IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1149

HARRY FRANKLIN PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On January 6, 1983, Appellant, Harry Franklin Phillips, was charged by indictment, in case no. 83-435, with the First-Degree Murder of Bjorn Thomas Svenson with a firearm, which occurred on August 31, 1982. (DAR. 1)[1] After a trial, Appellant was convicted as charged and sentenced to death based on a 7-5 jury recommendation of death. (DAR. 277, 1068-69, 329-42)

Appellant appealed his conviction and sentence to this Court, which affirmed. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). In affirming Appellant's conviction and sentence, this Court outlined the facts of the case as follows:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of [Appellant's] parole. The record indicates that for approximately two years prior to the murder, the victim and [Appellant] had repeated encounters regarding [Appellant's] unauthorized contact with a

[1] The symbol "DAR." refers to the record from the direct appeal in case no. 64883. The symbols "RSR." and "RST." refer to the resentencing record and transcripts, respectively, in appeal case no. 83731. The symbols "PCR3." and "PCT3." will refer to the record on appeal and transcripts of proceedings regarding the relinquishment proceedings of the 2006 intellectual disability evidentiary hearing, already provided to this Court in case number SC06-2554.

> probation officer. On each occasion, the victim advised [Appellant] to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, [Defendant's] parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against [Appellant]. Neither was injured in the incident, for which [Appellant] was subsequently charged.
>
> Following the victim's murder, [Appellant] was incarcerated for parole violations. Testimony of several inmates indicated that [Appellant] told them he had killed a parole officer. [Appellant] was thereafter indicted for first-degree murder.
>
> * * * *
>
> The trial court found four statutory aggravating circumstances applicable in sentencing [Appellant] to death: the murder was committed while [Appellant] was under a sentence of imprisonment, [Appellant] was previously convicted of another felony involving the use of violence, the murder was especially heinous, atrocious or cruel, and was committed in a cold, calculated and premeditated manner.

Id. at 195-96.

On April 4, 1994, Appellant was resentenced after the Florida Supreme Court affirmed the conviction but reversed the penalty phase, finding counsel was ineffective. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992). After considering the evidence presented, the jury recommended that Appellant be sentenced to death by a vote of 7 to 5. (RST. 811-12) This Court

followed this recommendation and sentenced Appellant to death. (RST. 826-45) In doing so, this Court found four aggravating factors: (1) under sentence of imprisonment; (2) two prior violent felony convictions; (3) disruption or hindrance of the lawful exercise of any government function; and (4) murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (RSR. 174-89) It did not find any statutory mitigating factors. (RSR. 182-88) It found as nonstatutory mitigation Appellant's low IQ, his poor family background and his abusive childhood, including his lack of proper guidance from his father, and gave them little weight. (RSR. 185-87)

Appellant appealed his sentence to this Court, which affirmed on September 25, 1997. *Phillips v. State*, 705 So. 2d 1320, 1321-22 (Fla. 1997) (rehearing denied Feb. 23, 1998). Appellant sought certiorari review in the United States Supreme Court, which was denied on October 5, 1998. *Phillips v. Florida*, 525 U.S. 880 (1998).

Subsequent collateral challenges have been rejected. *Phillips v. State*, 751 So. 2d 1253 (Fla. 2000) (affirming denial of shell motion and denying writ of prohibition); *Phillips v. State*, 894 So. 2d 28 (Fla. 2004) (affirming denial of state habeas claim and amended postconviction relief motion); *Phillips*

v. State, 2007 Fla. Lexis 1221 (Fla. Jun. 21, 2007) (affirming denial of successive postconviction motion); *Phillips v. State*, 996 So. 2d 859 (Fla. 2008) (affirming denial of second successive postconviction motion because the claim was barred); *Phillips v. State*, 984 So. 2d 503 (Fla. 2008) (affirming denial of third successive postconviction motion and finding that this Court had properly determined that Appellant was not intellectually disabled[2]); *Phillips v. State*, 91 So. 3d 783 (Fla. 2012) (rehearing denied June 21, 2012) (affirming denial of the fourth successive motion for postconviction relief based on the claim that Appellant's sentence violates the Sixth and Eighth Amendments under *Porter v. McCollum*, 130 S. Ct. 447 (2009)).

Relevant to the instant appeal is what occurred at Appellant's 2006 3.203 evidentiary hearing after this Court relinquished jurisdiction of Appellant's appeal regarding his claim that he was intellectually disabled.

Findings at the 2006 Evidentiary Hearing

The evidentiary hearing was held by the postconviction court from February 13-16, 2006. PCR3 at 2214. Appellant presented testimony of Dr. Glenn Caddy and Dr. Denis Keyes. *Id.* The State presented testimony of Dr. Enrique Suarez. *Id.* at 10.

[2] "Intellectual Disability" was once referred to as "Mental Retardation" To ensure uniformity within the facts section of this response, Respondent shall refer to the term as Intellectual Disability.

At that time, the postconviction court applied the defense burden of proving by clear and convincing evidence that he met the definition of [intellectual disability] set forth in rule 3.203(b). PCR3. at 2227.

Dr. Caddy, a clinical psychologist who had only done forensic work for defendants, testified that he was hired only to evaluate Defendant's intelligence, he gave Appellant the WAIS-III, Appellant obtained a full-scale IQ score of 70, a verbal IQ score of 69 and a performance IQ score of 76. PCT3. 51-60. He said a reason for the variance between the verbal and performance scores could be educational and cultural deficits. PCT3. 61. He believed that his IQ score was consistent with the IQ scores obtained by Drs. Keyes and Carbonell because of the 95% confidence interval. PCT3. 64-66. Although he did not perform any achievement tests of his own, Dr. Caddy reviewed the other experts' tests and asserted Drs. Keyes and Carbonell's scores might be slightly higher as Appellant was incarcerated, which could have improved his performance due to living in a structured environment. PCT3. 67-69.

Dr. Caddy suggested that malingering should not be considered because people with low IQs are incapable of malingering. He did no validity testing because he believed Appellant was incapable of malingering, and he was only testing

intelligence. PCT3. 84, 120, 126-28, 142-46, 186. He also believed that if Appellant was going to malinger, he would have exaggerated a head injury that allegedly occurred in 2000. PCT3. 84-85. He also opined that similar performance on IQ tests was an indicator Appellant had not malingered and repeated IQ testing was the best way to determine malingering. PCT3. 120-22, 126. However, he acknowledged the DSM indicated malingering should be considered if a person was referred by a lawyer for evaluation or had antisocial personality disorder. PCT3. 122-26. He admitted that validity tests did exist, outlined how he would have tested validity when pressed to do so, acknowledged that he had not pursued this course because he was not asked to do so, and admitted that he would have done so if he had been hired by someone other than the defense. PCT3. 186-89.

Dr. Caddy admitted he did not expect Appellant to be able to process information effectively or reason abstractly. PCT3. 151. However, he did not consider if Appellant's actions in this crime or his prior crimes indicated he processed information effectively or reasoned abstractly, as he did not have the facts of the priors and did not consider the facts of this case. PCT3. 153-57. He also insisted the Bro White letter, where Appellant planned to kill witnesses against him and their families, did

not so indicate because Appellant should have expected capture. PCT3. 152-53.

Dr. Keyes, a special education professor and school psychologist who does extensive work in the criminal justice system solely for the defense, testified that in assessing retardation, he first looks at school records to see if there was a special education placement, then conducts IQ tests and finally interviews family members and teachers for adaptive functioning. PCT3. 189-95, 210-11. He chose to interview family members and teachers for adaptive function because he looks exclusively at how the person functioned before they were 18. PCT3. 246, 260. He claimed this was proper because one needed to see how the individual functioned at the time of the crime. PCT3. 259-60. However, he admitted the definition of intellectual disability required that the adaptive functioning deficits exist at the same time as the sub-average intellectual functioning. PCT3. 285-86.

Here, the few school records provided to Dr. Keyes showed no special education placement. Dr. Keyes considered that intellectual disability was still a possibility because Appellant's grades were low, the school system was segregated, and he was educated before special education became prevalent. PCT3. 212-13. On the WAIS-III Dr. Keyes administered,

Appellant's performance IQ was 76, verbal IQ was 74 and full-scale IQ was 74. PCT3. 244. He asserted academic achievement had nothing to do with intelligence and believed Appellant's higher scores were due to his placement in a structured environment, which allowed him to learn. PCT3. 234, 236. Later, he admitted IQ was supposed to measure one's ability to learn and the scores should correlate. PCT3. 315-17.

Dr. Keyes did not believe Appellant was malingering because he observed no behavior that caused him concern. PCT3. 219. Dr. Keyes believed he would be able to tell if someone was malingering because it takes the person a long time to answer the questions, he would get every question wrong and he would get tired. PCT3. 223, 231, 308-09. He also believed that it was impossible for a person to malinger over multiple administrations of IQ tests and would therefore give multiple IQ tests if he thought malingering was possible. PCT3. 222, 230-31. He admitted that he gave validity testing in the past and claimed he did not do so here because he had not studied the test when he evaluated Appellant. PCT3. 309.

To assess adaptive functioning, Dr. Keyes administered the Scales of Independent Living to Appellant and Norman Parker, a childhood friend of Appellant who is also a death row inmate represented by Appellant's counsel, the Vineland to Appellant's

mother, and twice to his sister and asked exclusively how he functioned before age 18. PCT3. 246-49, 325-26. Appellant's mother's Vineland results were invalid because she did not know enough about him. PCT3. 249. The first Vineland administration to Appellant's sister also included many "do not know" answers. PCT3. 331.

Dr. Keyes also received anecdotal evidence about Appellant's behavior from his brother, a neighbor and Parker. PCT3. 253-55. Parker related how Appellant failed to distract a shopkeeper from whom they tried to steal and how Appellant got friends caught trespassing because he wore his clothes when swimming. PCT3. 253-54. Appellant's brother described Appellant as shy and attached to his abusive father. PCT3. 255. Dr. Keyes also reviewed Appellant's work history, which he felt was unusual for an individual with intellectual disability but not inconsistent. PCT3. 262-64, 333-34.

Dr. Keyes found Appellant had unspecified deficits in adaptive behavior. PCT3. 261. He believed this history and the school records showed onset before the age of 18. PCT3. 261. Overall, Dr. Keyes opined that Appellant was [intellectually disabled]. PCT3. 264.

However, Dr. Keyes admitted that [intellectually disabled] individuals lack the ability to plan and Appellant's actions in

committing this crime indicated planning inconsistent with his diagnosis. PCT3. 281-84. Gathering casings and removing them from the crime scene were particularly inconsistent with his diagnosis. PCT3. 372. He acknowledged Appellant did not acquiesce with police as expected. PCT3. 284. Dr. Keyes also admitted that the alibi note showed planning inconsistent with his opinion but would not accept that Appellant wrote it. PCT3. 296-98. Dr. Keyes insisted the Bro White letter was inconsistent with his knowledge of Appellant and stated that he had never seen Appellant write in cursive. PCT3. 298-303.

Dr. Keyes admitted Appellant could probably balance a checkbook. PCT3. 290. He acknowledged his testing of Appellant's academic achievement placed him in the low average range. PCT3. 312-15. He insisted family affidavits about Defendant paying bills and buying typewriters and cars were statements about simply paying for activities and not actually doing them. PCT3. 343-45. He said Appellant may have swam in his clothes because he was shy. PCT3. 325. He admitted that Appellant's grades could have been low due to truancy, conduct and lack of motivation. PCT3. 331-32.

Dr. Keyes acknowledged that IQ scores can be artificially lowered by factors like cultural and linguistic problems, conduct problems and poor motivation. PCT3. 342-43. He admitted

Appellant received reduced or no credit for answers on the IQ test indicating a knowledge of the subject because they were not the answers specified in the test manual. PCT3. 334-37, 339-40.

Dr. Suarez, a neuropsychologist who testifies on behalf of both sides in criminal cases, chose to give Appellant the test of nonverbal intelligence (TONI) because he had recently been given the WAIS (causing a concern about the practice effect). Dr. Keyes had reported that Appellant could not read and write and suffered head trauma and the TONI correlated with a validity test he planned to perform. PCT3. 447-50. He also said the TONI was developed partly because people of other cultures, including the African-American sub-culture in this country, were being overly diagnosed as retarded due to the emphasis on verbal skills in the WAIS and Stanford-Binet. PCT3. 386-87. Appellant scored an 86 on the TONI, which is in the lower average range. PCT3. 454. This score was consistent with his observed ability to plan, lack of acquiescence, work history and achievement test results. PCT3. 455-58.

Dr. Suarez felt it important to test a person's psychological makeup because certain psychological states can depress one's IQ score. PCT3. 435-37. Dr. Suarez believed validity testing important because while experts can detect gross malingering without help, research showed they do no

better than chance at detecting subtle malingering. PCT3. 406-11. The MMPI Dr. Suarez gave Appellant to evaluate his psychological state indicated that he was attempting to manipulate the testing. PCT3. 496, 498. Results on two of three validity tests Dr. Suarez gave also indicated that he was malingering. PCT3. 476-85, 487-51. The third validity test indicating a lack of malingering reflected a decision not to malinger on that test. PCT3. 485-87. Dr. Suarez asserted that the discrepancy between Appellant's achievement test scores and IQ test scores, his performance on the Wechsler Memory Scales, and that Dr. Keyes had never seen Appellant write in cursive indicated malingering. PCT3. 395-97, 404-07, 459-64, 434-35.

To measure adaptive functioning, Dr. Suarez gave the ABAS to corrections officials who had more knowledge of Appellant's current functioning than Appellant's family. PCT3. 499-502, 505-06. Among the corrections officials was Lisa Wiley, a psychological specialist on death row to whom any reports of problems with an inmate's function were made, who never received any such reports concerning Appellant. PCT3. 503-04. The results indicated no deficits in adaptive functioning. PCT3. 510-12.

Dr. Suarez also considered that Appellant was able to provide historical information at a level of sophistication inconsistent with retardation and that the Bro White letter

indicated a level of planning and knowledge inconsistent with retardation. PCT3. 414-17, 433-34. He felt Appellant's poor school performance was probably due to conduct problems and truancy and not a lack of ability. PCT3. 512-14. As such, Dr. Suarez opined that Appellant was not intellectually disabled. PCT3. 514-15.

After weighing the evidence, the postconviction court made the following findings of fact and law:

1. *No finding of Significant Subaverage General Intelligence Functioning. (pg. 31-37)*

"Significantly sub average general intellectual functioning" was defined by the postconviction court as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." PCR3. at 2233. The postconviction court noted that according to American Association on Mental Retardation ("AAMR"), "an IQ score of 75 is 'approximately 2 standard deviations below the mean, considering the standard error of measurement.'" PCR3. at 2230. Additionally:

> limited intellectual functioning requires that an individual have impairment in general intellectual functioning that places him/her in the lowest category of the general population. Intelligence Quotient (IQ) scores alone are not precise enough to identify the upper boundary of [intellectual disability]. Some experts generally agree that [intellectual disability]

> includes everyone with an IQ score of 70 or below, but the definition also includes some individuals with IQ scores in the low to mid-70s.

PCR3. at 2230

Accordingly, the postconviction court found Appellant scored a 74 full-scale IQ score on Dr. Keyes' administration of the WAIS-III. PCR3. at 2239. Dr. Caddy indicated Appellant's WAIS-III full-scale IQ score was 75 when Dr. Carbonell tested him. PCR3. at 2239. The postconviction court rejected Dr. Caddy's WAIS result and opinion about his explanation for the score difference because Appellant previously stated, "he did not read much." PCR3. at 2239. Further, the postconviction court found there was no factual basis to explain Dr. Caddy's interpretation of the score differences as there was no testimony to support Appellant's access to a television or a group of inmates. PCR3. at 2239.

The postconviction court acknowledged that, while Dr. Keyes felt that Appellant met the first prong even though Appellant tested higher in skills than Dr. Keyes thought he would have given his IQ of 74, he opined "there are reasons other than [intellectual disability] that can cause a person to have a low IQ." PCR3. at 2241. For instance, Dr. Keyes gave a zero score for some of the answers Appellant provided on the WAIS-III test. *Id.* In one example, Appellant received a zero score on the

question who is "Gandhi" when he answered, "ruler of India." PCR3. at 2241. Because the test manual failed to recognize the word "ruler", this resulted in his "dismal performance on this question." PCR3. at 2241. Dr. Keyes had similar results "on other questions where Appellant had knowledge of the subject but failed to use the precise word required by the manual." PCR3. at 2241.

Additionally, the postconviction court noted that Dr. Caddy "explained that the difference in the verbal and IQ scores could be because low functioning individuals have reduced capacities to express themselves verbally due to educational and cultural disadvantages." PCR3. at 2241. Thus, based on Dr. Caddy's testimony, the postconviction court found:

> [Appellant's] borderline IQ scores of 74, 75, and 70 are not precise, explicit, lacking in confusion, or of such weight that they produced in this Court's mind a firm belief or conviction, without hesitation, that Defendant has noticeable sub average intellectual functioning. . . . [Appellant's] own experts place the [Appellant] in the "borderline" range of sub average intellectual functioning.

PCR3. at 2242.

The postconviction court was concerned that Appellant's experts chose not to conduct validity tests and that all three expert witnesses should have administered objective testing and ruled out any malingering on Appellant's behalf. PCR3. at 2242-43. Although Dr. Keyes admitted he has given malingering tests

to other death row inmates, he did not give one to Appellant because he did not suspect that he was malingering. PCR3. at 2243.

Thus, the postconviction court found that Dr. Keyes' opinion was based on insufficient data and not credible "because he did not perform a complete evaluation that included testing for malingering." PCR3. at 2243. Dr. Suarez was the only expert who conducted three validity tests,[3] which supported his suspicions that Appellant was indeed malingering. PCR3. at 2244.

In concluding the first prong was not met, the postconviction court rejected the defense expert's scores as they failed to perform a complete evaluation or test for malingering. This finding was given deference and affirmed by this Court as it was based on competent substantial evidence. *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008) ("Even were we to disregard the circuit court's credibility finding, Phillips's IQ scores do not indicate that he is [intellectually disabled]"). In *Jones*, 966 So.2d at 329, we found that IQ scores ranging from 67 to 72 did not equate to significantly subaverage general intellectual functioning. *See also Rodgers v. State*, 948 So. 2d 655, 661 (Fla. 2006) (finding that the defendant did not prove he was [intellectually disabled] under section 921.137

[3] Memory 15-Item; recognition test; and test of memory malingering ("TOMM").

despite the defense expert's finding that the defendant had an IQ of 69 and was [intellectually disabled]); *Burns v. State*, 944 So.2d 234, 247 (Fla. 2006) (finding that even though the defendant scored an IQ of 69 on one of the expert's IQ tests, the defendant did not meet the first prong of the intellectual disability determination because the more credible expert scored the defendant's IQ at 74)).

2. No Finding of Adaptive Deficits 37-40

Addressing the second prong, the postconviction court found the "deficit in adaptive behavior" component is as important as a low IQ score and "[e]ven where an individual's IQ is lower than 70, [intellectual disability] would not be diagnosed if there are no significant deficits or impairments in adaptive functioning." PCR3. at 2235. Citing *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005), the postconviction court understood that "a low IQ is not, by itself, sufficient to establish [intellectual disability]; there must also be deficits in the defendant's adaptive functioning." PCR3. at 2235.

On the evidence presented, the postconviction court dismissed Dr. Caddy's opinion regarding adaptive functioning because he was specifically asked by defense counsel to conduct an intellectual assessment (an IQ measure) only and therefore did not evaluate Appellant's adaptive functioning. PCR3. at

2245. While Dr. Keyes made an adaptive functioning assessment of Appellant, the postconviction court found that he "regretfully admitted that the planning of the murder in this case and the planning of the cover up are inconsistent with a finding that the [Appellant] suffers from [intellectual disability]." PCR3. at 2245-46.

Dr. Keyes also admitted that Appellant's alibi note suggested "planning skills" and no evidence showed he had help writing it. *Id.* Dr. Keyes opined that "maladaptive behavior does not constitute adaptive behavior." PCR3. at 2246. In rejecting Dr. Keyes opinion, the postconviction court referenced the AAMR to find that "the fact that [one] produce[s] maladaptive behavior does not mean that [one does not] have adaptive abilities." PCR3. at 2246. Further, "the AAMR further states that the presence of problem behavior is not considered to be a limitation in adaptive behavior." PCR3. at 2246. Dr. Suarez supported this assertion, detailing that "the concept that adaptive skills exclude maladaptiveness, only positive skills, is not tenable." *Id.* Further, Dr. Keyes opined the alibi letter "evidenced adaptive functioning if it had been written without assistance." PCR3. at 2246.

The postconviction court also considered that Appellant held jobs as a dishwasher, a garbage collector for the City of

Miami, and a short-order cook for 2 ½ to 3 years. PCR3. at 2246. "Dr. Keyes admitted that this was an unusually high-level job for someone who suffered from [intellectual disability]." PCR3. at 2246. Appellant exhibited skills by his "ability to hold a high stress job, drive a car, and purchase items" and taking "his nieces and nephews to the ice cream shop." PCR3. at 2247.

The postconviction court further relied on Dr. Suarez's conclusion that "the Bro White letter, written in cursive, shows that [Appellant] has graphomotor ability" and "demonstrates that he is able make innuendos which takes understanding of the situation, the people involved, and what needs to be done." PCR3. at 2247. Further, "[Appellant]'s actions on the night of the homicide, particularly his gathering up of the spent shell casings, shows a keen instinct toward self-preservation and forethought." PCR3. at 2247-48. Lastly, Appellant's refusal to give a statement to detectives seemed medically inconsistent with one who may be intellectually disabled and quicker to acquiesce a confession. PCR3. at 2247-48.

These findings regarding Appellant's failure to prove deficits in adaptive functioning were supported by competent substantial evidence and affirmed. *Phillips*, 984 So.2d at 511-12. Specifically, this Court found:

> Phillips does not suffer from deficiencies in adaptive functioning. Phillips supported himself. He worked as

> short-order cook, a garbage collector, and a dishwasher. The mental health experts generally agreed that Phillips possessed job skills that people with [intellectual disability] lacked. Specifically, the defense's expert admitted that Phillips's position as a short-order cook was an "unusually high level" job for someone who has [intellectual disability].
>
> Phillips also functioned well at home. He resided with his mother. According to her, he paid most of the bills and did the majority of the household chores. Phillips was also described as a great son, brother, and uncle. Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.
>
> The experts also agreed that the planning of the murder and cover-up in this case are inconsistent with a finding that Phillips suffers from [intellectual disability].... The mental health experts generally agreed that persons suffering from [intellectual disability] lack goal-directedness and the ability to plan. Phillips had both.

Id.

3. No Onset of Adaptive Deficits Prior to Age 18 (p. 41-42)

Reviewing the third prong, the postconviction court did not find Norman Parker's or Dr. Keyes's testimony about Appellant's swimming in his clothes as evidence that he manifested adaptive behavior deficits before the age of 18. PCR3. at 2249. The court found that Appellant's dismal school history and performance could be equally explained by "poor effort and nonattendance" rather than intellectual disability. PCR3. at 2249.

Specifically, "[t]here was no evidence to support the [Appellant's] contention that his poor grades were a result of [intellectual disability]." PCR3. at 2249. Thus, Appellant did not prove "by clear and convincing evidence that he has significantly sub average general intellectual functioning existing concurrently with deficits in his adaptive behavior which manifested during the period from conception to age 18." PCR3. at 2249. As such, the trial court denied Appellant's motion for postconviction relief.

On March 20, 2008, this Court affirmed the denial of the fourth motion for postconviction relief, finding that the postconviction court had properly determined that Appellant did not meet all three prongs to be found intellectually disabled. *Phillips*, 984 So. 2d at 509, 513 ("The circuit court concluded that Phillips failed to prove any of these factors by clear and convincing evidence…. Thus, contrary to Phillips's contentions, he is not so impaired as to fall within the range of [intellectually disabled] offenders exempt from the death penalty.").

Appellant's subsequent intellectual disability claim

On April 21, 2017, the circuit court denied Appellant's *Hurst* claims which alleged that he could relitigate prior intellectual disability claims. However, within the order, the

postconviction court indicated it was denying his *Hall* claim without prejudice so that Appellant's defense counsel could file a separate motion based on *Hall* and *Walls v. State*, 213 So. 3d 340 (Fla. 2016). *See* April 21, 2017. This Court ultimately issued an opinion concluding Appellant was not entitled to *Hurst* relief. *Phillips v. State*, 234 So.3d 547 (Fla. 2018).

On February 28, 2018, more than one year after this Court issued its opinion in *Walls*, Appellant filed his seventh successive 3.851 postconviction, which contended that the postconviction court must hold another evidentiary hearing under rule 3.203 because Appellant was denied "the type of holistic review" of his intellectual disability claim under *Walls* and *Moore*. PCR7 at 75-76 n.17.[4] The content of Appellant's argument on *Moore* was almost identical as his supplemental authority he provided on *Moore* from April 2017. The State filed its response on March 27, 2018, arguing there was no new evidence provided in support of his claim. PCR7 at 138. Appellee further argued that Appellant was able to present evidence on all three prongs of intellectual disability in a prior evidentiary hearing and received a holistic review from the 2006 circuit court, whose opinion was affirmed by this Court in 2008. PCR7 at 172.

[4] "PCR7." at [page number] refers to the record concerning the seventh postconviction record filed in this appeal on October 1, 2018.

It was not until Appellant filed his reply brief on April 12, 2018 that he put Appellee on notice that Dr. Keyes had "reviewed his past work and testimony in the case and has again seen and evaluated Mr. Phillips concerning his adaptive functioning deficits." PCR7 at 224. Appellee immediately filed a motion to compel any new report from Dr. Keyes, who according to Appellant in his objection to the motion to compel, had not completed a report at that time. PCR7 at 276-78. On April 16, 2018, Appellant filed a witness list and a new report from Dr. Keyes who re-interviewed Appellant and the same three witnesses (Appellant's brother, sister and next-door neighbor), who he interviewed in 2000. PCR7 at 406-422.

A *Huff* hearing was held on April 19, 2018. PCR7 at 286. After reviewing the entire record and the latest report of Dr. Keyes, the postconviction court issued a six-page order denying Appellant's motion for postconviction relief. PCR7 286-291. This appeal follows.

SUMMARY OF THE ARGUMENT

Appellant is procedurally barred from raising the claim that he deserves another evidentiary hearing when he already had a full review of the merits of his claim in 2006. The 2018 postconviction court properly denied this successive motion for postconviction relief. Appellant's claim did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B). The United States Supreme Court's recent decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017), should not alter in any manner this Court's conclusion in *Phillips v. State*, 984 So. 2d 503 (Fla. 2008), that Appellant failed to establish by clear and convincing evidence that he is intellectually disabled. Appellant failed to meet the definition of intellectual disability because he does not suffer from **significant** subaverage intellectual functioning, or concurrent adaptive functioning deficits. Because the 2006 and 2018 postconviction courts and this Court in 2008 properly relied on current medical standards when analyzing Appellant's intellectual disability claim, this Court should once again affirm the postconviction court's findings that Appellant has not met the prongs of intellectual disability.

STANDARD OF REVIEW

As this Court recently stated:

> "[I]t is necessary to clarify what *Moore* did not change—our standard of review. As noted in *Glover v.*

State, 226 So. 3d 795 (Fla. 2017), neither *Hall* nor *Moore* "alter[ed] the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." *Id.* at 809.

> In reviewing the circuit court's determination that [the defendant] is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). [This Court] "[does] not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007). However, [this Court] appl[ies] a de novo standard of review to any questions of law. Herring, 76 So. 3d at 895.

Glover, 226 So. 3d at 809 (alterations in original) (quoting *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015)).

Wright v. State, **---** So.3d ----, 43 Fla. Law Weekly S404 2018 WL 4656661 (Fla. Sept. 27, 2018).

ARGUMENT

APPELLANT WAS GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE AS TO ALL THREE PRONGS OF INTELLECTUAL DISABILITY AND DOES NOT RECEIVE A SECOND OPPORTUNITY TO PRESENT THE SAME EVIDENCE JUST BECAUSE HE FAILED TO DO SO THE FIRST TIME.

Appellant is procedurally barred from challenging the credibility of expert witnesses and this 2008 Court's findings, which demonstrated that Appellant did not meet the prongs of intellectual disability. Appellant raised the identical argument

in his appeal in 2008, and this Court determined that there was competent substantial evidence to support the 2006 postconviction court's factual findings at the full evidentiary hearing. *See Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017)(holding summary denial of motion was proper as "Jones is not entitled to a new hearing in order to present additional evidence of intellectual disability because he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard in 2006, and *Hall* does not change the fact that Jones failed to establish that he meets the second or third prong."); *see also Rodriguez v. State*, 219 So. 3d 751, 759-60 (Fla. 2017)(denying relief under *Hall* where trial court "considered evidence concerning all three prongs of intellectual disability in both Rodriguez's prior proceeding and in the summary denial below" and defendant introduced insufficient evidence of his intellectual disability at prior hearing).

To that point, Appellant once again raises the argument that the postconviction court and this Court incorrectly accepted the State expert's findings that Appellant did not have concurrent adaptive functioning deficits by only looking at maladaptive behavior and strengths. As this Court found in *Jones*, this argument is procedurally barred:

> Jones also asserts that the trial court in 2006 and this Court in 2007 improperly concluded that he did not meet the adaptive deficits prong because those determinations were based on reports from corrections officers or other observations of his functioning in prison, which are not valid indicators of adaptive behavior. This claim is procedurally barred and meritless. We rejected this argument in 2007, finding that the conclusion that Jones did not meet the adaptive deficits prong was not solely based on observations of Jones's functioning in prison. Jones, 966 So.2d at 327–28. *Hall* does not disturb the previous finding that Jones failed to establish that he has concurrent adaptive deficits, and Jones is not entitled to relitigate this claim....

Jones, 231 So. 3d at 374.

Therefore, just because *Hall* is now retroactive to cases where defendants were deprived of their right to present further evidence on the second and third prongs of intellectual disability based on the strict cut-off score outlined in *Cherry* does not mean Appellant who was given the opportunity to present evidence on all prongs is now afforded a second opportunity for a full evidentiary hearing. In essence, many of the arguments that Appellant makes in his initial brief are tantamount to filing a motion for reconsideration or rehearing of this Court's 2008 opinion. *See* IB. at 40[5] ("This Court misrepresented Dr. Keyes testimony in the 2008 Phillips' appeal.")

Appellant unreasonably delayed filing his *Hall* motion and thereby is also time-barred from asserting his current

[5] "IB" refers to Appellant's initial brief.

successive claim based off the date of the *Walls* opinion. His successive 2018 motion expresses the same supplemental intellectual disability arguments made in conjunction with his prior postconviction motion. Specifically, Appellant was granted leave to amend his 2016 motion after *Walls v. State* determined *Hall* to be retroactive. In March 2017, Appellant refiled his amended 45-page successive motion in the trial court, which included two substantive footnotes about his *Hall*/*Walls* claim. Subsequently, on April 18, 2017, Appellant filed a 12-page notice of supplemental authority and argument, citing *Moore*, 137 S. Ct. 1039, in support of his footnotes that he should be entitled to a new evidentiary hearing in light of *Hall*. On February 28, 2018, Appellant filed his seventh postconviction motion, which was **nearly identical to the supplemental authority filed in April 2017**. As no motion to toll time was made, Appellant's motion should have been considered outside the one-year window in rule 3.851(d) exception. *See* Fla. Crim. R. P. 3.851(d)(2)(a)&(b).

At the *Huff* hearing held on April 22, 2017, nothing prevented Appellant from making argument regarding why his prior intellectual disability evidentiary hearing was insufficient under *Hall*. Appellant was aware of *Walls* and *Moore* as evidenced by his 12-page supplemental authority given to the trial court

in 2017. Claims raised in prior postconviction proceedings cannot be relitigated in a successive postconviction motion unless a movant can show that the grounds for relief were not known and could not be known at the time of the earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Therefore, his argument is procedurally barred.

Even if Appellant's arguments are not procedurally barred, as explained below, this case is distinguishable from *Moore*. Here, given that this Court's 2008 analysis was consistent with prevailing current clinical standards and based on a proper credibility determination of the conflicting experts' opinions, this Court should again find that there was competent substantial evidence to summarily deny Appellant's claim of intellectual disability.

Appellant was already given the opportunity in 2006 to present clear and convincing evidence proving that he had current adaptive functioning deficits. There was competent, substantial evidence to support the 2006 postconviction court's findings that he failed to meet each prong. The original circuit court judge had the benefit of observing the witnesses' testimony and making credibility determinations. As this Court previously stated:

> Although Phillips challenges the trial court's credibility finding, we give deference to the court's

> evaluation of the expert opinions. *See Brown v. State*, 959 So.2d 146, 149 (Fla.2007) ("This Court does not ... second guess the circuit court's findings as to the credibility of witnesses." (citing *Trotter v. State*, 932 So.2d 1045, 1050 (Fla. 2006)); *Bottoson v. State*, 813 So.2d 31, 33 n. 3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.")

Phillips, 984 So. 2d at 510.

As argued below, *Moore* does not allow Appellant to present the same doctor's testimony with no discernible new evidence to attempt to prove adaptive functioning deficits merely because he was criticized by this Court for failing to test for concurrent adaptive functioning deficits the first time.

THE CIRCUIT COURT'S DETERMINATION TO SUMMARILY DENY PHILLIP'S SUCCESSIVE 3.851 MOTION IS ENTIRELY CONSISTENT WITH THE UNITED STATES SUPREME COURT'S RECENT ANALYTICAL FRAMEWORK FOR REVIEWING SUCH CLAIMS.

Following this Court's previously detailed analysis and rejection of Appellant's intellectual disability claim in *Phillips v. State*, 984 So. 2d 503 (Fla. 2008), the United States Supreme Court issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017). The Supreme Court's decision in *Moore* however does not call into question this Court's findings that Appellant failed to establish that he suffers from **significant** subaverage intellectual functioning or concurrent deficits in his adaptive

functioning.[6]

The United States Supreme Court's recent decision in *Moore* does not alter this Court's previous conclusion in any manner. In *Moore*, the Texas Court of Criminal Appeals (CCA) reversed a lower court's decision finding Moore intellectually disabled because the lower court "erroneously employed intellectual-disability guidelines currently used in the medical community rather than the 1992 guidelines adopted by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (2004)." *Id.* at 1044. Employing the *Briseno* analysis, the CCA found five of Moore's IQ scores unreliable and only considered valid his scores of 74 and 78. *Id.* at 1047. Notably, when looking at these two scores, the CCA discounted the lower end of the SEM range associated with these scores due to Moore's academic behavior and performance when taking the tests and concluded that his scores ranked above the intellectually disabled range. *Id.*

The Supreme Court reversed and concluded that the CCA's analysis of Moore's intellectual functioning was irreconcilable with *Hall* because the CCA had not accounted for the SEM and had

[6] In order for a defendant to establish a claim of intellectual disability, he must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. *See* § 921.137(1), Fla. Stat. (2018).

deviated from prevailing clinical standards by relying on the outdated 1992 guidelines. *Moore*, 137 S. Ct. at 1049-50.

Contrary to Appellant's mischaracterization of the facts in *Wright*, Wright did not receive a "post-*Moore*" evidentiary hearing by a trial court. Rather, "as a result of Wright's certiorari petition, the Supreme Court vacated this Court's decision and remanded [to this Court] for reconsideration in light of *Moore*." *See Wright*, 2018 WL 4656661 at *2-3.[7]

As such, Appellant's argument that he is required another evidentiary hearing in the trial court so that his expert may provide the same evidence, or the findings of his new evaluation due to the criticism[8] he previously received from this Court due

[7] "[W]e must dispel Wright's impression that the Supreme Court's vacation and remand indicates that it either reversed on the merits or intends for us to do so. The remand was in the form of a Supreme Court summary reconsideration order, which is colloquially known as a "GVR" (granted, vacated, and remanded). A GVR is a "mode of summary disposition, though not necessarily on the merits, [by] an order that grants certiorari, vacates the judgment below, and remands the case to the lower court for reconsideration in light of an intervening Supreme Court ruling." Stephen M. Shapiro et al., Supreme Court Practice 346 (10th ed. 2013) (emphasis added) (collecting cases as examples of GVRs with nearly identical language as the GVR here, including *Siegelman v. United States*, 561 U.S. 1040, 130 S.Ct. 3542, 177 L.Ed.2d 1120 (2010)); *see also* Aaron-Andrew P. Bruhl, The Supreme Court's Controversial GVRs—And an Alternative, 107 Mich. L. Rev. 711, 712 (2009)."

[8] *See Phillips*, at 511 ("in *Jones*, 966 So. 2d at 325–27, we held retrospective diagnosis insufficient to satisfy the second prong of the [intellectual disability] definition. We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently with

to his prior insufficient evaluation, fails. By making additional factual findings from a cold reading of the 2006 evidentiary hearing transcript and record, the 2018 postconviction court went beyond what was required, instead of solely determining whether Appellant received a holistic review of his claim pursuant to *Hall*. It follows that, based on Appellant's *Moore* argument, this Court has the equal capability of reading a cold record to determine whether this Court's 2008 decision was correct and competent substantial evidence existed to support both the 2006 and 2018 postconviction courts' summary denials. *See Wright*, at *3 (citing e.g., *Kenemore v. Roy*, 690 F.3d 639, 642 (5th Cir. 2012) ("A GVR does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate.")

The 2018 postconviction court reached the right conclusion in summarily denying Appellant's motion, notwithstanding it found Appellant had subaverage intellectual functioning.

In 2006, the circuit court allowed Appellant to provide all evidence, notwithstanding that two of his IQ scores were over 70. In 2018, the postconviction court determined that taking

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deficits in adaptive behavior. *Id.* (citing § 921.137(1), Fla. Stat. (2007); Fla. R. Crim. P. 3.203(b)). Dr. Keyes tested Phillips's intellectual functioning in 2000; however, he did not assess Phillips's adaptive functioning as of that date.").

into consideration the SEM and the scores of 70, 74, and 75, Appellant probably had provided clear and convincing evidence to suggest he could meet the first prong of intellectual disability. PCR7. at 288. The 2018 postconviction court assumes that just because Appellant's scores were between 70-75, taking into consideration the SEM under *Hall*, he would have proved by clear and convincing evidence that he satisfied the first prong.

The 2006 postconviction court understood the then "brightline cutoff" announced in *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007), but still took into consideration all of the other evidence in a holistic manner, just as *Hall* requires. It is clear, however that both this Court and the 2006 postconviction court took into consideration other factors for lower scores as well as the fact that borderline numbers do not automatically satisfy the prong. Specifically, the postconviction court noted that Dr. Keyes gave a zero score for some of the answers Appellant provided on the WAIS-III test. PCR3. at 2241. In this case, for example, Appellant received a zero score on the question who is "Gandhi" when he answered, "ruler of India." PCR3. at 2241. Because the test manual failed to recognize the word "ruler", this resulted in his "dismal performance on this question." PCR3. at 2241. Dr. Keyes had similar results "on other questions where Appellant had

knowledge of the subject but failed to use the precise word required by the manual." PCR3. at 2241.

As such, this Court was able to review the record and find competent substantial evidence to suggest that prong one had not been met. To this point, this Court noted that, even if it had disregarded the state expert's credibility regarding the WAIS scores being the result of malingering[9]:

> Phillips's IQ scores do not indicate that he is [intellectually disabled]. In *Jones*, 966 So.2d at 329, we found that IQ scores ranging from 67 to 72 did not equate to significantly subaverage general intellectual functioning. *See also Rodgers v. State*, 948 So.2d 655, 661 (Fla. 2006) (finding that the defendant did not prove he was retarded under section 921.137 despite the defense expert's finding that the defendant had an IQ of 69 and was [intellectually disabled]); *Burns v. State*, 944 So.2d 234, 247 (Fla. 2006)" (finding that even though the defendant scored an IQ of 69 on one of the expert's IQ tests, the defendant did not meet the first prong of the [intellectual disability] determination because the more credible expert scored the defendant's IQ at 74).

[9] Appellant in his brief points to a conflict in the evidence regarding this Court's 2008 questioning the validity of Appellant's IQ tests to produce such scores of 70, 74, 75 based on Dr. Suarez's testimony, and the 2018 postconviction court's finding that Dr. Suarez was not credible and thus Appellant meets subaverage intellectual functioning. [IB at 27] In his reply to the State's response in the postconviction court, Appellant contended that Dr. Suarez should not have been considered credible because he did not perform the WAIS test or another acceptable test to assess IQ and decided to give malingering tests. *See* PCR7. at 220. Even with this critique, what Appellant fails to acknowledge is that his own expert in 2018 also decided to conduct malingering/validity tests, even though he disavowed using them in assessing intellectual disability at the 2006 hearing.

The fact that the 2018 postconviction court now finds that, like Victor Tony Jones, Appellant has "clearly proven prong 1 by convincing evidence", is not dispositive. Conducting a *Huff* hearing "does not mean that the judge must conduct an evidentiary hearing. . . Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion." *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

Even if this Court accepts the 2018 postconviction court's finding that Appellant now meets the clear and convincing evidence standard for the first prong, it does not change the analysis because, "If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Wright v. State*, 213 So. 3d 881, 895, 898 (Fla. 2017) (holding that Wright failed to prove that he is of subaverage intellectual functioning and "[f]or this reason alone, Wright does not qualify as intellectually disabled under Florida law"); *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016). Thus, contrary to Appellant's suggestion, nothing in the analysis of the 2006 postconviction court and this Court's opinion in 2008 violates the holding in *Moore*.

Appellant failed to establish that he had concurrent significant deficits in his adaptive functioning.

While the United States Supreme Court has indicated that a

single IQ score is not dispositive of an intellectual disability claim, *see Hall*, 134 S. Ct. at 1995; *Moore*, 137 S. Ct. at 1050, it is still a requirement that a defendant must establish significant subaverage intellectual functioning; concurrent deficits in adaptive behavior; and manifestation of the condition before age eighteen. *Wright*, 213 So. 3d at 895. Here, both the state postconviction court and this Court in its 2008 opinion extensively analyzed the record on appeal and testimony from the 2006 evidentiary hearing to properly conclude that Appellant failed to establish that he suffers from concurrent deficits in his adaptive behavior. This Court's analysis of this latter prong of Appellant's intellectual disability claim was consistent with the Supreme Court's pronouncements in *Moore* and with prevailing clinical standards.

As previously noted, under Florida law, a defendant claiming intellectual disability as a bar to execution must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. See § 921.137(1), Fla. Stat. (2013). Section 921.137 further defines the term "adaptive behavior," as the effectiveness or degree with which an individual meets the standards of personal

independence and social responsibility expected of his or her age, cultural group, and community. *Id.*

In this case, the postconviction court reviewed all the testimony from the 2006 hearing, as well as expert testimony regarding Appellant's adaptive behavior. Contrary to what Appellant's defense expert asserts now in 2018, Dr. Keyes was heavily questioned in 2006 about his lack of adaptive deficits testing. While he focused on interviews of his family concerning Appellant's demeanor before age 18, he did not do any testing to suggest that those adaptive deficits existed concurrently. *See Phillips*, 984 So. 2d at 511.

Further, in 2006, the State's expert Dr. Suarez testified that he analyzed Appellant's adaptive functioning based on current clinical standards and reviewed the three broad categories outlined in the American Psychiatric Association's Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-4) and the American Association of Intellectual and Developmental Disabilities (AAIDD) clinical manual: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and

safety.[10] *See Phillips*, 984 So. 2d at 511.

Dr. Suarez testified that he tested Appellant's adaptive functioning "contemporaneously with his IQ", whereas this Court found Dr. Keyes only conducted a "retrospective diagnosis", contrary to Appellant's assertion. *Id.* Based on this testimony, both the state postconviction court and this Court relied on the State's expert's testimony and found that Appellant had not established current deficits in his adaptive behavior. Specifically, this Court cited that there was competent substantial evidence presented through the testimony of both experts that Appellant did not suffer from deficiencies in adaptive functioning, for instance:

> Phillips supported himself. He worked as short-order cook, a garbage collector, and a dishwasher. The mental health experts generally agreed that Phillips possessed job skills that people with [intellectual disability] lacked. Specifically, the defense's expert admitted that Phillips's position as a short-order cook was an "unusually high level" job for someone who has [intellectual disability].
>
> Phillips also functioned well at home. He resided with his mother. According to her, he paid most of the bills and did the majority of the household chores. Phillips was also described as a great son, brother, and uncle. Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of

[10] The American Psychiatric Association's Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the American Association of Intellectual and Developmental Disabilities (AAIDD) clinical manual has revised into three general areas comprising: conceptual skills, social/interpersonal skills, and practical skills.

> time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.

Phillips, at 511. Accordingly, this Court's analysis of Appellant's intellectual disability claim unlike in *Moore* was the result of a fact-specific review in accordance with the DSM-4 and credibility determinations which were decided adversely to Appellant.

In *Moore*, the Supreme Court found that the Texas court's consideration of Moore's adaptive behavior deviated from prevailing clinical standards. Specifically, the Court faulted the Texas court for overemphasizing Moore's adaptive strengths and concluding that his strengths overcame "the considerable objective evidence of Moore's adaptive deficits." *Moore*, 137 S. Ct. at 1050. Additionally, the Texas court departed from clinical standards by requiring Moore to show that his deficits were not related to a personality disorder. *Id.* at 1051.

While the Supreme Court cautioned in *Moore* that a court should not overemphasize an individual's adaptive strengths and should not rely on strengths developed in a controlled setting

like prison[11], this Court's analysis did not do as such. It is clear that this Court noted Appellant's behavior prior to his incarceration. Although Appellant's concurrent adaptive behavior was tested by Dr. Suarez while incarcerated, that was a necessity as Appellant had been in and out of prison for the majority of his life and incarcerated after being sentenced to life for a 1973 offense and committing the instant murder in 1982 when he escaped from prison.

While Dr. Keyes questioned Appellant's self-reporting and now suggests that looking at these adaptive strengths is in error, there was never any evidence introduced which refuted this narrative. As was found to be supported by competent substantial evidence by this Court in 2008:

> Aside from personal independence, Phillips has demonstrated that he is healthy, well-nourished and well-groomed, and exhibits good hygiene. Likewise, there was "no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure." Thus, as the foregoing illustrates, competent substantial evidence supports the trial court's conclusion that Phillips failed to prove the second prong—impairments in adaptive functioning.

Phillips, at 512.

Additionally, the 2018 postconviction court found

[11] *See Moore*, 137 S. Ct. at 1050 (citing the DSM-5 and noting that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained")

Appellant's statements during interrogations by Detective Greg Smith, his refusal to confess, as well as lay witnesses' testimony refuted any claim that he had adaptive deficits, which included evidence of the "Bro White" Letter.[12] "In the 'Bro White' letter, Phillips informed the recipient that he was aware of the State's witnesses against him and that he had sent the names and addresses of their family members to a 'reliable source on the outside world.' *Phillips*, at 512. Appellant also wrote, "I hate like hell to do that. But the innocent must suffer." *Id.*

Unlike in *Moore*, this Court in 2008 relied on current definitions of intellectual disability at the time which are still consistent with the DSM-5 and the AAIDD-11 when analyzing Appellant's intellectual disability claim. The 2018 postconviction court likewise relied on the current prevailing medical standards. *See* PCR7 at 290 ("according to the DSM", an intellectually disabled individual's "abstract thinking and executive function (i.e. planning, strategizing, priority setting, and cognitive flexibility) are impaired.").

[12] Dr. Keyes' explanation of the contents and competence of the Bro White letter was simply that there was no evidence proving that Appellant was the true author of the letter. However, Dr. Keyes admitted if Appellant in fact was the author, this would be evidence refuting a claim of intellectual disability because it would be an example of "executive functioning". The 2018 postconviction court noted this in its' order. PCR7 at 291.

While this Court referenced facts relating to the complex crime spree and Appellant's testimony in its overall analysis and while the 2018 postconviction court also referenced and relied on Appellant's extreme capacity for planning the carrying out the murder, this does not equate to a violation of the Supreme Court's recent analytical framework set forth in *Moore*.

In *Ex parte Briseno*, 135 S.W.3d 1 (Tx. Crim. App. 2004), the Texas court adopted a definition of intellectual disability from the 1992 version of the American Association on Mental Retardation, the predecessor to the current AAIDD-11 manual, as the legal standard for determining intellectual disability. *Moore*, 137 S. Ct. at 1046. The Texas court's use of an outdated definition of intellectual disability and consideration of seven "*Briseno* evidentiary factors" deviated from clinical standards as these factors relied on lay persons' perceptions of intellectual disability as opposed to clinical standards. *Id.* at 1051-52.

Specifically, the standard adopted in *Briseno* required adaptive deficits to be "related" to intellectual functioning deficits and required courts to consider seven evidentiary factors which were not referenced by any medical or judicial authority. *Id.* The additional *Briseno* factors were: 1) did those who knew the person best during the developmental stage — his

family, friends, teachers, employers, authorities — think he was intellectually disabled at that time, and, if so, act in accordance with that determination; 2) has the person formulated plans and carried them through or is his conduct impulsive; 3) does his conduct show leadership or does it show that he is led around by others; 4) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; 5) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; 6) can the person hide facts or lie effectively in his own or others' interests; and 7) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose. *Id.* at 1046 n.6.

While this Court referenced Appellant's conduct and statements at trial, as well as the complex crime spree committed by Appellant, this was only one basis of this Court's entire analysis on the issue and was a valid consideration when considering Appellant's alleged deficits in adaptive behavior. Although Appellant contends this Court's partial reliance on these factors could arguably be a consideration of two of the

seven *Briseno* factors,[13] these considerations are also consistent with clinical standards for evaluating adaptive behavior as they are reflective of Appellant's communication ability and self-direction.

Appellant's contention that Dr. Suarez and this Court only focused on maladaptive behavior to suggest a violation of *Moore* is misleading. As shown above, **letter writing is not maladaptive behavior**. Despite how Appellant frames the issue surrounding the 2018 postconviction court's assessment of Dr. Suarez's credibility and this Court's 2008 analysis, it is the planning and preparation that went into the carrying out of a calculated and cold crime, not just the maladaptive behavior itself that this Court focused on:

> Phillips's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings. Also noteworthy is that Phillips killed the parole officer in a cold, calculated, and premeditated manner. A cold, calculated, premeditated murder is "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Franklin v. State*, 965 So.2d 79, 98 (Fla. 2007).

Phillips, 984 So. 2d at 512. To that point, the 2018 postconviction court's order echoed this Court's findings,

[13] Factors number 5 and 7 refer to a person's ability to respond coherently and rationally to questions and whether the commission of the murder required forethought, planning, and complex execution of purpose. They are also examples of executive function and abstract thinking of the DSM-5.

pointing to the actions of Appellant waiting for his victim to leave the office, removing bullet casing to avoid detection, and hiding the gun. PCR7 at 290.

The alleged "new" report indicating Dr. Keyes 2018 findings evinces the **same** evidence regarding the **same** three witnesses that was presented to the prior circuit court judge in 2006. Dr. Keyes' change of heart to conveniently test Appellant's concurrent adaptive functioning deficits at this juncture more than four years after this Court published its opinion in *Hall*,[14] and right before the *Huff* hearing is dubious. The fact that Respondent was not even made aware that Dr. Keyes, a doctor who works solely for the defense, reevaluated Appellant in 2018 until Appellant mentioned it in its reply to the State's response in April of 2018 is questionable. Appellant failed in 2006 and fails now to establish his claim of intellectual disability as he has not asserted any new evidence to demonstrate that Appellant had significant deficits in adaptive behavior. As was noted by this Court in 2008:

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[14] Notably, Appellant also past the one-year time frame after the *Walls* opinion to bring forth his ID postconviction motion 3.851, when *Hall* was said to apply retroactively. In fact, he waited until February 2018 (almost one year after his *Hurst* motion was denied) to bring forth said motion, which was when this Court stated it would deny his *Hall* claim without prejudice to allow him to file supplementary motion for his ID postconviction claim. Appellant should not be rewarded with a new evidentiary hearing for such dilatory tactics and when he has already had his full review.

> The State's expert, Dr. Suarez, was the only mental health expert to test Phillips's adaptive functioning contemporaneously with his IQ. Dr. Keyes, the only defense expert to evaluate Phillips's adaptive functioning, relied on the technique of retrospective diagnosis, focusing on Phillips's adaptive behavior before age 18. However, in *Jones*, 966 So.2d at 325–27, we held retrospective diagnosis insufficient to satisfy the second prong of the [intellectual disability] definition.

Phillips, 984 So. 2d at 511. Thus, just because Appellant now argues that Dr. Keyes' testimony should be reevaluated by another circuit court in another evidentiary hearing to complete his insufficient evaluation from 2005 does not mean the 2006 postconviction court's finding was not supported by competent substantial evidence.

While the 2018 postconviction court improperly found there was evidence to support the third prong of "Onset Prior to Age 18", that evidence still does not require another full evidentiary hearing because competent substantial evidence supports the 2006 postconviction court's findings and Appellant presents no new evidence within Dr. Keyes report on this prong.

Finally, while the 2018 postconviction court's order reaches the right result in summarily denying Appellant's motion for evidentiary hearing, the postconviction court's finding that there was evidence to suggest Appellant could show onset of intellectual disability prior to age 18, does not require this Court to allow Appellant to "re-do" his evidentiary hearing. Unlike the 2006 postconviction court, the 2018 postconviction court did not have the benefit of seeing the testimony first-

hand to make the appropriate credibility determinations. As this Court found in 2008, there was competent substantial evidence to support the 2006 postconviction court's conclusion that Appellant did not meet the third criterion:

> anecdotes about Phillips's childhood do not suggest a manifestation of low IQ and adaptive deficits before age 18. For example, the defense suggests that Phillips was adaptively impaired because he would swim in his clothes rather than in his underwear when he and his childhood friends broke into pool areas. However, as the defense expert agreed, Phillips could have swum fully clothed due to shyness rather than because of any [intellectual disability].

Phillips, 984 So. 2d at 513.

Appellant's expert witness in 2018 interviewed the same three witnesses he interviewed in his 2005 report. 2018 is farther out in time from when Appellant was age 18, and for Appellant to suggest that there is new valid evidence to for a trial court to analyze is simply untenable. Appellant's motion, as well as Dr. Keyes report did not demonstrate how calling the same three witnesses at a hearing (who would essentially provide the same testimony) would change the outcome of his intellectual disability claim. Thus, Appellant's expert's report, in terms of proving the third criteria of onset prior to age 18, does not contain sufficient information to require a new hearing.

Accordingly, while the postconviction judge in 2018 may have reviewed the record and improperly suggested the same

evidence presented otherwise, *Hall* or *Moore*[15] does not require Appellant receive an additional evidentiary hearing so that he can demonstrate to a different court that he now believes in assessing concurrent adaptive functioning deficits. Appellant neglects to mention to this Court that Dr. Keyes expressly admitted the definition of intellectually disability required that the adaptive functioning deficits exist at the same time as the sub-average intellectual functioning; yet he chose not to analyze Appellant's concurrent adaptive deficits. PCT3. 285-86.

CONCLUSION

Contrary to Appellant's position, the findings in the 2008 Florida Supreme Court opinion are not violative of *Moore v. Texas*. Under the criteria set forth in *Hall v. Florida*, Appellant has already had a holistic review of all three prongs of intellectual disability by the postconviction circuit court. Appellant like Tavares Wright did receive a full evidentiary hearing; Appellant does not get a "second bite at the apple" when under *Hall*, relief is not warranted. Appellant had the opportunity but failed to prove his intellectual disability claim by clear and convincing evidence in 2006, which was the ultimately the same finding of the 2018 circuit court when it

[15] Importantly, Appellant does not point to any authority when he suggests that *Moore* is required to be retroactively applied to afford him a new evidentiary hearing.

found that the record was devoid of any old or new evidence suggesting the opposite. Therefore, this Court should affirm the 2018 circuit court's summary denial of Appellant's 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished via email to William M. Hennis, Marta Jaszcolt, 1 East Broward Blvd., Suite 444, Fort Lauderdale, Florida 33301, this 13th day of December 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

/s/ Melissa Roca Shaw
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