

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1149

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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RECEIVED, 11/26/2018 05:13:26 PM, Clerk, Supreme Court

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Phillips's successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

“PCR” - record on SC06-2554;

“PCR-88” - record on SC75,598;

“T-88” - transcripts of 1988 evidentiary hearing;

“T-94” - transcripts of 1994 resentencing;

"T" - transcripts of 2006 evidentiary hearing;

“2018R” – record on instant 3.851 appeal to this Court;

REQUEST FOR ORAL ARGUMENT

Mr. Phillips has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Phillips through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

On December 16, 1983, Mr. Phillips was convicted of one count of first-degree murder. After a separate sentencing hearing, the jury recommended a sentence of death by a vote of seven (7) to five (5). On February 1, 1984, the trial court imposed a death sentence upon Mr. Phillips. This Court affirmed on appeal. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). Mr. Phillips filed pleadings pursuant to Fla. R. Crim. P. 3.850 and a habeas corpus petition in this Court in November of 1987. Amongst his claims, Mr. Phillips argued that he was deprived of an individualized and reliable sentencing determination due to trial counsel's failure to investigate and present any mitigation. Specifically, Mr. Phillips alleged that trial counsel was aware of his low intelligence, or should have been aware given the plethora of Department of Corrections (DOC) records reflecting his diminished psychological functioning, impairments, and intellectual and emotional deficiencies. Accordingly, Mr. Phillips claimed that he was prejudiced by trial counsel's failure to secure and present critical background information and failure to hire a mental health expert for an evaluation.

The trial court conducted an evidentiary hearing on January 19-22, 1988, and reopened the hearing for additional testimony on September 15, 1988. At the evidentiary hearing, postconviction counsel presented Dr. Joyce Carbonell and Dr. Jethro Toomer, who were retained to assess Mr. Phillips' "current level of

functioning as well as his functioning as it may have related to his 1983 case.” *See* PCR-88 Defense Exhibit A-14. In rebuttal, the State presented Dr. Lloyd Miller and Dr. Leonard Haber.

Dr. Carbonell, who is a qualified psychologist and neuropsychologist, evaluated Mr. Phillips in 1988.¹ The evaluation included a 4.5-hour clinical interview with Mr. Phillips, a review of affidavits from family members and friends, as well as an interview of Mr. Phillips’ former teacher. More importantly, Dr. Carbonell reviewed numerous records dating back to Mr. Phillips’ childhood, including: school and employment records, DOC Records, court records, Metro-Dade County Prison Health Services Records, and parole records. Mr. Phillips’ records suggested that he had a history of below average intellectual functioning, therefore Dr. Carbonell administered a battery of tests.²

On the WAIS-R, Mr. Phillips obtained a full scale IQ score of 75. (T-88. 356). The results on the intelligence testing are “uniformly low,” indicating that the intellectual deficits have been there a long time (T-88. 356-357). Dr. Carbonell

¹ Dr. Carbonell testified live at the 1988 evidentiary hearing and that testimony was utilized at subsequent hearings. As a result, all of her testimony will be cited under the designation “T-88. _.”

² Dr. Carbonell administered the WAIS-R, the Wide Range Achievement test, Level 2 Revised (WRAT-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt and the McGee L Bond MMPI. *See* PCR-88 A14.

testified that his score was congruent with other testing she performed, as well as the DOC's 1983 testing which reported a score of 73. (T-88. 373). The results were also consistent with Mr. Phillips' poor performance in school. (T-88. 373-74). Dr. Carbonell testified that Mr. Phillips' scores indicate "significantly sub-average intellectual functioning" placing him in the "lower sixth percent of the population." (T-94. 357). She also testified about Mr. Phillips' deficiencies and adaptive problems, emphasizing, among other things, his inability to learn from past experiences, communication deficits, and follower behavior.³ Ultimately Dr. Carbonell diagnosed Mr. Phillips as intellectually disabled and concluded he was incompetent to stand trial in 1983.

On cross examination, the State questioned Dr. Carbonell about a letter and "alibi notes" attributed to Mr. Phillips. Dr. Carbonell explained the letter had little impact on her determination that Mr. Phillips was incompetent to stand trial in 1983. She described the letter as very primitive and indicative of lashing out in a useless way since the letter was written to a fellow inmate as opposed to someone on the

³ Dr. Carbonell noted that her testing results were consistent with what family members, friends, and teachers reported about Mr. Phillips—that he has always been socially isolated, withdrawn, and lacked social and inter-personal relationship skills. (T-88. 394-97). Moreover, DOC records dating back to 1964 question Mr. Phillips' "mental condition." And in 1974, DOC records indicated that Mr. Phillips has a "limited learning ability" and describe him as "easily led into trouble." *See* PCR-88, A-14; *see also*, T-88, 436.

outside. (T-88. 489, 91). She noted that such a letter “would be rather dreadful for his defense—to write a letter, give it to another inmate, and have it end up in the court record.” (T-88, 492). She pointed to portion of the letter which says, “Bro White, I’m, innocent as hell. I don’t care what happens to me anymore” as indicative of someone who is not invested in their own defense. (T-88. 493). On redirect, Dr. Carbonell testified that the letter and pathetic “alibi notes” indicated a lack of comprehension and spoke to “his deficits rather than his abilities.” (T-88. 509).

Dr. Toomer, a psychologist and university professor, evaluated Mr. Phillips in January, 1988. Dr. Toomer’s evaluation process consisted of an interview with Mr. Phillips as well as a review of information provided by individuals who had knowledge of Mr. Phillips’ development over the years. In order to corroborate Mr. Phillips’ self-reported history, Dr. Toomer reviewed affidavits from family members, friends, and a school teacher, as well as DOC, court, school, and employment records. (T-88. 170-78). Dr. Toomer additionally administered several psychological testing instruments, including the Revised-Beta Examination. Mr. Phillips obtained a full scale IQ score of 76, which falls in the borderline range. (T-88. 183). Dr. Toomer noted that Mr. Phillips’ low IQ level did not change over time and more importantly, the background information and testing also confirmed that his low functioning and deficiencies have existed a long time. (T-88. 200).

Dr. Toomer explained that Mr. Phillips’ intellectual deficiencies needed to be

considered in conjunction with his emotional deficits that came about as a result of the environment that he was exposed to. (T-88. 203). In addition to growing up in an extremely impoverished and segregated neighborhood, Mr. Phillips also endured physical abuse at the hands of his father until his father deserted the family when he was roughly 11 years old. (T-88. 204) Since Mr. Phillips was so young and impressionable, Dr. Toomer explained that such trauma would have had lasting impact on his ability to regulate his emotions and behavior. (T-88. 204-05). Dr. Toomer pointed to the responses and affidavits of individuals who knew Mr. Phillips following the departure of his father as corroboration for the longstanding nature of his emotional deficits. *Id.* As a result of his intellectual and emotional deficits, Dr. Toomer characterized Mr. Phillips as an individual with a child-like level of understanding who lacked the ability to make rational choices, was easily manipulated, and was motivated by a need to be accepted. (T-88. 259-62).

On cross exam, Dr. Toomer was also questioned about the letter and “alibi notes” and whether they had any impact on his finding that Mr. Phillips was incompetent. Dr. Toomer explained that he considered the letter and notes in relation to his testing and everything he examined. He testified that the letter and notes indicate a “primitive level” of understanding and he would need to know the conditions under which they were written and whether Mr. Phillips was provided any assistance. (T-88. 278-79). The State also questioned Dr. Toomer regarding Mr.

Phillips' statement to detectives and whether somebody of Mr. Phillips' intellectual capacity would similarly be able to "toy" with detectives. Dr. Toomer rejected the idea of looking at a single isolated event as reflective of a pattern of behavior, and explained that "toying is a tactic that is often used by individuals who have intellectual deficit[s] to mask their lack of knowledge or their lack of awareness of what is going on." (T-88. 292-93).

Both Drs. Carbonell and Toomer testified as to applicable statutory mitigation and expressed similar views with regard to the existence of mitigating circumstances. Specifically, Dr. Carbonell noted Mr. Phillips' history of a low level IQ, which was corroborated by both school records and DOC records. (T-88. 439). Dr. Carbonell noted that despite Mr. Phillips' impoverished and abusive upbringing, he went to school and tried his best. *Id.* Dr. Carbonell pointed out that Mr. Phillips' school records for the last few years of high school indicated that he was only absent about eight days in two years, even with his failing grades. (T-88. 440). She also noted that by all accounts—including that of family, friends, and DOC records—Mr. Phillips was a loner and had a history of being unable to conform or learn.⁴

⁴ The testimonies of Mr. Phillips' family, friends, and a former teacher, repeatedly reference his quiet nature, lack of friends, and inability to learn. *See* T-88. 36 (Mr. Phillips' brother, Julius, testified that Mr. Phillips was a "very quiet type person who did not have any friends or even girlfriends"); *see also*, T-88. 155-57. (Mr. Ford, a former teacher, testified that Mr. Phillips was "very quiet" and came to school daily but was a "below average student." In fact, according to Mr. Ford, Mr.

According to DOC and parole records, Mr. Phillips has spent the majority of his life in prison. At the age of 16, Mr. Phillips and two co-defendants were arrested, yet only Mr. Phillips was convicted and sent to an adult prison.⁵ In 1970, Mr. Phillips received parole and began working as a garbage collector at the Miami Sanitation Department. PCR-88, B-10. After working for only two years, in 1973, Mr. Phillips was arrested yet again with a co-defendant. Mr. Phillips received a lengthy sentence but eventually received parole in June of 1980. Upon his release, Mr. Phillips became employed as a dishwasher at Neighbor's Restaurant in Hialeah. PCR-88, B-9. However, after only six months, Mr. Phillips was arrested for a parole violation because he had driven to Broward county without permission. (T-88. 395). According to Dr. Carbonell, the incident was another example of Mr. Phillips' inability to effectively adapt to his environment. Mr. Phillips was placed in Baker County institution, and tried to escape. Due to his lack of planning, Mr. Phillips was

Phillips' own siblings "ran circles around" him in terms of school performance).

⁵ Affidavits and police reports suggest that the 1960 conviction for attempted murder of a non-uniformed state trooper may have been a product of racial tensions and segregation in Opa Locka. *See* PCR-88. Exhibit A-1 (when the police came to arrest Harry, "they said that Harry and some other boys from the neighborhood had whistled at a white woman, and that her boyfriend, who was an off-duty trooper, came up to Harry and the other boys and started talking stuff about 'n*****' not knowing their place. A fight broke out, and the trooper ended up getting shot"). The police report also confirms that the entire incident transpired because Mr. Phillips and his co-defendants whistled at a white woman who subsequently reported the incident to her state trooper boyfriend upon returning home.

caught instantly and received another year in prison. In August 1982, Mr. Phillips was released and returned to his previous employer, Neighbor's, to resume his job. After approximately two weeks of employment, Mr. Phillips was arrested for the current offense.

Dr. Carbonell opined that Mr. Phillips suffers and suffered from a substantially impaired capacity to conform his conduct to the requirements of the law due to his impairments. (T-88. 444-45). Mr. Phillips "never seems to grasp in terms of what was required of him ..." *Id.* Mr. Phillips has trouble learning, has a deficient I.Q., "hasn't a very good achievement level" and is deficient in his ability to understand. *Id.*

In response, the State presented Drs. Haber and Miller. According to their individual reports as well as their respective testimonies, both experts were hired to examine Mr. Phillips with such "examination to be limited to the issue of the defendant's competency to stand trial, when he did, in 1982-83." (T-88. 679, 821, 868). The evaluation was conducted in the presence of both examiners, one at a time, from 12:05 pm to 2:40 pm on the same day. Both experts ultimately concluded that Mr. Phillips was "competent to stand trial." Neither expert expressed any opinions on mitigating circumstances, nor provided any testimony in rebuttal of Drs. Carbonell and Toomer.⁶

⁶ The State's experts were specifically asked whether they had any opinions

At the evidentiary hearing, both experts were asked to explain what they relied upon in reaching this conclusion. Dr. Miller testified that he conducted a “professional conversation or interview” with Mr. Phillips, which did not include any written testing. (T-88. 847-48). He explained that he reviewed police reports, the deposition of Vivian Chabrier (a co-worker from the 1980s), two Department of Corrections Classification Reports, and conducted a telephonic interview with Mr. Phillips’ former defense attorney, Mr. Guralnick. (T-88. 849). Dr. Miller testified that he did not call any family members, or review any medical, school, jail, or juvenile records. In fact, Dr. Miller testified that he did not have any knowledge of what psychological assessments were done on Mr. Phillips throughout his years in prison—other than what Dr. Carbonell wrote in her report indicating that she had reviewed those records. When asked if he had relied upon any of the historical accounts provided in her report or if he had attempted to seek out firsthand information to verify the accuracy of the information, Dr. Miller said no, stating that he only relied on it “as a source of data” and “not for the opinions that I rendered.” (T-88. 841).⁷ While Dr. Miller indicated that background information “can be”

as to mitigating circumstances, and thus whether they were willing to contradict the accounts of Drs. Toomer and Carbonell in that regard, and they each testified that they did not.

⁷ On cross examination, defense counsel inquired as to a discrepancy on Drs. Haber and Miller’s reports indicating that Mr. Phillips had reported that he had seen his trial attorney three times when all other reports provided that Mr. Phillips had

important in evaluating a person's mental state, he did not seek it out. (T-88. 849).

Dr. Miller also testified that Mr. Phillips' evaluation was the first time he had ever conducted a psychological evaluation assessing a defendant's competency back in time. (T-88. 850). And while his competency evaluation consisted of questioning Mr. Phillips, during cross examination, it became clear that Dr. Miller didn't always follow up with questions to assess Mr. Phillips's understanding of the question. (T-88. 855) For example, when asked whether Mr. Phillips understood capital punishment, Dr. Miller opined that Mr. Phillips understood that it was a possible punishment because "he had a first degree murder case and a very, in my opinion, adequate counsel. I cannot believe in his discussions the imposition of death penalty could not have come up. I can't believe that." (T-88. 855). When pressed about whether he had asked Mr. Phillips if his defense counsel had explained the death penalty or if Mr. Phillips could define capital punishment, Dr. Miller indicated that he did not ask those questions. (T-88. 857).

Dr. Miller testified that Mr. Phillips' "general level of intelligence may be assessed as less than average but certainly not in the retarded range. One of the parameters I use was the ability to obtain a driver's license. He stated although he

only seen his attorney once in jail prior to trial. Dr. Miller testified that he did not have an explanation for the discrepancy as he did not ask Mr. Guralnick how many times he visited with his client nor did he ask Mr. Phillips how much contact he had with Mr. Guralnick. (T-88. 858).

flunked the test once, he was able to pass the written driver's test." (T-88. 827). On cross examination, it became clear that due to Dr. Miller's reliance on self-reporting, he was unaware of collateral records indicating that Mr. Phillips had taken the test three times before finally passing. *See* T-88. 875-76.

Dr. Haber reviewed the same materials as Dr. Miller. His examination consisted of a screening test—the Bender Gestalt, an hour long interview of Mr. Phillips, and follow-up questions after Dr. Miller's interview with Mr. Phillips concluded. (T-88. 685). Dr. Haber did not dispute the I.Q. test results obtained by Dr. Carbonell, but nevertheless disagreed with her finding of intellectual disability. (T-88. 682). As Dr. Haber explained, under the professionally accepted designations of the time, scores ranging “between 75 and 87 clearly fall in the category of borderline intellectual functioning and/or low average intellectual functioning, far removed from the condition known as mental retardation.” (T-88. 684).

Dr. Haber additionally testified as to the significance of the “Bro White” letter. Dr. Haber opined that the letter was an important source for assessing Mr. Phillips' competency at the time of trial. He explained, assuming the names listed in the letter corresponded to the inmates listed on the State's witness list, the letters reflected Mr. Phillips' interest, willingness, and capacity to defend himself. (T-88. 692-93).

On cross examination, Dr. Haber agreed that Mr. Phillips has consistently earned IQ scores falling within the borderline range (T-88. 745). Dr. Haber testified

that he did not seek out any additional material to verify any self-reported information (T-88. 766). In fact, Dr. Haber was questioned as to why he had written in his report that Mr. Phillips passed a driver's license test. Dr. Haber stated that Mr. Phillips had reported having a license, but he was not aware of the fact that he had taken the exam three times prior to passing as Mr. Phillips only reported "taking it twice." (T-88. 798). When asked why he didn't specify in his report that Mr. Phillips had reported failing the exam, Dr. Haber testified that he did not believe it was pertinent information. (T-88. 799).

Drs. Carbonell and Toomer both testified as to their concerns with Dr. Miller's and Dr. Haber's evaluation. Dr. Carbonell stated that it is professionally improper to form an opinion without the use of collateral data. (T-88. 451). She noted that neither expert conducted any adequate testing and largely based their reports on self-reporting:

DR. CARBONELL: "You don't guess a person's I.Q. You don't base it on a test that's not designed to do that.

THE COURT: Isn't their IQ examination like yours? I mean—

DR. CARBONELL: No. I gave the WAIS-R

THE COURT: Forget about how you arrived at it. Weren't **the results exactly the same, borderline? (emphasis added).**

(T-88. 458-59).

Dr. Toomer also testified that he did not feel that Drs. Miller and Haber

produced accurate findings as they relied too heavily on Mr. Phillips' self-reporting and contaminated one another's evaluations because they were conducted concurrently. (T-88. 255-58).

On February 13, 1989, the circuit court issued its order denying relief. Mr. Phillips appealed and this Court remanded for a new penalty phase due to ineffective assistance of counsel at sentencing. *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992).⁸

On April 4, 1994, the resentencing proceedings began in the Circuit Court for the Eleventh Judicial Circuit, again before the Honorable Arthur Snyder. At resentencing, Mr. Phillips presented the former testimony of Dr. Joyce Carbonell and the live testimony of Dr. Jethro Toomer. The State presented both Dr. Miller and Dr. Haber in rebuttal.

Dr. Miller, who testified out of order, accepted Mr. Phillips' IQ score and stated that the 72 to 76 range would be in the "range of borderline intelligence. It would be clearly below an average individual which is in the 90 to 110 range." (T-94.

⁸ In granting a new penalty phase, this Court noted that the mental health testimony "provides strong mental mitigation and was essentially unrebutted. The testimony of the State experts related solely to the issue of competency. While these experts testified that they did not believe Phillips had significant mental or emotional disorders, they offered no opinion as to the applicability of the statutory mental mitigators, and even these experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded."

445). Dr. Miller explained that a person with below average intelligence could perform work-related activities, but could not “be a brain surgeon.” (T-94. 446). People with Mr. Phillips’ low intelligence level could follow simple instructions being supervised and doing what a supervisor asked. *Id.* Dr. Miller also testified that such an individual may have the capacity to pass a driver’s license exam, noting that it might be tough but “you don’t have to be very smart to drive a car.” *Id.*

On cross-examination, Dr. Miller testified that he had no notes of his 1988 evaluation, did not remember that Dr. Haber was with him when he saw Mr. Phillips, and stated: “I couldn't tell you the details of who I went with or the circumstances. I just don't remember other than I have no notes from seeing him” (T-94. 459, 468). He testified that the information he obtained during his examination “was unconvulsive” and that he did not recall obtaining “any firsthand information about Mr. Phillips” (T-94. 460). Dr. Miller acknowledged that he was aware of the fact that Mr. Phillips spent the majority of his adult life (since age 16) incarcerated (505), yet he did not review DOC or prison records (T-94. 465-66). Dr. Miller only looked at material provided by the prosecutor. (T-94. 462). He did not speak to family members, review the court file, or even ask Mr. Phillips' counsel for information (T-94. 461). In fact, Dr. Miller “didn't submit Harry to any psychological testing instruments.” (T-94. 462).

For the 1994 resentencing, the State experts were asked to evaluate whether

any statutory mitigation applied. On the basis of his limited examination and information that was provided, Dr. Miller testified that he found mitigating factors in this case. When asked whether Mr. Phillips' low intelligence establishes mitigation, Dr. Miller answered “[t]hat is correct” and outlined matters he had learned from Mr. Phillips confirming his low intelligence—such as not performing well in school, repeating classes and low grades. (T-94. 473-74). Dr. Miller also considered Mr. Phillip’s history of child abuse as a mitigating circumstance, noting that he was beaten serious enough to have at least injuries to tissues and that could have an effect on him or “could have a bearing on his personal development.” *Id.*

Dr. Haber testified that he had examined the defendant in 1988 (T-94. 652). He evaluated competency and sanity and did not test Mr. Phillips, other than one screening test. (T-94. 654). Dr. Haber testified that he did not do any other psychological testing because he had reviewed the testing of Drs. Toomer and Carbonell and was satisfied that a “complete battery had been done and there was no point to repeat it.” *Id.* Dr. Haber acknowledged that people with IQ scores in the range of 75 to 84, would not be highly skilled, but would be capable of any labor type employment “that they can be trained for.” (T-94. 657). Dr. Haber provided examples, such as a long distance truck driver or a store clerk, concluding that “there are lots of things that [such] a person can do.” *Id.*

On cross-examination, Dr. Haber acknowledged he did not do any intelligence

testing himself and characterized the testing of Drs. Toomer and Carbonell as very good procedures which he had no reason to question. (T-94. 679). However, Dr. Haber maintained that he disagreed with their conclusions.

Dr. Carbonell's 1988 testimony was admitted into the record as she was unavailable to testify live due to a scheduling conflict. However, Dr. Toomer testified live. Both Drs. Carbonell and Toomer opined that Mr. Phillips functions in the borderline range of intellectual disability.

In April, 1994, Mr. Phillips was resentenced to death after the jury, again by a vote of seven to five, recommended death. In the sentencing order, the trial court found that no statutory mitigators were applicable. While acknowledging that all four experts agreed that Mr. Phillips was of low or borderline intelligence, the court found Drs. Miller and Haber more credible than that of the two defense experts, thus giving their testimony greater weight. As a result, the court concluded, "to the extent that these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight as they... do not...reduce the degree of moral culpability." *See*, Sentencing Order at 14.

On September 13, 1999, Mr. Phillips filed a Rule 3.850 motion, which was amended on December 2, 1999. The circuit court issued an order summarily denying the motion without an evidentiary hearing on September 26, 2000. On appeal, this Court affirmed but allowed Mr. Phillips to file a Rule 3.203 motion concerning his

intellectual disability. *Phillips v. State*, 894 So. 2d 28 (Fla. 2004). On May 27, 2005, this Court relinquished jurisdiction and an evidentiary hearing was held before the Honorable Israel Reyes in Miami, Florida on February 13-16, 2006. Mr. Phillips called Dr. Glenn Ross Caddy, a clinical psychologist, and Dr. Denis W. Keyes, a special education professor and psychologist, as his only two witnesses (T. 51-189; 190-374). The State called one witness, Dr. Enrique Suarez (T. 374-747). Dr. Joyce Carbonell's intellectual evaluation of Mr. Phillips was also introduced through the testimony of Dr. Caddy.

Dr. Keyes produced a report dated October 21, 2005 finding that Mr. Phillips was intellectually disabled (then mentally retarded) and met the criteria of having significant deficits in adaptive behavior in multiple areas. 2018R at 305-08. Dr. Keyes testified that he obtained information from a variety of sources and performed both formal scaled instruments as well as informal interviews and document review (T. 246). According to Dr. Keyes, both his formal testing and anecdotal vignettes showed that Mr. Phillips's adaptive functioning was significantly impaired.

Dr. Keyes testified that he administered valid formal adaptive functioning instruments to Mr. Phillips's sister Ida, his childhood friend Norman Parker, and Mr. Phillips himself. He utilized the Vineland test with Ida, and obtained valid scores in all the domains covered by the test, namely communications, daily living skills and

socialization.^{9, 10} In addition to the Vineland, Dr. Keyes testified that he obtained valid scores on the Scales of Independent Behavior - Revised (SIB-R) test, which was administered to Mr. Phillips himself and to Norman Parker, a childhood friend.¹¹ He achieved valid results on both administrations (T. 252). He also conducted several interviews that were not part of the scaled tests: with Mr. Phillips's brother Julius, with a former neighbor, Mr. Coachman, and with Norman Parker. Through these interviews he obtained several stories concerning Mr. Phillips's lifelong inability to adapt. For example, Mr. Phillips could not understand which bathroom to use in public, not understanding that he couldn't use either the women's bathroom or the whites only bathroom. (T. 254). He didn't understand that one does not enter

⁹ Dr. Keyes also testified that these areas are broken down into sub - domains. Communication is the first one which is expressive, receptive and written communication; daily living skills is divided into personal, domestic and community skills; and the socialization domain which is interpersonal relationships, play leisure and coping skills. *See* T. 250.

¹⁰Dr. Keyes also administered the Vineland test to Mr. Phillips's mother, but she did not know the answers to many of the questions, and so Dr. Keyes was unable to get a valid score for her instrument. However, as he stressed, the information from his face to face interview is still qualitatively valuable. Dr. Keyes was not surprised about Mr. Phillips's mother having less information about Mr. Phillips's adaptive skills because at the time he interviewed her she was very old, and because she had spent the majority of her time working outside the home when Mr. Phillips was growing up. *See* T. 250-251.

¹¹ The SIB-R may by the terms of its protocol be administered to the subject himself, unlike the Vineland. (T. 251)

a swimming pool fully clothed. And he didn't understand that his father was abusive and so kept returning to him, despite the father's continual rejection and abuse (T. 256).

During the hearing, Mr. Phillips's counsel also submitted several exhibits into evidence. (Supp. R. 196-197; 2022-2023). The State also submitted several items into evidence. (Supp. R. 1851). The circuit court then entered an Order Denying Defendant's Motion to Vacate Judgment of Sentence on May 27, 2006 (Supp. R. 2209-2253). This Court allowed Supplemental Briefing on appeal, then denied relief. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008).

Mr. Phillips timely sought federal habeas corpus review. Federal proceedings are on appeal at the United States Court of Appeals for the Eleventh Circuit. On March 2, 2016 the Eleventh Circuit granted Mr. Phillips' motion to stay proceedings based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), following Mr. Phillips filing of a successive *Hurst*-based Rule 3.851 motion on February 23, 2016. It was first amended on March 7, 2017. There was a subsequent amendment concerning intellectual disability filed on April 18, 2017. On April 21, 2017 this Court denied the *Hurst* claims advanced by Mr. Phillips but it denied the ID claim without prejudice.¹² Mr. Phillips then timely appealed the denial of the *Hurst* claims to the

¹² As to the intellectual disability issues noted in the instant pleading, this Court's April 21, 2017 order stated in pertinent part: "Defendant contends he is entitled to relitigate his previous *Atkins* claim pursuant to *Hurst*. At the Huff hearing,

Florida Supreme Court, and the appeal was docketed as No. SC17-984.

To preserve his rights concerning the intellectual disability issues during the pendency of the appeal, on January 8, 2018 Mr. Phillips filed a motion in this Court to relinquish jurisdiction to the circuit court with an attached Fla. R. Crim. P. 3.851 motion. On January 22, 2018, this Court issued an opinion denying relief on the *Hurst*-related issues. *See Phillips v. State*, 234 So. 3d 547 (Fla. 2018). At the same time, by separate order, this Court denied the pending motion to relinquish jurisdiction, the Order stating in pertinent part: “Appellant’s motion to relinquish jurisdiction is hereby denied as moot and without prejudice to file the successive 3.851 motion in the trial court.” The mandate issued from this Court on February 7, 2018.

A brief status hearing as to the issuance of the mandate was held by the Circuit Court on February 23, 2018. Counsel filed the preserved Rule 3.851 motion in the circuit court on February 28, 2018. 2018R at 70-87. A case management conference was held on April 19, 2018. 2018R at 374-402. On June 14, 2018, the circuit court entered an order denying an evidentiary hearing and denying relief. The order denied

counsel stated he raised this claim in this motion to preserve due diligence and would file a separate motion pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Walls v. State*, 2016 WL 6137287 to raise the issue of intellectual disability. As such, this claim is denied without prejudice giving the Defendant leave to timely file motion.” Order at 1-2.

relief based on a finding that Mr. Phillips did not meet Prong 2 of the intellectual disability definition, the adaptive functioning prong. However, the order found, for the first time, that Mr. Phillips did meet Prongs 1 and 3 of the intellectual disability definition. 2018R at 286-91. This appeal follows.

STANDARD OF REVIEW

Mr. Phillips has presented issues which involve mixed questions of law and fact. Thus, a de novo standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

SUMMARY OF THE ARGUMENT

The circuit court entered an order denying evidentiary development and finding that Mr. Phillips did not meet prong 2 of the definition of intellectual disability (ID) – the existence of significant adaptive deficits. The circuit court’s order failed to review the defense mental health expert’s findings in 2005 and in 2018 in support of prong two and ignored those findings in making a determination that Mr. Phillips is not presently intellectually disabled. Instead, the circuit court based its determination entirely on an overemphasis on adaptive strengths in circumstances where it also found Mr. Phillips did meet prongs one and three of the ID definition. The finding that Mr. Phillips is not intellectually disabled was an unreasonable determination of the facts and the law without competent and substantial evidence to support the lower court’s findings as to prong 2.

The lower court’s finding as to ID and the failure to allow additional evidentiary development also violated Mr. Phillips’s rights under the equal protection and due process clauses of the Fourteenth amendment as well as the Eighth amendment’s prohibition on cruel and unusual punishment.

ARGUMENT

ARGUMENT I

THE ORDER OF THE CIRCUIT COURT DENYING FURTHER EVIDENTIARY DEVELOPMENT AND RELIEF WAS AN ABUSE OF DISCRETION AND WAS NOT BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE. IN THE ORDER DENYING RELIEF THE CIRCUIT COURT FOUND THAT MR. PHILLIPS DID NOT HAVE INTELLECTUAL DISABILITY (ID) BECAUSE MR. PHILLIPS DID NOT MEET PRONG 2 OF THE ID DEFINITION – THE EXISTENCE OF SIGNIFICANT ADAPTIVE DEFICITS - BASING THE DETERMINATION ENTIRELY ON AN OVEREMPHASIS ON ADAPTIVE STRENGTHS. THIS WAS AN UNREASONABLE DETERMINATION OF THE FACTS AND THE LAW WITHOUT COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE LOWER COURT’S FINDINGS AS TO PRONG 2.

a. Introduction

Mr. Phillips filed a successive Fla. R. Crim. P. 3.851 motion below to obtain a new evidentiary hearing on ID and to have the lower court undertake a holistic review of the entire record, in light of the retroactivity of *Hall v. Florida*, 134 S. Ct. 1986 (2014) as recognized in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and the new United States Supreme Court case law announced in *Moore v. Texas*, 137 S. Ct. 1039 (2017). 2018R at 70-135.

In *Moore v. Texas*, the United States Supreme Court’s central holding is a powerful recognition that if a court “deviated from prevailing clinical standards [or]

from the older clinical standards [it] claimed to apply” when determining whether someone is death ineligible under *Atkins*, that court violated the Eighth Amendment. *See Moore*, 137 S. Ct. at 1050, 1053 (“By rejecting the habeas court’s application of medical guidance... the [reviewing court] failed adequately to inform itself of the ‘medical community’s diagnostic framework.’ *Hall*, 572 U.S., at ___, ___ (slip op., at 19-20)”).

Short of saying prevailing clinical standards govern *Atkins* proceedings entirely, prevailing clinical standards are to be afforded exceptional deference. *See Moore*, 137 S. Ct. at 1050 n.8 (“But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths...”). At the heart of this case, *Moore* demonstrates that if a court “failed [or fails] adequately to inform itself of the ‘medical community’s diagnostic framework’” when making an *Atkins* determination, *Moore* error exists. *See Moore*, 137 S. Ct. at 1053.

Prior to the case management conference, counsel for Mr. Phillips listed Dr. Denis Keyes, who had been involved as an ID expert in the case since the late 1990s, as the witness he wished to call at the prospective evidentiary hearing. Copies of Dr. Keyes’s new 2018 report and his previous 2005 report were attached to the witness

list. 2018R at 406-22.¹³ Following an April 19, 2018 case management conference, on June 14, 2018, the circuit court entered a five and one-half page denying any further evidentiary development and denying Mr. Phillips's new ID claim. 2018R at 286-91. The order reviewed the process undertaken by the court:

Defendant argued that in light of the new law and a new evaluation prepared by Dr. Denis Keyes, who had testified at the 2006 hearing, he should be entitled to a new evidentiary hearing. In the alternative, counsel requested that this court reevaluate the evidence presented at the 2006 hearing, along with the new report of Dr. Keyes. The State argued that the Defendant presented evidence on all three prongs and that all three prongs were sufficiently addressed in the 2006 hearing. This court agreed to review all transcripts and evidence presented at the hearing in 2006, as well as the new report prepared by Dr. Keyes.

2018R at 287. There was nothing novel about the process the circuit court used to deny the ID claim. The circuit court's analysis was uncomplicated. The order reviewed the three well-established aspects of the definition of intellectual disability and outlined its findings with a conclusion denying relief. No explanation was

¹³ The 2018 test results are summarized at 2018R at 410. The 2005 test results are summarized at 2018R at 420. Dr. Keyes did not do IQ testing in 2018. His 2018 work was exclusively on adaptive functioning. He did repeat achievement testing, using the Wide Range Achievement Test-IV (WRAT-4) in 2018 instead of the Woodcock-Johnson. He also used the Independent Living Scale standardized test to test Mr. Phillips's adaptive behavior in the prison setting in 2018, obtaining a full scale score of 67, as well as administering the ABAS-3 to Mr. Phillips and his brother and sister in 2018. Finally, he did administer a malingering test, the Test of Memory Malingering as part of his new testing of Mr. Phillips. The results indicated valid effort by Mr. Phillips.

provided for denying additional evidentiary development.

b. Finding below on the subaverage intellectual functioning prong of the ID definition

The circuit found that Mr. Phillips did meet prong one, the first part of the ID definition, generally associated with IQ scores on standardized instruments, specifically the Stanford-Binet or WAIS in Florida. The circuit court found in its order that: “The Defendant has clearly proven the first prong by clear and convincing evidence.” 2018R at 288. In doing so, the court relied on the full scale WAIS IQ scores obtained by Drs. Carbonell (75) in 1987, by Dr. Keyes (74) in 2000, and Dr. Caddy (70) in 2006. 2018R at 287-88. In the post *Hall* era, the circuit court’s finding as to Mr. Phillips’s IQ scores mirrored this Court’s recent concession regarding *Hall* and prong one of the ID definition in another case where relief was denied following a 2006 evidentiary hearing on ID:

Jones argues that he is entitled to relief under *Hall* because the IQ scores that were presented to the trial court in 2006 fall within the tests’ acknowledged and inherent margins of error – which *Hall* requires courts to take into account – and he is therefore entitled to present additional evidence of intellectual disability. **Jones is correct that in light of *Hall*, he would likely now meet the first prong of the intellectual disability standard – significantly subaverage general intellectual functioning.**

Jones v. State, 231 So. 3d 374, 376 (Fla. 2018) (emphasis added). Even with this concession, this Court affirmed the summary denial in *Jones* below:

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.

Here, in Mr. Phillips's case, the lower court has now found for the first time that two prongs of the ID definition are met but still denied any additional evidentiary development. The circuit court's 2018 finding contrasts sharply with this Court's affirmance of the lower court's opposite finding concerning subaverage intellectual functioning in 2008:

Here, the majority of Phillips's IQ scores exceed that required under section 921.137. Moreover, the court questioned the validity of the only IQ score falling within the statutory range for mental retardation. Therefore, competent substantial evidence supports the trial court's finding that Phillips did not meet the first prong of the mental retardation definition.

Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008). The circuit court in 2018 disagrees, finding that prong one has been proven by clear and convincing evidence. 2018R at 288.

c. Finding below on onset of ID in the developmental period (prior to age 18)

The lower court's order also contradicts the previous findings in state court that there was no onset of ID prior to age 18. This finding by the circuit court implicitly finds that Mr. Phillips was suffering from ID prior to the age of 18. The

Order specifically recites that: “Moving to the third prong, onset before age 18, the Court finds that Dr. Keyes’s testimony from the 2006 hearing is credible and sufficient to prove onset before age 18. Again, Dr. Keyes interviewed family members and a friend who had known the Defendant in childhood. He also managed to locate school records that substantiated onset before age 18. (Transcript of 2006 hearing at p. 219, hereinafter referred to as “T”). 2018R at 288. (emphasis added). So the circuit court finds Dr. Keyes credible and also finds that Mr. Phillips meets two of the three prongs of the definition of ID for the first time in the judicial history of this case.

d. Finding below on adaptive functioning prong of the ID definition

In the Order denying relief the circuit court affirms the denial of *Atkins*¹⁴ relief solely on the basis that Mr. Phillips failed to establish the second prong of intellectual disability. 2018R at 290-91. (“[I]n reviewing the entirety of the record this Court finds that the Defendant has failed to demonstrate by clear and convincing evidence, the existence of a concurrent deficit in adaptive behavior.”). 2018R at 290.

Given that the circuit court found onset before age 18 and significantly subaverage general intellectual functioning, the only rational conclusion to the court’s finding concerning adaptive functioning is that sometime after the age of 18,

¹⁴ *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

based on the circuit court's ultimate findings connected to prong two, Mr. Phillips was no longer ID because the adaptive deficits which necessarily must have existed prior to age 18 in order for the court to agree that he was properly diagnosed retrospectively as ID prior to the age of 18, were later mediated by new "adaptive strengths" including but not limited to criminal behavior that outweighed any deficits. See Order at 2018R at 290 ("[I]n reviewing the entirety of the record this Court finds that the defendant has failed to demonstrate by clear and convincing evidence, the existence of a concurrent deficit in adaptive behavior.") (emphasis added).

Along with the court's previously referenced credibility findings as to Dr. Keyes's testimony, the order of the circuit court also praises Dr. Keyes's 2006 testimony as "substantiated by science on almost every point", yet the order completely fails to acknowledge or discuss the substance of Dr. Keyes's findings of adaptive deficits in 2006 or in 2018. 2018R at 291 (emphasis added). Instead the order improperly relies upon stereotypes including the assumption that the intellectually disabled lack strengths, in violation of *Moore*'s dictates. Here, a court that failed to allow any evidentiary development or testimony in 2018 criticizes Dr. Keyes saying that "he was not able to point to any prevailing standard to suggest that criminal behavior could not be evidence of adaptive behavior." *Id.* In fact, Dr. Keyes's 2018 report states in pertinent part, "The American Association on

Intellectual and Developmental Disabilities [AAIDD] and the American Psychiatric Association [APA] stress that, when considering adaptive behavior skills, it is crucial to avoid mistaking maladaptive skills as being adaptive.” 2018R at 418.

In 2008 in Mr. Phillips’s case, this Court relied on the State’s position and that of their expert that maladjusted or maladaptive behavior constitutes or is evidence of adaptive functioning. This Court also upheld the circuit court’s findings which disregarded prevailing clinical standards as to adaptive deficits

Even prior to the time of the 2006 hearing, the use of “adaptive strengths” to offset adaptive deficits was cautioned against by the Supreme Court: “[I]ntellectually disabled persons may have ‘strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.’” *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (quoting AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (10th ed. 2002)).

Accordingly, because the circuit court in 2018 relied upon perceived adaptive strengths in order to counter or negate the existence of deficits in adaptive functioning, its ability to adequately evaluate the evidence before it was contaminated by a refusal to utilize prevailing clinical standards. Had it relied on prevailing clinical standards, the circuit court would have found prong two established. *See Moore*, 137 S.Ct. at 1052 (“[T]he medical profession has

endeavored to counter lay stereotypes of the intellectually disabled.... Those stereotypes [about intellectually disabled people], much more than medical and clinical appraisals, should spark skepticism.”). *Moore* error exists in this case.

This Court recently tried to distinguish its actions in considering adaptive strengths in denying relief in the Tavares Wright remand based on *Moore* following an evidentiary hearing denying relief: “Our opinion discussed some of Wright’s adaptive strengths and behavior in prison, *Wright*, 213 So. 3d at 899-902; whereas *Moore*, the DSM-5, and AAIDD-11 all caution against overemphasis on that type of evidence. *Moore*, 137, S. Ct. at 1050, DSM-5, at 33, 38; AAIDD-11, at 47. Yet the crux of our decision rested on the competing medical testimony of Dr. Gamache and Dr. Kaspar instead of independently weighing strengths and deficits or focusing on prison conduct.” *Wright v. State*, 2018 WL 4656661 at *8 (Fla. Sept. 27, 2018). (emphasis added)

Unlike Mr. Wright, Mr. Phillips was not granted a post-*Moore* evidentiary hearing where he could present testimony or evidence. In reaching its conclusion as to the absence of adaptive deficits, the lower court’s order still stands in stark contrast to this Court’s approach in the 2008 Phillips opinion concerning intellectual disability (ID) by finding the state expert Dr. Suarez not credible and his work outcome determinative. 2018R at 289:

Dr. Suarez reviewed only the reports of Dr. Keyes and Dr.

Caddy. (T at 340). Dr. Suarez also relied heavily on prison records and interviews with prison personnel. (T at 457-470). He did not interview any family members or friends from the Defendant's past. He did not review school records, and while he emphasized the importance of an individual's history, he relied solely on the Defendant's self-report for a life history. His testing methods were flawed. (T at 227-236). Finally, his entire evaluation and focus appeared to be geared toward a desired result, namely undermining a finding of ID, rather than being the neutral findings of an expert clinician. For these reasons, this Court does not find the testimony of Dr. Suarez to be credible and gives it little or no weight in determining ID.

2018R at 289. Given that the circuit court failed to rely on Dr. Suarez's findings to support its findings on prong 2, its findings are unreasonable. In *Wright* this Court also claimed that it "simply relied on expert testimony, with regard to connected adaptive deficits and the postconviction court's credibility determinations" instead of using "completely unrelated adaptive strengths" as criticized in *Moore*, "such as living on the street, mowing lawns for money, and playing pool, to offset extensive evidence of adaptive deficits in all three domains." *Id.* at *9. In this case, the circuit court similarly focused on Mr. Phillips being able to drive a car and having a work history as a sanitation worker, a dishwasher, and as a cook. The court even pointed to his failure to confess to his crimes and attempt to establish an alibi as maladaptive behavior or criminal behavior that offset adaptive deficits. 2018R at 289-90. The circuit court did not rely on Dr. Suarez or his opinions to support these findings.

The lower court's order acknowledged both that there appeared to be a new

legal framework for consideration of the ID claim and that counsel had requested additional evidentiary development: “Defendant argued that in light of the new law and a new evaluation prepared by Dr. Denis Keyes, who had testified at the 2006 hearing, he should be entitled to a new evidentiary hearing.” 2018R at 287. The lower court also noted in the order that it had agreed to review the entire record, which self-evidently included all of Dr. Keyes’s reports and testimonial evidence of adaptive deficits: “This court agreed to review all transcripts and evidence presented at the hearing in 2006, as well as the new report prepared by Dr. Keyes.” *Id.*

Dr. Keyes’s 2006 testimony and his October 21, 2005 and April 15, 2018 reports provide detailed information supporting the presence of adaptive deficits that meet prong 2 of the ID definition. In contrast to the credibility findings as to the state’s expert, the order denying relief fails to provide any substantive review of Dr. Keyes’s specific findings in support of the presence of adaptive deficits, including the 2005 and 2018 findings of Dr. Keyes’s that are clearly concurrent adaptive functioning deficits in this Court’s parlance:

This issue relates to the second prong of the ID test: concurrent “deficits in adaptive behavior.” § 921.137(1). The statute defines “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 Florida, the first prong (subaverage intelligence) must exist “concurrently” with the second prong, which this Court has interpreted to mean that the two must exist “at the same time” and “that there

must be current adaptive deficits.” *Dufour v. State*, 69 So. 3d 235, 248 (Fla. 2011); *see Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017). The AAIDD-11 and DSM-5 definitions are mostly similar to the statutory definition. *Compare* § 921.137(1), *with* DSM-5 at 37, *and* AAIDD-11, at 6, 43. Comparable to IQ scores, the AAIDD-11 recommends that adaptive deficits be established by standardized tests when an individual scores approximately two standard deviations below the population mean, with the results accounting for SEM, AAIDD-11, at 47; *see also* DSM-5, at 37. The DSM-5 divides adaptive functioning into three broad categories or “domains”: conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain “involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations.” DSM-5, at 37. The social domain “involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment.” *Id.* The practical domain “involves learning and self management across life settings, including personal care, job responsibilities, money management, recreation, self management of behavior, and school and work task organization.” *Id.* According to the DSM-5., adaptive deficits exist when at least one domain “is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.” *Id.* at 38; *see* AAIDD-11 at 43.

Wright v. State, at *5-*6 (emphasis added) . This Court then notes that only one domain, the conceptual was at issue in Wright’s remand pursuant to *Moore v. Texas*, because both experts “at the renewed ID determination hearing” testified “that Wright has no deficits in the social and practical domains that rise to the level of an ID determination. *Wright v. State* at *6. This is self-evidently not the set of

circumstances in Mr. Phillips's case, where there was no new hearing, no battle of the experts, and the circuit court found the state expert to be incredible.

After rehearing was filed in this Court's opinion in *Wright*, a revised opinion was issued on November 1, 2018 changing the citation in footnote 5 and replacing the previous citation to *Dufour*, 69 So. 3d at 511, for the proposition that "The DSM-5 differs from earlier editions in that adaptive deficits are now organized into three broad domains as opposed to numerous subcategories. Prior opinions held that defendants must show deficits in at least two of the previous smaller subcategories." The revision now cites to this Court's opinion following the 2006 evidentiary hearing on ID in Mr. Phillips's case, *E.g., Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008).

In that *Phillips* opinion, citing to DSM 4th ed. 2000, this Court reported: "To be diagnosed mentally retarded, Phillips must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety". This Court went on to criticize the defense evaluation on now familiar grounds:

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 Phillip's adaptive functioning, relied on the technique of retrospective diagnosis, focusing on Phillip'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 mental retardation definition. We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently with deficits in adaptive behavior. *Id.* (citing § 921-137(1), Fla. Stat. (2007); Fla. R. Crim. P. 3.203(b). Dr. Keyes tested Phillip's intellectual functioning in 2000; however he did not assess Phillips's adaptive functioning as of that date.

Phillips, 984 So. 2d at 511. This analysis completely failed to acknowledge that Dr. Keyes's academic achievement testing was self-evidently the basis for his finding in 2005 of concurrent adaptive deficits in functional academic skills.

The conundrum posed by the meaning of concurrent adaptive functioning deficits is apparent in Mr. Phillips's case. Despite this Court's dismissive attitude concerning retrospective diagnosis evinced in the 2008 *Phillips* opinion and in *Jones v. State*, 966 So. 2d 319 (Fla. 2007), this Court has recently acknowledged that a determination must be made about whether ID was present before the age of 18 in cases like Mr. Phillips's. *See Wright*, at *5, fn. 4 (“...Moreover, because intelligence and functioning deficits must present themselves during the developmental period (prong three), it seems necessary that they exist at the same time (i.e., before a defendant turns eighteen.)”). This important concession is reflected in the circuit court's order which was entered prior to the *Wright* opinion.

Retrospective diagnosis should properly be subsumed within a longitudinal diagnosis as prevailing clinical practice and best practice pursuant to *Moore*. In Mr.

Phillips's case, where a ID determination of a previously undiagnosed prisoner is being made many years after the developmental period, "It is difficult to conclude where the Supreme Court drew the line for reliance on prison conduct as our only guidance is a single sentence "caution[ing] against reliance on adaptive strengths" developed in prison. *Moore*, 137 S. Ct. at 1050" *Wright v. State*, at *9.

This Court's 2008 finding that "Dr. Keyes tested Phillips's intellectual functioning in 2000; however, he did not assess Phillips's adaptive functioning as of that date," is simply false. *Phillips v. State*, 984 So. 2d at 511. Dr. Keyes specifically testified in 2006 about his administration of an academic achievement instrument in 2000. T. 311-17. In 2018 the circuit court ignored the fact that Dr. Keyes again did achievement testing as well as standardized adaptive functioning testing of Mr. Phillips in the prison. Among its concerns that the reviewing state court did not adhere to prevailing clinical standards, the *Moore* Court pointed to the reviewing courts improper and non-clinically based reliance of perceived adaptive strengths to either negate or outbalance the existence of adaptive functioning deficits. *See Moore*, 137 S. at 1050.

Specifically, the reviewing state court in *Moore* relied on accounts that Moore was able "to live on the streets", mow lawns, and play billiards for money. *See id.* The *Moore* Court explained that this sort of review was improper because "the medical community focuses the adaptive-functioning inquiry on adaptive deficits"

and proceeded to cite to the clinical authorities on this diagnostic framework. *Id.*

There was a similar reliance of perceived adaptive strengths by the circuit court in 2006 and 2018 and by this Court in 2008 on work done by Mr. Phillips as a garbage collector, a dishwasher and as a short-order cook, along with his lifetime of living at home with his mother. This reliance ignored prevailing clinical standards for consideration of adaptive deficits by instead concentrating on these perceived strengths. Dr. Keyes testified at the evidentiary hearing that Mr. Phillips's work history as a garbage collector, short order cook and dishwasher did not rule out a diagnosis of ID. T. 219-22; 292. He also testified that "anyone who has an IQ of below 75, who has very significant adaptive skill deficits, can be identified as mentally retarded." T. 295.

Dr. Keyes testified in 2006 that what is important for a determination of intellectual disability is not maladaptive behavior or adaptive strengths but whether the individual has the necessary adaptive functioning deficits in 2 of 10 designated areas. T. 296-97. (emphasis added). His test results supporting the finding of adaptive deficits were included in his 2005 report. 2018R at 306. They include the results of the Woodcock Johnson Psycho-Educational Battery for Academic Achievement, and the results of the Vineland Adaptive Behavior Scales (deficits in communication, daily living, and socialization) and the Scales of Independent Behavior-Revised (adaptive deficits in social interaction and communication,

personal living skills, community living skills and broad independence). 2018R at 420.

In *Hall v. State*, this Court specifically found that courts may rely upon a retrospective analysis so long as defendant's evidence of adaptive functioning deficits was not **wholly retrospective**. *Hall v. State*, 201 So. 3d 628, 635-37 (Fla. 2016) ("We reject the trial court's narrow reading of *Phillips* and the State's argument that mental health experts may only evaluate a prisoner's adaptive functioning during his or her incarceration.")(emphasis added).¹⁵ This Court also concluded that when a defendant's expert does not interview prison staff, it does not *per se* amount to a wholly retrospective adaptive functioning evaluation. *See id.* This Court reasoned, in part, that courts may not so hold because prisons represent the "antithesis of the environment in which adaptive functioning can be displayed." *See id.* at 236.

¹⁵ Dr. Keyes' testimony specifically demonstrated that his 2000 adaptive functioning evaluation of Mr. Phillips was not wholly retrospective. He noted that his 2000 administration of part 2 of the Woodcock-Johnson Psychoeducational Battery tested for current academic achievement, education, experience." T, 192-95; 269-75; 310-11. He also noted that some relative strengths in academic skills were unsurprising because Mr. Phillips "was in prison for 20 years prior to this, or darn near 20 years, and as such he had a long time to work on his skills." T. 281. During his testimony he referred to the clinical process of adaptive functioning assessment as the "gestalt" of adaptive skills determined by the "whole functioning of the individual as best you can" determine. T. 204. And he testified that in cases like Mr. Phillips his determination, based in part on clinical judgment, included consideration of the individual at age 18, at the time of the offense, and twenty years later. T. 218.

This Court misrepresented Dr. Keyes testimony in the 2008 Phillips’ appeal. The Court also ignored his cogent critique of the “inadequate” ABAS interviews of prison personnel by the state’s experts. T. 227-32. Although Dr. Keyes did not interview any prison personnel, his adaptive functioning evaluation of Mr. Phillips, which included the academic achievement portion of the Woodcock Johnson, was not “wholly retrospective.”

This Court failed to note his reliance on convergent validation where he was “trying to find more than one person to give you as much information as you can [get] on that individual.” T. 288-89; 2018R at 414. In testifying about his findings he stated that “[t]he simple fact is that Mr. Phillips has been in a structured, highly structured, probably the most structured environment in the planet, for the last 20 years, and in that time he has been able to achieve a higher level of reading comprehension...One of the main reasons that most people forget is that people with mental retardation do have areas of strength, they can do things better after long periods of practice.” T. at 193-94. He further testified that “[t]he fact is that Harry Phillips does have some strengths, he has some strengths in achievement, academic achievement. He is able to write some, he is able to read some, and he is able to do some math. That doesn’t necessarily preclude the possibility of mental retardation. The definition of mental retardation clearly states that people with mental retardation often have strengths existing with their deficits.” T. at 273.

Dr. Keyes' "Brief Summary of Findings" in his 2005 report noted that "[Mr. Phillips'] adaptive skills such as communication, daily living skills, socialization, community living and independence skills are so distorted as to put him in the lowest tenth of a percentile of the general population. Academic achievement testing indicated that Mr. Phillips's past and present learning in areas such as written language and math, is also impaired. The results of this evaluation and the lengthy associated adaptive interviews confirm that Harry Franklin Phillips has a significant cognitive and adaptive impairment, mental retardation." 2018R at 421 (emphasis added).

Dr. Keyes's second report was prepared 13 years after the first following some additional work. It revealed similar results. 2018R at 410-19. A long quote from the 2018 report section "Diagnostic Impression" highlights the information concerning adaptive deficits that the lower court ignored in its order:

Harry's two siblings have consistently described Harry as a loner and "slow." His personal judgement, perceptual abilities, and cognitive capacity are not, effectively, developed much beyond those of a child of roughly seven to fourteen years of age. It is important to note that, lacking detailed educational or psychological records from his childhood or schooling, and the fact that Harry was already in his mid-fifties at the time of examiner's first evaluation in 2000, the only legitimate way to determine Harry's skills during childhood and adolescence was via interviewing surviving family members and his neighbors, including next door neighbors Mr. and (the late) Mrs. Howard Coachman (both of whom I interviewed in 2000, and Mr. Coachman in 2018; the latter used to go fishing

with Harry as a child).

The reader is cautioned to remember that intellectual disabilities, even at the mild level, essentially indicates that an individual's cognitive and adaptive functioning levels are roughly within the bottom 2% of the population. In Harry's case, his intellectual capacity appears to be within the mild range of intellectual disability (his IQ falls somewhere between 69 and 79, around the 2nd to the 8th percentile). However, his adaptive functioning, as determined in both the 2000 and 2018 assessments, is significantly lower; his scores place him somewhere between the .01 to the 4th percentile. Effectively, Harry Phillips's adaptive functioning falls roughly between the moderate and severe range of adaptive functions. The results of both assessments indicate that Harry's communication skills, daily living skills and socialization skills were significantly defective. The latter assessment indicates very significant defects in Harry's conceptual and practical skills (ABAS-III), as well as a general lacking in basic living skills (ILS = 67).

Given Harry Phillips's history of learning and adaptive problems, as well as his behavioral deficits, the existence of intellectual disability was more than just likely. He likely learned how to "cloak" the significance of his deficits in limited conversations and interactions with others (see generally: Edgerton, *The Cloak of Competence*, 1967). As a result, those who did not know him very well, and/or who are/were untrained in the characteristics so common to the disability might easily have overlooked Harry's disability. It cannot be denied that Harry can *talk* a good game, but if one believes that someone who *acts* like he knows what he is talking about probably does, then s/he does not know anything about mild mental disabilities, especially as one might see in adulthood.

This distinction is important for several reasons, but the most important is that Harry's ability to adapt to situations he experiences has likely always been severely impaired

when compared to those of his peers or family members. He may be inappropriate, he may be temperamental, and he may be more childlike than those people he has been closest to in the past, even those who know him best. People who have intellectual disabilities are often viewed as more childlike, not so much because of their lack of intellect, but because of their inability to adapt their behavior to their *settings*, and the *associated social norms*.

Professionals in the field of intellectual disabilities (including this examiner) strive to maintain that people in this functioning range have skills, even some strengths, but rarely do those strengths come close to what one might refer to as “normal.” Harry’s highest adaptive functioning area, by most accounts and as it appears in the present evaluation, appears to be his social skills. However, again the reader is cautioned to remember that these skills may, in fact, be the result of several years of incarceration and structure. As mentioned earlier in this report, had the high level of *structure* that Harry Phillips currently experiences, existed at any time he was living within the community, the sad facts that led to the need for this evaluation and report may never have occurred. Such is the tragedy of adaptive deficits, and the difference between those who are of normal functioning, and those who have significant intellectual and adaptive defects.

Finally, it is important to note that some of Harry Phillips’ behaviors may seem to have been adaptive in nature, his planning of the crime and his various attempts to cover up his involvement. There is a paradox in this situation, too. The American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association stress that, when considering adaptive behavior skills, it is crucial to avoid mistaking maladaptive skills as being adaptive. Maladaptive skills, like adaptive skills, are often learned responses to background experiences; however, since they are, most frequently, far outside of behaviors that constitute the norm, they cannot be considered adaptive, per se. They are deviant behaviors

that usually were learned in error to escape unpleasant consequences, and/or have been reinforced by secondary experience. Yes, Harry Phillips is a criminal who has a history of numerous infractions and incarcerations, but he has an intellectual disability that has not kept him from learning essentially naïve and futile ways to attempt escaping punishment. Individuals who are of normal adaptive functioning will rarely permit themselves to get into such dire circumstances to begin with, let alone try to lie their way out of it.

2018R 303-304 (emphasis added). The lower court's order relies on speculation and hearsay concerning adaptive strengths and criminal behavior to refute the presence of adaptive deficits with no apparent consideration of Dr. Keyes actual findings of adaptive deficits in 2006 and 2018.

The order itself is internally contradictory. For example, where it refers to Dr. Keyes 2006 testimony: "Moreover, while Dr. Keyes' testimony was substantiated by science on almost every point, he was not able to point to any prevailing standard to suggest that criminal behavior could not be considered as evidence of adaptive behavior." 2018R at 291 (emphasis added). As quoted above, Dr. Keyes actually directed the court in his 2018 report to the place to look for prevailing clinical standards: "The American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association stress that, when considering adaptive behavior skills, it is crucial to avoid mistaking maladaptive skills as being adaptive." 2018R at 418.

The findings by the circuit court improperly rely on adaptive strengths. Such

an analysis warps the clinical diagnostic framework, which is supposed to be about scientific data (Dr. Keyes’s testimony, “substantiated by science at almost every point”), into something centered on insensitive stereotypes thereby involving courts in the perpetuation and endorsement of such stereotypes. *See Moore*, 137 S. Ct. at 1052 (indicating that the recitation of perceived strengths, “normal” behavior, and laypersons perceptions runs afoul with the medical professions efforts to counter lay stereotypes of the intellectually disabled); *See also* AAIDD-11, at 47 (“significant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills”).

Moore v. Texas stands for the proposition that “[I]n assessing ID, a court must look to “prevailing clinical standards” and must not rely too heavily on “adaptive strengths developed in a controlled setting such as a prison.” *Moore* provides even more cautionary language about ever relying on adaptive strengths to refute adaptive deficits based precisely on authorities in the field of intellectual disability. “The medical community’s current standards supply one constraint on States’ leeway in this area. Reflecting improved understanding over time, *see* DSM-5, at 7; AAIDD-11, at xiv-xv, current manuals offer “the best available description of how mental disorders are expressed and can be recognized by trained clinicians.” *Moore v. Texas* at 1052-53.

The lower court’s “Conclusion” concerning the presence of adaptive deficits

is conclusory and an abuse of discretion. 2018R at 290-91. Despite Dr. Keyes's 2006 testimony and his reports identifying multiple adaptive deficits, the lower court found none. The only substantive discussion of a deficit in the order by the lower court concerns the "practical domain" in which the Order notes that "an individual with ID requires help with complex daily living tasks. They may require support with grocery shopping, transportation, home or child care, food preparation, banking and money management." 2018R at 289.

Obviously Mr. Phillips has been an indigent inmate on death row in a maximum security prison setting for more than 35 years. None of these areas are of any relevance in Mr. Phillips's life as part of a concurrent functioning evaluation in 2018. This Court recently observed: "For death defendants who have typically been in prison for some time, this lack of guidance is particularly problematic. For instance, the AAIDD-11 instructs that an adaptive functioning analysis centers on an individual's "present functioning," AAIDD-11, at 54, but it warns against considering prison functioning, *id.*, at 55. Moreover, the AAIDD-11 itself notes that there is a "growing need for research at the intersection of ID determination and forensic science, especially in relation to the measurement of adaptive behavior of individuals living in prisons." *Id. Wright v. State*, at *9, fn. 10. This is, of course, part of the conundrum.

The entire discussion of adaptive deficits in the order denying relief fails to

discuss Dr. Keyes's findings but instead lists proposed adaptive strengths and criminal behavior:

Defendant knew how to drive. He had two jobs as a dishwasher and a job as a short order cook. Dr. Keyes testified that the Defendant's job as a short order cook was "unusual" because "there is sometimes a lot of pressure on people in that job, and sometimes people with mental retardation do not respond well to pressure..." (T at 222). He went on to say that this could be explained by his love for the job.

People with ID are also at risk of being manipulated. Dr. Keyes testified about the Defendant being manipulated by his childhood friends into acting as a decoy so that they could steal cokes from the local store.(T at 211). This appears to indicate that he was manipulated as a child. However, following the homicide, he was interrogated by Detective Greg Smith on three separate occasions and each occasion he did not confess. Dr. Keyes suggests that this could be learned behavior as a result of exposure to the criminal justice system. (T at 242).

According to the DSM, in an ID adult, abstract thinking and executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility) are impaired. In the instant case, the Defendant planned the murder of his parole officer. He had to wait for the officer to leave his office. After shooting him, he removed all of the bullet casings to avoid detection. He also hid the gun. (T 241). After being arrested he remained silent, he did not give any statements to th police. (T 242). From jail he authored a letter setting up an alibi and outlining an attempt to eliminate the state's witnesses who would be testifying against him. (T 257). Dr. Keyes, again, explains the crime itself and the disposal of the casings and the gun as "learned" behavior from repeated exposure to the criminal justice system. Dr. Keyes acknowledged that the "Bro White" alibi letter, was certainly an example of executive

functioning. But he expressed doubt about whether Mr. Phillips wrote the letter without assistance. He found the handwriting to be unfamiliar and he believed that the level of sophistication was inconsistent with all else he knew about the Defendant. (T 257-260).

2018R at 289-90. Even with a finding that the state expert is not credible, the circuit court's 2018 order as to adaptive functioning simply mirrors the findings of this Court in 2008 that competent substantial evidence supports a finding that Mr. Phillips does not suffer from deficiencies in adaptive functioning by relying on adaptive strengths and maladaptive criminal behavior:

Next, Phillips argues that the trial court erred in concluding that he failed to demonstrate deficits in adaptive functioning sufficient for a diagnosis of mental retardation. In Florida, defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior. *Rodriguez v. State*, 919 So.2d at 1252, 1266 (Fla.2005) (“[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning.” (quoting trial court's order)). “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.’ ” *Id.* at 1266 n. 8 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000)). To be diagnosed mentally retarded, Phillips must show “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.” *Id.*

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 mental retardation definition. We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently with* 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.

Moreover, the record contains competent substantial evidence that 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 mental retardation 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 mental retardation.

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 mental retardation. Although Phillips argues that his maladjusted behavior does not constitute adaptive behavior, we agree with the circuit court that argument is untenable. The mental health experts generally agreed that persons suffering from mental retardation lack goal-directedness and the ability to plan. Phillips had both. To commit the crime, Phillips, having discovered that his parole officer was generally the last to leave the office, lay in wait behind dumpsters outside of the building. When the parole officer emerged and there were no witnesses present, Phillips unloaded his gun into the officer. He reloaded the gun and shot the parole officer three more times. Phillips then retrieved the shell casings from the ground, fled the scene, and disposed of the gun. After he was apprehended, officers tried on several occasions to interview Phillips, but he refused to speak.

Also, while in jail, Phillips authored an alibi letter and a letter dubbed the “Bro White” letter. 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.” He further penned, “I hate like hell to do that. But the innocent must suffer.”

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). A CCP killing demonstrates “that the defendant had a careful plan or prearranged design to commit murder before the fatal incident ...; that the defendant exhibited heightened premeditation.” *Id.* The

actions required to satisfy the CCP aggravator are not indicative of mental retardation. *See Atkins*, 536 U.S. at 319–20, 122 S.Ct. 2242 (“Exempting the mentally retarded from [the death penalty] will not affect the ‘cold calculus that precedes the decision’ of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.”)

It is clear from the evidence that Phillips does not suffer from adaptive impairments. Aside from personal independence, Phillips has demonstrated that he is healthy, wellnourished and wellgroomed, 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 v. State, 984 So. 2d 503, 511–12 (Fla. 2008) (emphasis added).

Mr. Phillips pointed out in his Reply to the State Response to his 3.851 motion that these same issues existed at the time of the 2006 hearing in the citations to the existing clinical guides:

[A] closer review of what AAMR/AAIDD says about the diagnosis of the other two prongs of the definition of mental retardation/intellectual disability is appropriate in the instant circumstances. The 2002 AAMR diagnostic guide in effect at the time of the 2006 evidentiary hearing makes several points relevant to the mistakes made in the prior findings in Mr. Phillips’ case:

Problem behavior that is “maladaptive is not a characteristic or dimension of adaptive behavior, as conceptualized in the 2002 definition of mental retardation, although it often influences the

acquisition and performance of adaptive behavior. The presence of problem behavior is not considered to be a limitation in adaptive behavior, although it may be important in the interpretation of adaptive behavior scores (i.e., in clinical judgment) for diagnosis.

Adaptive behavior must be examined in the context of the developmental periods of infancy and early childhood, childhood and early adolescence, late adolescence, and adulthood. A continuing theme is the importance of the developmental relevance of specific skills within these adaptive areas.

A diagnosis of the presence of mental retardation under the 2002 definition requires a finding that the person's intelligence and adaptive behavior are significantly below average and that the combination was present during the developmental period. Typically this requires the administration of an individualized assessment of intelligence, an individualized assessment of adaptive behavior, and a determination made through review of documents and interviews with relevant observers that the disability was present before the age of eighteen...Making a diagnosis of mental retardation can be challenging in some cases and may require the application of clinical judgment.

MENTAL RETARDATION, Definition, Classification, and Systems of Support, 10th Edition, 2002, AAMR. At 75, 93-94.¹⁶ These are simply examples of what should have been considered after the 2006 hearing. The postconviction court picked and chose what it wished to use from the AAMR and ignored what did not fit with its

¹⁶ The AAMR subsequently became AAIDD. *See also* Intellectual Disability, Definition, Classification, and Systems of Support, 11th Edition, 2010, AAIDD.

results oriented Order. In *Moore v. Texas*, the United States Supreme Court was clear that if a court “**deviated from prevailing clinical standards** [or] from the older clinical standards [it] claimed to apply” when determining whether someone is death ineligible under *Atkins*, that court violated the Eighth Amendment. *See Moore*, 137 S. Ct. at 1050, 1053.

See 2018R at 216-17. Among its concerns that the reviewing state court did not adhere to prevailing clinical standards, the *Moore* Court pointed to the reviewing courts reliance of perceived adaptive strengths to either negate or outbalance the existence of adaptive functioning deficits. “[T]he medical community focuses the adaptive functioning inquiry on adaptive deficits, *E.g.*, AAIDD-11, at 47 (“significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills”); DSM-5, at 33, 38 (inquiry should focus on “[d]eficits in adaptive functioning”, deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits). *Moore* at 1050.

In the instant case, the circuit court made the same mistake in Mr. Phillips’s case that was identified in *Moore v. Texas*. The “[reviewing court] deviated from prevailing clinical standards and from the older clinical standards [it] claimed to apply” with regard to Moore’s adaptive functioning, and instead the United States Supreme Court relied upon prevailing clinical standards and *Hall v. Florida* in granting relief. *Moore*, 137 S. Ct. at 1050. This Court should proceed to do the same.

Given that the lower court’s found that Dr. Suarez was not credible and that

his prison adaptive functioning testing was not credible, Dr. Keyes's evidence in support of adaptive deficits from both 2006 and 2018 is essentially un rebutted except for the lower court's improper reliance on adaptive strengths and criminal history to offset the adaptive deficits. The lower court's finding that Mr. Phillips does not meet prong two despite this un rebutted evidence requires a review of Dr. Keyes's findings by this Court and a grant of relief or a remand back for further evidentiary development. This is absolutely critical in the instant circumstances where no evidentiary development was allowed below.

CONCLUSION

Here, the circuit court's order and findings below as to intellectual disability were not based on competent and substantial evidence. The order rejects the findings of the state's expert, and fails to comment on the specific findings of adaptive deficits by the defense expert. In the end, although the circuit court finds that Mr. Phillips meets the criteria of significantly subaverage intellectual functioning and that he had the onset of intellectual disability in the developmental period, his adaptive deficits which allowed him to be diagnosed as ID before the age of 18 have been offset by adaptive strengths so that he no longer meets the criteria for ID and thus is not protected from the death penalty by the 8th amendment through *Atkins*. This is an unreasonable determination of the facts based on all the evidence that the court indicates it has reviewed. Mr. Phillips requests that this court enter an order finding

that he meets the criteria for intellectual disability under Florida law. In the alternative he requests that the case be returned to the circuit court for a full and fair hearing at which all the evidence can be heard with additional testimony which was not allowed pursuant to the instant order of the circuit court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been filed through the Florida State Courts e-filing portal which electronically sent a copy to of the foregoing Appellant’s Initial Brief to Melissa Roca Shaw, Asst. Attorney General, Office of the Attorney General, Capital Appeals Division, 1 SE 3rd Ave., Suite 900, Miami, Florida 33131, on November 26, 2018.

/s/ William M. Hennis, III
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CERTIFICATE OF COMPLIANCE

I hereby affirm that this Supplemental Initial Brief satisfies Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

/s/ William M. Hennis, III
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