelaez's "other mental health mitigation" including the issue of mental retardation because no prejudice was established, however, deficiency in the investigation was noted; (2-c) affirmed the denial of relief respecting the decision not to call Arbelaez's family members given counsel's reasonable strategic rationale offered at the hearing; Arbelaez, 898 So.2d at 31-41; (3) agreed that there was no constitutional violation under the Fifth and Sixth Amendments of the United States Constitution as those protections did not apply to preclude a mental health professional from testifying about her conversations with or observations of an incarcerated defendant; Arbelaez, 898 So.2d at 42; (4) agreed that there was no abuse of discretion in the trial court's refusing to hear Arbelaez's supplemental motion raising Ring v. Arizona, 536 U.S. 584 (2002) and Atkins v. Virginia, 536 U.S. 304 (2002) as the remand had been a limited one, however, this Court also found that the Ring and Atkins claims would "fail on the merits" as Arbelaez had a contemporaneous conviction and it was improper to try to "feed Atkins through Ring." Arbelaez, 898 So.2d at 42-43.

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....

...

Although we believe that expert testimony relating to Arbelaez's low intelligence would have been vastly preferable and that counsel was deficient in failing to arrange for such testimony, we are confident that the presentation of such testimony would not have changed the outcome. Given that the jury listened to Arbelaez's testimony and also heard him explain on videotape how he

executed a premeditated murder of a five-year-old boy to exact revenge on his former girlfriend, we do not believe that expert testimony about Arbelaez's intellectual limitations, short of mental retardation or major mental illness, would have altered the jury's perceptions to such an extent that it would have been swayed from its nearly unanimous recommendation of death.

Arbelaez, 898 So.2d at 35-37 (emphasis supplied).

In resolving the Atkins issue and the impact of Ring v. Arizona, 536 U.S. 584 (2002), this Court concluded in its postconviction review that "Arbelaez has no right under Ring and Atkins to a jury determination of whether he is mentally retarded" Arbelaez, 898 So.2d at 43; and included the following footnote:

Arbelaez also asserts that he is preserving his right to request a determination of whether he is mentally retarded for purposes of Atkins. The procedure for requesting such a determination is provided in Florida Rule of Criminal Procedure 3.203, which became effective on October 1, 2004. See *Amendments to Fla. R. Crim. P. and Fla. R. App. P.*, 875 So. 2d 563, 565 (Fla. 2004). Rule 3.203(d)(4)(E) governs Arbelaez's circumstances. **Arbelaez must pursue his mental retardation claim in accordance with the new rule.** We express no opinion on the merits of such a claim.

Arbelaez, 898 So.2d at 43, n.2 (emphasis supplied).

During the pendency of the postconviction appeal, on November 30, Arbelaez served his Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850/3.853 (PCR3 5-24) without first

seeking relinquishment of jurisdiction from this Court as required by Florida Rule of Criminal Procedure 3.203(d)(4)(E). The State moved to have the motion stricken as jurisdiction rested with this Court at that time and Arbelaez had not complied with the time limits and filing requirements of Rule 3.203. (SPCR3.1-3 11-255). The trial court took no action on the case, except on January 13, 2005, to remove the case from its docket. (PCR3 31) It was not until July 6, 2005, a few months after Arbelaez, 898 So.2d at 25 had been decided, that the court ordered a Case Management Conference be held on July 20, 2005 upon its review of Arbelaez's postconviction motion and the State's Motion to Strike. (PCR3 - 32).

In Claims I and III of his postconviction motion (PCR3 5-24), Arbelaez argued that he was mentally retarded, therefore, his death sentence was unconstitutional under the Eighth Amendment of the United States Constitution, and the Cruel and Unusual Punishment prohibition included in the Florida Constitution, as well as being forbidden under section 921.137 Fla. Stat. (2001) and Atkins v. Virginia, 536 U.S. 304 (2002). At the Case Management Hearing, the State noted that its motion to strike (PCR3 76;SPCR3.1 11-20) was moot now that jurisdiction had returned to the trial court, however, it submitted that Arbelaez was time barred for having failed to comply with the time restrictions for asserting a postconviction claim raising

mental retardation. (PCR3 76). Additionally, the State objected to Arbelaez's claim for an evidentiary hearing to show mental retardation. This was based on the fact that the matter was procedurally barred and refuted from the record. (PCR3 33-57, 76-82, 91-93; SPCR3.3 264-75, 283-311). Not only was Arbelaez relying exclusively upon the mental health professional's opinion which had been rejected by the trial court and affirmed on appeal, but this was the same professional who refused to define mental retardation in the same manner as provided in Atkins, sections 916.106(12) and 921.137, Fla. Stat., and the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"). Arbelaez had nothing new to offer which had not been considered and rejected when he claimed counsel was ineffective for not having produced evidence of possible mental retardation (PCR3 5-24, 60-61, 88-89) and this Court agreed that "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, 898 So.2d at 35 (emphasis supplied). In fact, this Court stated "Arbelaez's strongest evidence of mental health mitigation is that he is of low intelligence (but has a high level of adaptive functioning)...." Id. (emphasis supplied).

In summarily denying the motion for postconviction relief claiming mental retardation, the trial court addressed the

merits of the claim noting this Court's discussion of the mental retardation issue in the rule 3.851 appeal following an evidentiary hearing. Arbelaez, 898 So.2d at 35-36 (PCR3 60-61).

Continuing, the trial court reasoned:

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 the sole basis for relief under this claim. Yet an evidentiary hearing was held during which she (Dr. Latterner) 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. Latterner reached her conclusions based only on Defendant's I.Q. The Supreme Court noted the definition of 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 adaptive skill areas: communications, 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 had been previously raised. *Stewart v. State*, 801 So.2d 59 (Fla. 2001).

(PCR3 61-62).

Arbelaez admitted that his legal challenges to Rule 3.203 Fla. R. Crim. P did not require evidentiary development. (PCR3 90-91). The trial court determined that the challenge to rule 3.203 was not ripe because there had been a prior determination, not under the rule, that Arbelaez was not mentally retarded. However, the court found even on the merits, there was no constitutional infirmity, and the relief was denied summarily. (PCR3 63). Upon this case history, the instant appeal followed.

SUMMARY OF THE ARGUMENT

Point I - Arbelaez's motion time barred and waived as he failed to comply with the filing requirements of Rule 3.203(d)(4)(E). Further, the underlying matter, a claim of mental retardation, had been decided adversely to Arbelaez in prior litigation during which an evidentiary hearing was conducted. He has offered nothing new to refute that determination affirmed on appeal nor has he shown entitlement to another evidentiary hearing. Arbelaez was not entitled to the appointment of new experts to investigate a settled issue or to an evidentiary hearing on a matter that was alternately procedurally barred and/or meritless as his claim was refuted from the record.

Point II - Atkins v. Virginia, 536 U.S. 304 (2002), reviewed the issue of execution of those mentally retarded under the Eighth Amendment, did not bestow on capital defendants Sixth Amendment guarantees. Moreover, this Court rejected the Sixth Amendment issue in Arbelaez v. State, 898 So.2d 25, 31 (Fla. 2005).

ARGUMENT

POINT I

**THE SUMMARY DENIAL OF ARBELAEZ'S RULE 3.851
MOTION RAISING THE ISSUE OF MENTAL
RETARDATION WAS PROPER (restated)**

Arbelaez asserts that the trial court erred in summarily denying his postconviction relief motion where in he claimed he was mentally retarded and that his execution would be cruel and unusual. He asserts that this Court's statement that Rule 3.203(d)(4)(E) governs his circumstances and that he "must pursue his mental retardation claim in accordance with the new rule" Arbelaez, 898 So.2d at 43, n.2, precluded the trial court from finding his claim procedurally barred or from summarily denying relief. Additionally, Arbelaez claims the trial court failed to accept his allegations as true and that it was error not to appoint mental health experts and to appoint counsel who would be subject to review under the Sixth Amendment. The State disagrees.

A trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So. 2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the

record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

Not only is Arbelaez's motion time barred and waived as he did not comply with the filing requirements of Rule 3.203(d)(4)(E), but the underlying matter, a claim of mental retardation, had been decided adversely to Arbelaez in prior litigation and he offered nothing new to refute that determination or to show entitlement to a second evidentiary hearing. As a result, Arbelaez was not entitled to the appointment of new experts to investigate a settled issue or to an evidentiary hearing on a matter that was alternately procedurally barred and/or meritless as his claim was refuted from the record.

With regard to Arbelaez's claim that he is entitled to the appointment of new counsel, one he entitles "Sixth-Amendment counsel" (IB 17-19), the State will address this issue in Point II, where Arbelaez reiterates his claim and other challenges to the constitutionality of the rule are addressed.

As an overview and to put in context Arbelaez's position, he asserts that his reliance upon Dr. Latterner in his rule 3.203/rule 3.851 motion was sufficient to require the

appointment of new defense mental health experts under rule 3.203(c)(1) and (2) and the granting of an evidentiary hearing under rule 3.203(e). Arbelaez's argument is specious as he did not comply with the time limits requirements of rule 3.203(d)(4)(E) and he is relying upon Dr. Latterner, a defense expert, who explicitly and completely was rejected as being "of little if any value" and "otherwise wholly unbelievable" (emphasis supplied) (SPCR3.3 290).

As this Court will recall, Dr. Latterner testified in the prior postconviction evidentiary hearing where Arbelaez was asserting that his counsel was ineffective in not presenting evidence of mental retardation. This Court agreed with the rejection of Dr. Latterner as she refused to look at anything in Arbelaez's history or experience except the I.Q. value obtained from the test. Such did not comply with the medical criteria adopted by rule and statute. In conclusion, this Court found that "Arbelaez did not demonstrate at the evidentiary hearing that he suffers from mental retardation ... and in fact, "has a high level of adaptive functioning." Arbelaez, 898 So.2d at 35 (emphasis supplied). Yet, without timidity, and curiously without presenting this historical information, Arbelaez offers only this discredited witness and alleges trial court error when his demand for other experts to prove his claim were denied. Additional defense experts are not required under rule

3.203(c)(2) because Arbelaez has been evaluated previously. Nonetheless, he again boldly demands that his "wholly unbelievable" expert supports the granting another evidentiary hearing be held on his claim of mental retardation in spite of the fact that his sole basis for seeking such a hearing, Dr. Latterner, was rejected and Arbelaez has been found to have a high level of adaptive functioning. Arbelaez, 898 So.2d at 35. To require another evidentiary hearing under the facts of this case,² especially where the record refutes the claim of mental retardation, would violate the well settled principles of procedural bar and *res judicata* as well as waste precious judicial resources by giving Arbelaez an opportunity for a second review of the issue and an opportunity to shop for a doctor who would be willing to offer a more favorable opinion to the defense. These steps are not required under the rule or under constitutional dictates. Upon this backdrop, the State offers the following analysis.

This Court determined that rule 3.203(d)(4)(E) governs Arbelaez's case and that "he must pursue his mental retardation

²Arbelaez has had a full opportunity to show, via an evidentiary hearing, that he was mentally retarded and that counsel was ineffective in not presenting this information. The finding that Arbelaez's expert was not believable and that Arbelaez was not mentally retarded, have been affirmed on appeal to this Court. There has been no showing, nor could there be, that there has been any change in Arbelaez's mental intelligence as it relates to retardation.

claim in accordance with the new rule." Arbelaez, 898 So.2d at 43, n.2. (emphasis supplied) No opinion on the merits was expressed by this Court. Id. Rule 3.203(d)(4)(E) provides:

If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

Of additional import is rule 3.203(f) which provides:

(f) Waiver. A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.

There is no dispute; Arbelaez's postconviction appeal was pending on October 1, 2004 and he never sought relinquishment of jurisdiction during the provided 60 day window. Hence, rules 3.203(d)(4)(E) and 3.203(f), together with this Court's opinion mandate that Arbelaez's claim be found to be time barred.³

³The trial court misconstrued the State's argument at the case management hearing when it concluded that the State agreed

The fact that Arbelaez's motion is time barred gains further support from the fact that this Court did not grant leave to file a rule 3.203 motion outside the time limits of the rule as it did in other cases which had been pending when the rule went into effect. See Nixon v. State, 2006 WL 102135, *11 (Fla. April 20, 2006) (ruling "[t]o the extent the Nixon is eligible to pursue a claim of mental retardation under Florida Rule of Criminal Procedure 3.203, he should do so within sixty days of the release of this opinion); Walls v. State, 2006 WL 300665, *14 (Fla. Feb. 9, 2006) (granting Walls leave to file a rule 3.203 motion because he had filed a timely motion to relinquish jurisdiction under the rule which had been denied without prejudice for Walls to file his motion in the circuit court after resolution of the appeal); Hill v. State, 921 So.2d 579, 584 (Fla. 2006) (finding mental retardation claim procedurally barred because defendant failed to file rule 3.203 motion within 60 days of October 1, 2004); Rodriguez v. State, 919 So.2d 1252, 1267, n.8 (Fla. 2005) (permitting defendant to re-raise mental retardation issue under rule 3.203 even though

that Arbelaez's failure to comply with rule 3.203 would not be grounds for denial without prejudice. (PCR3 59). The State's argument was, and continues to be that Arbelaez was time barred, procedurally barred, and meritless, but because jurisdiction had been returned to the trial court and to the extent the court would find any pleading failures, such as attachment of the doctor's report, those would not be fatal to the claim, and could be cured. (PCR3 37-39, 42-52, 76-82, 91-93).

defendant unable to show mental retardation under a claim of ineffective assistance of counsel because he had moved to relinquish jurisdiction during the pendency of the postconviction appeal and the motion was denied without prejudice); Thomas v. State, 894 So.2d 126, 131, 137, n. 10-11 (Fla. 2005) (treating direct appeal claim of improper sentencing to death in spite of evidence defendant mentally retarded as an invocation of rule 3.203 and relinquishing jurisdiction to trial court).

In each of the above cases, the defendant invoked rule 3.203 by seeking relinquishment at the appropriate time and this Court made rulings recognizing those defense efforts. Here however, Arbelaez disregarded the rule completely. He failed to seek relinquishment within the provided 60 days of October 1, 2004.⁴ His only defense was to claim that the time deadline in

⁴Given the fact that this Court crafted rule 3.203 differently than the legislative scheme by specifying the parameters of the claim, the manner in which it may be raised, and the time frame for asserting such a claim, the parties have a right to expect the courts will enforce the rule. The defendant, with a pending postconviction appeal, was afforded a 60 day window from October 1, 2004, to move to relinquish jurisdiction to seek review. Failure to so move, requires this Court to enforce the time limits placed in the rule, and preclude Arbelaez from presenting a rule 3.203 claim after the time limits expired. The necessity of this Court enforcing the time limitations of its rule is especially true where the defendant has had a full evidentiary hearing on the issue under a standard later adopted in rule 3.203. See Dillbeck v. State, 643 So.2d 1027, 1028-31 (Fla. 1994) (approving prior ruling by

rule 3.203(d)(4)(E) to file for relinquishment was merely permissive, not mandatory, where it provided that "the prisoner may file a motion in the supreme court to relinquish jurisdiction" within 60 days of October 1, 2004. His reading of the rule 3.203(d)(4)(E) would render not only that provision, but rule 3.203(f) superfluous. If there were not a time deadline which had to be met, then there would have been no need for this Court to have included such in its rule. Merely because this Court provided that a defendant may file a motion for relinquishment,⁵ does not mean that the defendant could disregard the time limit set by this Court for filing such a motion. Moreover, this Court provided that: "[a] claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown...." See rule 3.203(f). Arbelaez's failure to comply with all of the dictated of rule 3.203(d)(4)(E), as required by this Court's announcement in Arbelaez, 898 So.2d at 43, n.2 rendered his motion time barred/procedurally barred.

Likewise, there is no merit to Arbelaez's claim that the trial court could not find the claim procedurally barred and

trial court on procedure that was consistent with subsequently adopted rule).

⁵Clearly, not every defendant would be required to file a motion for relinquishment as not every defendant has a claim of mental retardation. As such, those who wish to avail themselves of the rule were given the option to file.

"was in no position to ignore this Court's language" (IB 8) in footnote 2 of its recent opinion, Arbelaez, 898 So.2d at 43, n.2. First, the record shows that the trial court did not ignore the dictates of this Court. It held a case management hearing on Arbelaez's recent postconviction/mental retardation motion for relief. The court recognized that rule 3.202(d)(4)(E) applied, considered the claims made in the motion and the record evidence presented, and ruled accordingly. (PCR3 58-64). Second, the court's ruling was dual in nature. While it found the matter procedurally barred, it also addressed the merits finding "[e]ven if the testimony of Dr. Latterner is taken as true, Defendant's claim is still lacking in merit. Dr. Latterner reached her conclusions based only on Defendant's I.Q. ... It is clear that Defendant does not meet the definition of mental retardation under *Atkins, supra* of §916.1006(12), Fla. Stat. (2003), as he does not have any defects in adaptive behavior." (PCR3 62) (emphasis supplied). Without question, the court reached the merits of the claim, found Arbelaez failed to make a *prima facie* showing of mental retardation given the sole authority he relied upon had been thoroughly discredited in the prior litigation. In fact, the record showed Arbelaez was not mentally retarded. Together, these factors refute Arbelaez's claim that the court failed to accept his allegations as true, (IB 14) and that it disregarded this Court's statement that rule

3.203(d)(4(E) applied to him and that he must pursue his claim "in accordance with the new rule." Arbelaez, 898 So.2d at 43, n.2.

Even if this Court ignores Arbelaez's failure to comply with the time limitations set forth in the rule, as did the trial court, the matter is procedurally barred and meritless given that Arbelaez's sole support for his claim of mental retardation was a discredited witness. He had his opportunity to prove his claim of mental retardation and there has been a finding, affirmed on appeal, that he has not carried his burden in this matter.⁶ In fact, it was determined that Arbelaez was not mentally retarded; he had a high level of adaptive

⁶In rejecting the mental retardation issue within the claim of ineffective assistance of counsel, Judge Rothenberg resolved conflicts in the testimony of mental health professionals along with Arbelaez's confessions, trial evidence, and empirical data of his adaptive functioning. It must be remembered that the standard of proof required to prove mitigation is "preponderance of the evidence." See Evans v. State, 808 So. 2d 92, 108 (Fla. 2001) (noting defendant had established mitigation by proving such by a "preponderance of the evidence"). The standard of "preponderance of the evidence" is a lower burden of proof than the intermediate standard of "clear and convincing" or the high burden of "beyond a reasonable doubt. See Inquiry Concerning a Judge (Halloway), 832 So. 2d 716, 726 (Fla., 2002) (noting "clear and convincing" proof is the intermediate standard - it is higher than "preponderance of the evidence", but less than "beyond and to the exclusion of a reasonable doubt"). As such, Arbelaez was unable to show he was mentally retarded even under the lowest standard of proof.

functioning. Arbelaez, 898 So.2d 35. Under *res judicata*,⁷ Arbelaez should not be given multiple opportunities to try and prove his claim either by having successive judges hear the matter or by contacting an ever widening group of mental health experts in the hopes of finding one to give an opinion to Arbelaez's liking. Jones v. State, 732 So. 2d 313, 320 (Fla. 1999)(reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because defendant found expert who would provide testimony conflicting with original expert).

As he argued below, Arbelaez maintains that his mere request for an evidentiary hearing, and his offering of Dr. Latterner in support of that motion sufficed to require new experts be provided and an evidentiary hearing be scheduled. In claiming it was error for the court to fail to accept his allegations as true and to fail to appoint new experts, Arbelaez points to rule 3.203(c). However, he neglects to take into account the fact that he has been tested by his own experts, therefore, rule 3.203(c)(2) applies, not rule 3.203(c)(3) which addresses instances where the defendant had not been evaluated. Rule 3.203(c)(2) entitles the State, not the previously-tested

⁷"Res judicata bars relitigation in a subsequent case or action not only of claims raised, but also claims that could have been raised." Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001).

defendant, to the appointment of an expert. Having been tested previously, Arbelaez was not entitled to new experts, and the trial court did not commit error.

Moreover, Arbelaez fails to address the fact that Dr. Latterner's opinion, the sole basis for his rule 3.203 request (PCR3 5-24, 88-89), was discredited fully. While initially the court must consider the allegations as true, where the record refutes those allegation, relief is not required. Cf. Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) (finding summary denial of postconviction claims proper where court "state[s] its rationale in its decision or attach[es] those specific parts of the record that refute each claim presented in the motion"). Here, the record from the evidentiary hearing, as well as this Court's findings on appeal, Arbelaez, 898 So.2d at 35-36), refuted Arbelaez's renewed claim of mental retardation and laid a valid basis for summary denial of relief.

It is most telling that Arbelaez failed to advise the trial court, as well as this Court, of the extensive hearing on this matter and extensive findings by the trial court as well as this Court. The trial court's explicit and complete rejection of Dr. Latterner's testimony as being "of little if any value" as it is refuted by other mental health professionals and other evidence, and is otherwise wholly unbelievable" was affirmed by this

Court. (emphasis supplied) (SPCR3.3 290).⁸ Below, Arbelaez

⁸Dr. Latterner's opinion, was rejected by the trial court in the postconviction evidentiary hearing with such findings as:

(1) Despite the Defendant being incarcerated under a death sentence and having suffered numerous seizures since his confinement, Dr. Latterner refused to consider any evidence other than her testing data and her interview of the Defendant [T.1/8/02, Pgs.338-340]. When asked if she had ever viewed the Defendant's videotaped confession taken in 1988, she replied that she had not. When asked if she would watch it in Court to see if her observations confirmed or changed her conclusions, she refused to do so saying that nothing would change her opinions as they are based solely upon her testing. (SPCR.3.3 89-90);

(2) When Dr. Latterner concluded that due to the Defendant's low intelligence he would not be able to function on his own unless trained to do so, she refused to consider evidence outside the testing including that when the Defendant left home at age 18 he came on his own to the United States with no family here, learned to speak English on his own, spoke two languages, lived alone, was working at least two jobs, drove an automobile, had a girlfriend and took care of her children prior to the homicide. (SPCR3. 290)

(3) Dr. Latterner did not see or evaluate the Defendant until 1995 after he had been incarcerated on death row for some 4-5 years. She did not and would not consider anything other than her raw testing to draw her conclusions, despite the fact that she admitted that these scores can be affected by whether or not the Defendant was trying his best or whether or not he was malingering. ... More importantly, however, she refused to consider the effect incarceration on death row has had upon this individual. ... She also refused to consider the Defendant's adaptive functioning which is in fact a statutory requirement in determining whether someone is "retarded" or not. She refuses to consider other relevant and enlightening facts and factors including the fact that the Defendant had an excellent memory of the events in question when interviewed after returning to the United States in 1988. She additionally refuses to review or to consider the Defendant's taped statement, the fact that he reads and writes and the level of his reading (newspapers), that he taught himself English, his work experiences, the fact that he

offered nothing new to undermine this Court's prior rejection of Dr. Latterner.⁹ Given such, Arbelaex has shown no basis why Dr. Latterner's opinion now should be accepted as true, or where under the rules, new defense experts should be appointed. Such would amount to relitigation of a settled issue. Cf. Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992) (opining "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003).

As noted above, whether or not Arbelaex is mentally retarded was litigated fully in the rule 3.851 motion and subsequent appeal, albeit, as part of a claim of ineffective assistance of penalty phase counsel for not having presented such evidence to the jury. In fact, the standard utilized for determining whether Arbelaex was mentally retarded, the DSM-IV criteria, were adopted by statute and case law.¹⁰ Although

lives alone and learned to live in a new Country on his own, etc. (SPCR3.3 297-08) (emphasis in original).

⁹Also, it appears that Arbelaex is engaging in piecemeal litigation of his mental health issues. Cf. Jones v. State, 591 So.2d 911, 913 (Fla. 1991) (opining "defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions."); Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Card v. Dugger, 512 So.2d 829 (Fla. 1987).

¹⁰Both sections 916.106(12) and 921.137(1), Florida Statutes define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Adaptive behavior is defined as "the

referenced in the Statement of Facts, this Court's findings on appeal bear reiteration here. They show there was extensive exploration of Arbelaez's mental retardation status at an evidentiary hearing, thereby, barring re-litigation of the matter.

In analyzing the prejudice prong for the ineffectiveness claim for not having presented evidence of mental retardation,¹¹ this Court stated:

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

effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." See sections 916.106 (12) and 921.137(1), Florida Statutes. As reaffirmed in Rodriguiz v. State, 919 So.2d 1252, 1266, n.8 (Fla. 2005): "Even where an individual's IQ is lower than 70, mental retardation would not be diagnosed if there are no significant deficits or impairments in adaptive functioning. Adaptive functioning refers to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." In order for mental retardation to be diagnosed, there must be 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." (citations omitted). Such definitions comply with those suggested in Atkins v. Virginia, 536 U.S. 304 (2002) and set forth in the newly promulgated Rule 3.203.

¹¹Reference and discussion of the relevant portions of the evidentiary hearing testimony have been footnoted.

health mitigation is that he is of low intelligence (but has a high level of adaptive functioning)¹² 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....

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

¹²Although not relied upon in rejecting the claim of mental retardation, DOC psychological professional, Lisa Wiley ("Wiley"), is instructive on the issue of adaptive functioning. Wiley was responsible for assessment, counseling, case management, dealing with mentally retarded persons, and making medical referrals for death row inmates. As part of her employment, Wiley attended treatment team meetings regarding Arbelaez. Mental retardation was never discussed as one of his problems. Prior to April 2001, Wiley saw Arbelaez weekly in general rounds and about nine times per year individually (PCR2 856-66, 902; SPCR3.8 999-1000). She explained that one of the factors to be assessed in diagnosing mental retardation is adaptive behavior and she looks for impairments in functioning, excessive disciplinary reports, staff referrals, observations, and confinement reports. Over the ten years she observed Arbelaez, Wiley found he obeyed directions, cared for/groomed himself, followed the required pattern of death row activities, had appropriate time management, social, and interview skills, learned a second language as an adult, and showed no impairment in adapting to his environment. Based upon these observations, Arbelaez was not mentally retarded (SPCR3.8 1017-26,, 1030-37).

who testified unambiguously that Arbelaez has mental retardation or organic brain damage.¹³

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 "refused 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

¹³Neuropsychologist, Dr. Latterner, testified she conducted a neuropsychological examination of Arbelaez on August 11, 1995 while he was incarcerated on death row, and produced a report. Based upon the IQ and neuropsychological testing, the doctor concluded Arbelaez was mentally retarded with "organic brain syndrome mixed." (PCR2 688, 691-701, 745-46, 747-49, 787, 798-800). Dr. Latterner noted Arbelaez's ability to describe in detail the murder, his motivation, and how he accomplished the killing had nothing to do with the memory tests administered or his cognitive function (PCR2 767-68). She chose not to review any case information, confession, or police reports. Instead, she rested her conclusion on her 1995 test results alone, and would not take into consideration Arbelaez's adaptive behavior, because she felt the testing was adequate to form an opinion. Dr. Latterner explained Arbelaez's full scale IQ score of 67, with no malingering, placed him in the educatable, mentally retarded range, i.e., he is able to live independently, hold down a job, and be a responsible citizen (PCR2 701-03, 745, 757-59, 762-63, 785-86).

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 refuted" 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."¹⁴ However, unlike Dr. Latterner, Dr. Ruiz also considered Arbelaez's ability to adapt to his surroundings.¹⁵ She testified that Arbelaez's

¹⁴During her November 5, 2001 evaluation, Dr. Sonia Ruiz, a clinical psychologist, found Arbelaez very clear, lucid, and stable. Dr. Ruiz reported no evidence of major mental disorder or mental retardation. Before conducting her evaluation, Dr. Ruiz received Dr. Latterner's neuropsychological evaluation, Dr. Castiello's report, the Florida Supreme Court's July 13, 2000 opinion, and Arbelaez's April 11, 1988 confession. This information helped her assess whether his answers were consistent with prior examinations. Arbelaez related his life history and experiences, family relationships, education, interest in adventure, employment history, association with the victim's mother, and the murder. He told a "good story," had no difficulty in recalling details, and his thoughts were easily understood, coherent, and clear. His answers were appropriate and given with adequate detail except when reporting hallucinations, which were so vague, Dr. Ruiz found Arbelaez not credible. Dr. Ruiz saw "no indication of any psychopathology" (SPCR3.9 1158-59, 117074, 1176-99).

¹⁵Dr. Ruiz administered several tests which indicated Arbelaez had no gross organic impairment or mental retardation, however, he was malingering. With respect to mental retardation, Dr. Ruiz averred that IQ, adaptive functioning, and an onset before age 18 must occur before a person is labeled mentally retarded. This is based upon the DSM-IV. When determining a person's adaptive behavior, Dr. Ruiz compares the

"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."¹⁶ In fact, Dr. Haber

person's level of functioning to others with similar "socioeconomic status, culture, background, and age." Here, Dr. Ruiz found high adaptive functioning, and reasoned Arbelaez was not mentally retarded. He was living and traveling on his own before he was 18 years old. He established friends, worked, and lived independently in the United States without family support. He was responsible in his jobs, holding the keys to one hotel and distributing supplies to co-workers. Such responsibility would not have been given a mentally retarded person. Arbelaez held down two or three jobs and painted homes on weekends. He purchased his medication, clothes, and toys for his girlfriend's children. He was able to drive himself to work, and the children to school. Arbelaez's history is inconsistent with mild mental retardation. A diagnosis of mental retardation must not be based solely upon test results. Even if a person's IQ is low, but adaptive functioning normal, the person should not be labeled mentally retarded. Based upon everything Dr. Ruiz observed and reviewed, there was no evidence of mental retardation (PCR2 1049-59, 1064-68, 1071, 1116-20, 1133-38, 1144-48, 1150-51, 1154-55 SPCR3.9 1192-1202, 1207-11, 1258-62, 1274-79, 1285-89, 1291-92, 1295-96).

¹⁶Clinical and forensic psychologist, Dr. Haber, was called by Arbelaez, and reported that she evaluated him between June 1988 and May 1989 for competency. Dr. Haber found Arbelaez had a good remote memory, was cooperative and coherent with good eye contact. He was oriented to time, place, and person, with productive/goal oriented thought processes and had no lessening of association. He was not delusional, paranoid or suicidal, and did not have "homicide ideations", hallucinations, or sleeping/eating disorders. Dr. Haber found nothing in 1988/1989 that "required further evaluation." While she conducted no tests on Arbelaez, she was able to state "... with a reasonable degree of psychological certainty ... I did not find anything that I felt at that time required further evaluation." (emphasis

admitted that she "would not have thought about an IQ test" based on her brief pretrial evaluations in 1988 and 1989.¹⁷

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....

Because Arbelaez failed to present competent, substantial evidence that he

supplied). In 1988/1989, Dr. Haber saw no reason to ask for an IQ test. (PCR2 554-59, 566-70, 588-90, 608-10; 621-35, 643, 667-68, 671-73; PCR3 33-57; SPCR3.6 688-93, 700-04, 722-24, 742-44; SPCR3.7 764-73, 781, 805-06, 809-11,).

¹⁷Dr. Haber knew Arbelaez suffered from epilepsy and had a history of being in the workforce with friends and acquaintances from his years in Miami. She recalled Arbelaez's videotaped confession and documents that he confessed to the intentional killing of the child. After reviewing the videotape, Dr. Haber admitted that had she viewed the tape in 1988/89, she would not have thought about requesting an IQ test because Arbelaez's responses were coherent, productive, and readily understandable without any significant problems in understanding. (PCR3 588-90, 604; 635-38, 650-53, 671). Also, her review of documentation generated some six years after trial, Dr. Haber reasoned Arbelaez was functioning, at best, on a borderline intellectual level, and at worst, on a mental retardation level with a 67 full scale IQ which could range +/- seven points or even up to a score of 77. However, she admitted the IQ test was conducted by defense expert Dr. Latterner while Arbelaez was on death row, "so it is a close call" and her review of videotaped confession would not have led her to consider IQ testing. Further, a person's "adaptive behavior" must be taken into consideration when determining mental retardation. See section 916.106(12), Florida Statutes and section 921.137(1), Florida Statutes for the definition of "mental retardation." Based upon what Dr. Haber reviewed, Arbelaez appeared to have "adaptive functioning" within a borderline range, but was "functioning behaviorally within an adequate range." Based upon his confession, Arbelaez functioned at an acceptable level (PCR2 605-06; 652-61, 677-81; SPCR3. 739-40, 790-99, 815-19).

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, 898 So.2d at 35-36 (e.s.).

The postconviction evidentiary hearing, upon which Arbelaez relies exclusively for his successive postconviction motion, establishes that the mental retardation matter was fully litigated and that Arbelaez has not and cannot meet the definition for mental retardation contained in sections 916.106(12) and 921.137(1), Florida Statutes. He has offered nothing, other than his discredited expert, in support of his claim. Under the doctrine of *res judicata*, this Court should reaffirm that Arbelaez is not mentally retarded and deny relief.

Moreover, as recognized in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), a mental retardation issue based upon Atkins v. Virginia, 536 U.S. 304 (2002) does not require re-litigation "in light of the fact that [the defendant] already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim." Bottoson, 833 So.2d at 695. Such is especially true where, as here, the factual findings commensurate with rule 3.203 were made by this Court. Arbelaez's IQ level, adaptability, and onset before 18 years of age were considered by the trial court and rejected as not

showing mental retardation as explained above. An evidentiary hearing was denied properly, as Arbelaez failed to allege any evidence not considered and rejected by this Court previously as not supporting a finding of mental retardation. See Bottoson, 833 So. 2d at 695. Arbelaez should not be permitted to recycle his discredited expert as a basis for obtaining further testing not provided for under the rule a second review of his mental retardation claim. The summary denial of relief was proper and should be affirmed under the facts of this case.

POINT II

RULE 3.203 IS CONSTITUTIONAL (restated)

Here, Arbelaez raises Sixth and Eighth challenges to rule 3.203 primarily taking issue with the perceived dichotomy between the procedures and apparent constitutional rights afforded defendants yet to be convicted and sentenced to death, and those who have had their sentences affirmed on appeal. These challenges are that rule 3.203: (1) does not provide a constitutionally adequate procedure to resolve mental retardation claims raised by defendants whose death sentence has become final because Sixth Amendment guarantees are not extended to these defendants while such guarantees are provided for defendants not yet sentenced;¹⁸ (2) does not provide for a

¹⁸The Sixth Amendment rights to which Arbelaez refers include: (a) the right to competent counsel under Strickland v.

postconviction review following the determination of mental retardation status so a death sentenced defendant does not have the same opportunity to present his Eighth Amendment claims as one yet to be tried; (3) does not contain a standard of proof and the clear and convincing standard provided in section 921.137(4) violates due process; and (4) permits a judge to decide whether a defendant is mentally retarded when such should be made by a jury with the State having the burden to prove beyond a reasonable doubt that the defendant is not mentally retarded under Ring v. Arizona, 536 U.S. 584 (2002) and Atkins v. Virginia. These legal issues¹⁹ have been resolved adversely to Arbelaez's position. Relief must be denied.

Initially, Arbelaez argues that it was error for the trial court to find that his legal challenges to the rule were not ripe for review. Such was not error as it had been determined by this Court that Arbelaez was not mentally retarded. Arbelaez, 898 So.2d at 35-36. As such, the rule could not be challenged as it had no impact on Arbelaez. However, the trial court did not end its analysis there. It continued stating: "[e]ven if Washington, 466 U.S. 668 (1984); (b) disclosure of exculpatory or favorable evidence; (c) assistance of competent mental health professionals; (d) right to confrontation; and (e) right to direct appeal where counsel must render effective assistance.

¹⁹Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

the claim [were] ripe, it is lacking in merit." (PCR3 63).

In support of his claim that he is entitled to a new penalty phase proceeding with full Sixth Amendment guaranties, Arbelaez points to the out-of-state cases of Johnson v. State, 102 S.W.2d 535 (Mo. 2003); Lambert v. State, 71 P.3d 30, 31 (Okla. Crim. 2003); Atkins v. Commonwealth, 581 S.E.2d 514, 517 (Va. 2003); State v. Grell, 66 P.3d 1234, 1241 (Ariz. 2003); and State v. Canez, 74 P.3d 932 (Ariz. 2003). His Sixth and Eighth Amendment constitutional arguments raised here were presented by members of the defense bar, when this Court was in the process of drafting the rule. See pleading filed in Florida Supreme Court Case Number 03-685, Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure, (SPCR3.10 1303).²⁰ Without question, the Florida Supreme Court considered the instant Sixth and Eighth Amendment arguments when adopting rule 3.203. Moreover, Arbelaez's out-of-state cases are not applicable as the sentencing schemes of those states are different than the capital sentencing statute in Florida where death eligibility occurs at time of conviction. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is

²⁰There appears to be an error in the documents presented in the State's Exhibit 12 included in its Appendix to its Response to Arbelaez's postconviction relief motion.

death"); Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.) (determining death is the statutory maximum in Florida), cert. denied, 532 U.S. 1015 (2001).

Arbelaez has failed to demonstrate a need for this Court to revisit the Sixth and Eighth Amendment challenges especially in light of the rejection of his arguments in his prior rule 3.851 appeal. There this Court reasoned:

[Arbelaez] 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 (Ga. 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, 898 So.2d at 43 See Rodriguez v. State, 919 So.2d 1252 (Fla. 2005). Further, there is no Sixth Amendment right to jury sentencing. See Proffitt v. Florida, 428 U.S. 242, 252 (1976); Hildwin v. Florida, 490 U.S. 638 (1989).

Because Atkins considered the execution of those mentally retarded under Eighth Amendment terms, Atkins, 536 U.S. at 321, it did not bestow upon defendants Sixth Amendment rights. Similarly, this Court has determined that Ring does not require mental retardation claims to be presented to a jury, as such, no

Sixth Amendment rights are conferred upon defendants whose death sentences have been affirmed on appeal. Such review, as with other constitutional rights made retroactive, lies in the postconviction process where the defendant has the burden to try and vacate the sentence. The jury plays no part in that determination.

Similarly, there is no constitutional requirement that an attorney be appointed that would then be subject to a subsequent Sixth Amendment challenge. As noted above, the defendant is attempting to vacate a sentence, not block the imposition of a death sentence. Hence, representation falls on postconviction counsel and there is no constitutional right to a Sixth Amendment review of such counsel's performance. Lambrix v. State, 698 So. 2d 247 (Fla. 1996); Vining v. State, 27 Fla. L. Weekly S654, 658 (Fla., Jul 03, 2002); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001). Furthermore, in Pennsylvania v. Finley, 481 U.S. 551 (1987), the United States Supreme Court refused to extend a due process requirement for effective assistance of collateral counsel claims to situations where a state has chosen to provide collateral counsel to indigent inmates. See Murray v. Giarratano, 492 U.S. 1 (1989). Based upon this, there is no constitutional infirmity in rule 3.203 where those defendants whose capital sentences have been affirmed on appeal must litigate there claims before a trial

court in a postconviction setting.

While rule 3.203 does not contain a burden of proof, such is contained in section 921.137(4). Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563, 567 (Fla. 2004) (Pariante, J., concurring) (noting the omission of a standard of proof from the rule). Section 921.137 states that the burden to establish mental retardation is on the defendant and he must meet this burden under the clear and convincing standard. Not only did Arbelaez have notice of this via the statute, but it was pointed out in this Court's opinion adopting rule 3.203. Id. at 565.

Furthermore, the suggestion that anything other than a "preponderance of the evidence" standard would be unconstitutional under Cooper v. Oklahoma, 517 U.S. 348 (1997) fails to take into consideration the clear mandate from the United States Supreme Court on this subject. In Atkins v. Virginia, 536 U.S. 304 (2002), it was left to the states to determine the appropriate means to enforce the constitutional restriction on executing the mentally retarded. To this end, the Legislature enacted section 921.137(4) which imposes upon the defendant the burden of proving he is mentally retarded by "clear and convincing evidence." However, as noted above, the standard applied to Arbelaez to prove mental retardation was the preponderance of evidence standard as his claim was litigated in

conjunction with his claim of ineffective assistance of counsel. As such, even should this Court conclude that the standard announced in section 921.137 is improper, Arbelaez has suffered no constitutional infirmity as the lower "preponderance of the evidence" standard was applied to him and he could not even meet that burden.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Todd G. Scher, Esq. Law Office of Todd G. Scher, P.L., 5600 Collins Ave #15-B, Miami Beach, Fl 33140 on May 26, 2006.

LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on May 26, 2006.

LESLIE T. CAMPBELL