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

REPLY BRIEF OF APPELLANT

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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:

"R" – trial record

"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;

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

Throughout its recitation of the facts the State mischaracterizes the defense expert testimony in an attempt to show the lower court erred when it found both defense experts, Dr. Caddy and Dr. Keyes, more credible than Dr. Suarez. *See* 2018R at 289 ("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"). In its attempt to discredit the defense experts, the State had no choice but to ignore the previous testimony in the record regarding intellectual disability, given that the State's own former experts called into question Dr. Suarez's findings.[1]

First, the State attempts to discredit Dr. Caddy's evaluation of Mr. Phillips by misconstruing his testimony regarding malingering and validity testing. The State claims that Dr. Caddy suggested "malingering should not be considered because people with low IQs are incapable of malingering." Answer at 5. The State also alleges Dr. Caddy "did no validity testing because he believed Appellant was

[1] As explained in the Initial Brief, the State's previous experts, Drs. Miller and Haber, accepted that Mr. Phillips' IQ score fell within the "borderline range." Accordingly, before Dr. Suarez, all the experts were in agreement that Mr. Phillips' IQ scores consistently fell within the same range. Dr. Caddy's and Dr. Keyes' relied on this evidence in deciding that validity testing was not necessary in Mr. Phillips' case. Thus, the State's assertion that only the facts from the 2006 evidentiary hearing are relevant to Mr. Phillips' holistic intellectual disability determination defies the logic of *Hall v. Florida*.

incapable of malingering." *Id*. The State then concludes that Dr. Suarez is the only credible expert because he is the only expert who conducted validity testing.[2] *See* Answer at 11, 16. However, the State's argument, like Dr. Suarez's evaluation, disregards science and cherry-picks only the facts that tend to disprove a finding of intellectual disability.

At the evidentiary hearing, Dr. Caddy was asked what would be the way to assess "whether or not Mr. Phillips [was] trying his best to answer all of the questions accurately." (T. 84). Dr. Caddy replied that in ***Mr. Phillips' situation***, a particular protocol was not the best method of assessment. According to Dr. Caddy, **"we had a lot better information than those instruments. What we had was prior test results.** And if he is going to fake then faking by a couple of points on either side of that as he – as those tests suggests, would be faking within the range of the error of measurement of the test. Now, do I believe that this gentleman has the capacity to intuit how to accomplish that mission so that his tests results look very similar five years apart and eighteen years apart? Not in this lifetime I don't." (T. 85-86) (emphasis added). While the State suggests that Dr. Caddy's evaluation lacks

[2] The State attempts to paint Dr. Suarez as a neutral expert with vast experience, but fails to mention that Dr. Suarez had not taken any course work in intellectual disability nor written or published any articles on the subject. (T. 478-79). In contrast, Dr. Keyes wrote his dissertation on the subject of malingering. (T. 179-80).

credibility for failing to conduct validity testing, Dr. Caddy clearly utilized his clinical judgment as well as the guidance of the DSM-4 in his evaluation.

The State likewise alleges that Dr. Keyes' evaluation suffers from the same flaws. However, Dr. Keyes, like Dr. Caddy, reviewed much more available information and records than Dr. Suarez, also concluded there was no evidence to suggest malingering.[3] (T. 177). Rather than acknowledge this, the State ignores the record and instead points to the circuit court's 2006 rejection of Dr. Keyes' evaluation for failing to perform a "complete evaluation that included testing for malingering." *See* Answer at 15-16. That prior finding, however, is no longer valid where after reviewing the record in 2018, the circuit court concluded that Dr. Keyes' testimony was "substantiated by science" on almost every point. *See* 2018R at 291. More significantly, the State fails to acknowledge that Dr. Suarez ignored science when he utilized the MMPI, a personality test, as a validity test instrument in formulating his opinion on malingering.

The circuit court's conclusion that Dr. Suarez's "entire evaluation and focus appear to be geared towards a desired result, namely undermining a finding of ID," is correct and supported by the record. *See* 2018R at 289. For example, Dr. Suarez

[3] Dr. Carbonell's 1987 intellectual evaluation where Mr. Phillips obtained a full scale IQ score of 75, was admitted at the 2006 evidentiary hearing. The 1987 evaluation included validity testing and the results did not indicate malingering. Dr. Suarez, however, did not review Dr. Carbonell's report or testimony. (T. 509).

administered the TONI despite knowing that the Florida Statute and Florida Administrative Code provide for use of either a Stanford-Binet intelligence test of Wechsler Intelligence Scale. Dr. Suarez testified that he felt the TONI was more appropriate due to Mr. Phillips' limited reading and writing ability and because it was developed for the "African-American subculture in this country." (T. 345). According to Dr. Suarez, African-American's were being "labeled as mentally retarded when in fact they weren't, in other words, there was a move to look at culture-free tests, and the Test of Nonverbal Intelligence was one way to approach that." *Id*. But Dr. Suarez's stated rationale contradicts the State's own former expert. At the 1988 evidentiary hearing, the State's expert, Dr. Haber, was questioned as to the appropriateness of administering the MMPI to Mr. Phillips. According to Dr. Haber, "numerous studies question the appropriateness of the use of the MMPI, which is, by the way, a personality test. It is not a test of intelligence. **But the MMPI has been questioned as a proper and appropriate tool for use with minority groups in general, and with black individuals in particular,** based upon the **heavy requirement for reading and for understanding language**…" (T-88. 696) (emphasis added).

In light of Dr. Haber's statement and the medical guidance in 1988, and Dr. Suarez's stated justification for applying the TONI to Mr. Phillips, it is unclear how the MMPI could have produced valid results in this instance. If Mr. Phillips reading

and writing ability was so poor as to justify utilizing the TONI, how then could valid results be obtained on the MMPI? The answer is they could not and Dr. Suarez's testimony to the contrary is contrary to science and not credible. Furthermore, to the extent Dr. Suarez testified he conducted actual validity testing, those results were inconsistent and included findings that were invalid with regards to the VIP. (T. 662-664). This lack of reliability in Dr. Suarez's testing/findings is further supported by the fact there was no evidence of memory malingering by Mr. Phillips on the TOMM (T. 656-658). Accordingly, the lower court's finding that Dr. Suarez is not a credible expert, is supported by the record.

REPLY TO ARGUMENT OF THE APPELLEE

a. Appellant should receive a full and fair hearing below.

As noted in the Initial Brief, the instant case is in an entirely different posture than when it was last before this Court in 2008 on the question of whether Mr. Phillips meets the definition of intellectual disability. *See* the State's procedural bar argument in the Answer at 25. The argument presented therein that Mr. Phillips is now barred from challenging the credibility of expert witnesses and this Court's 2008 findings is refuted by the lower court's agreement to review the entire record and to take into consideration Dr. Keyes' 2018 adaptive functioning evaluation of Mr. Phillips.

The State complains that "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." Answer at 27. The lower court acknowledged in its order that it was rehearing the intellectual disability claim in new circumstances based on new law where it has been established that "a court holistically consider all three prongs of the definition of ID, not just IQ scores" and also must look to "prevailing clinical standards" and not rely on "adaptive strengths developed in a controlled setting such as a prison." 2018R at 287 (Order Denying Relief) (*citing Hall v. Florida*, 134 S.Ct. 1986 (2014); *Walls v. State*, 213 So. 3d 340 (Fla. 2016); and *Moore v. Texas*, 137 S.Ct. 1039 (2017)).

The Order also set forth what the lower court's intentions were subsequent to the April 19, 2018 case management conference:

> 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. <u>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</u>.

2018R at 287 (emphasis added). Thus, the lower court undertook this review and made completely new findings as to Prong 1 and Prong 3 of the ID definition without

hearing any additional witness testimony or considering any new evidence despite the promise to review Dr. Keyes' 2018 adaptive functioning report. There obviously was new law to consider and new evidence to be heard. In light of the lower court's findings as to Prongs 1 and 3, additional evidentiary development should have been permitted. The lower court's order reveals a complete failure to consider Dr. Keyes' 2005 and 2018 findings as to adaptive deficits. Here, summary denial without a hearing was an abuse of the lower court's discretion.

The State made a time bar argument in its response to the successive Rule 3.851 motion concerning ID. 2018R at 201-205. Mr. Phillips responded in his reply to the State's response. 2018R at 221-222. The State did not argue procedural bar at the case management conference. The State has again raised its procedural bar argument in the instant appeal, stating that "Appellant unreasonably delayed filing his *Hall* motion and thereby is also time-barred from asserting his current successive claim based off the date of the *Walls* opinion…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)." Answer at 28. No ruling was ever obtained from the lower court on the procedural bar argument. It was not addressed in the lower court's final order. 2018R at 286-91. The State did not request rehearing. This argument should be deemed to be waived.

The Initial Brief set forth the ways in which this Court was wrong in 2008 to find that Dr. Keyes did no concurrent adaptive functioning evaluation. IB at 37, 39, 40. The State continues to insist that there was no concurrent evaluation to consider in 2008 and that there was nothing "new" about Dr. Keyes' 2018 evaluation: "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." Answer at 30.

The 2018 report by Dr. Keyes specifically states that he again did testing of Mr. Phillips's concurrent academic functioning. Corrected Supp. 2018R at 414 ("Harry is an elderly adult and is capable of engaging in adult behavior. However, in terms of language development and skills, he actually functions nearer to what one might expect a 15 year-old adolescent child to behave"). In 2018 Dr. Keyes also administered of the *Independent Living Scales* (ILS 1996) to Mr. Phillips. He described this instrument his report as "a practical test of one's overall adaptive functions in various real life situations." The result of the testing was that Mr. Phillips full scale score was 67, more than two standard deviations below the mean as calibrated like an IQ test, showing defective adaptive functioning. Corrected Supp. 2018R at 416.

The State contends that "[w]hile (Dr. Keyes) 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." Answer at 38. This position completely ignores reality. In both 2000 and 2018 Mr. Phillips also was administered the Adaptive Behavior Skills Result (ABAS-III), to compare his self-assessment with that of his siblings. Corrected Supp. 2018R at 414-15. The report explained the reasoning behind this testing:

> The goal here is to verify the legitimacy of the overall scores by converging them when they (reasonably) correspond to each other, a method known as 'convergent validation' (see, generally, Allport, 1949). This method allows the examiner to review and compare the most accurate data obtained in order to develop scores that are most reliable. Convergent validation also helps to assure that no single respondent's input is excessively influential to the final diagnostic decision. Fortunately, several points of data were confirmed by more than one respondent, thus increasing the reliability.

Id. at 414. The record refutes the position of the State that there was not a proper adaptive functioning work-up in the case by the Appellant and that nothing new was added in 2018.

b. Appellant's evidence below establishes prong 2 by clear and convincing evidence or, in the alternative, requires further evidentiary development in light of the findings regarding prong 1 and prong 3.

In the Order denying relief the lower court made specific credibility findings against the state psychologist, Dr. Suarez. 2018R at 289 ("[T]his Court does not find

the testimony of Dr. Suarez to be credible and gives it little or no weight in determining ID"). This finding results in the evidence introduced by Dr. Suarez not being competent and substantial evidence. Relying on such evidence to deny a claim would be an abuse of discretion. Despite the lower court's finding, the State continues to argue that his testimony in 2006 negates the need for any further evidentiary development in the area of adaptive functioning, which is now the critical issue in dispute. Such a position ignores the fact that only Dr. Keyes's evidence of adaptive functioning deficits is competent and substantial evidence under the terms of the lower court's order denying relief: "Dr. Keyes' testimony was substantiated by science on almost every point." 2018R at 291.

The Answer brief sets forth the proposition that "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." Answer at 39. 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. *See Phillips v. State*, 984 So. 2d at 512.

The prior determination by this Court in 2008, based on the circuit court order following the 2006 evidentiary hearing, has been completely undermined by the changes in the law requiring a holistic review of all three prongs of the ID definition without any consideration of Dr. Suarez's findings. The Answer brief quotes from this Court's prior postconviction opinion citing to a description of Mr. Phillips and the alleged absence of adaptive functioning deficits that relies almost exclusively on alleged "adaptive strengths" describing that process as "a fact-specific review in accordance with the DSM-4 and credibility determinations which were decided adversely to Appellant." Answer at 40. The Answer properly provides a cautionary note stating that "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," and also contends that the analysis by this Court and the prior postconviction court "did not do as such." Answer at 40-41. The record of the case reveals otherwise, and was explained in the Initial Brief. IB at 44-48.

The State indicates that the attack on using adaptive strengths and criminal behavior to negate adaptive deficits is a new "tactic" that has emerged post-*Moore*: "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." Answer at 41. This is not the case. There

was such evidence. It includes: (i) the testimony of Dr. Keyes in 2006 concerning problems with Dr. Suarez's ABAS administration in the prison setting and the cross examination of Dr. Suarez about his inadequate ABAS adaptive functioning evaluations interviews of prison officials and officers which involved guessing and speculation about Mr. Phillips's alleged adaptive strengths in prison;[4] (ii) Dr. Keyes' educational and ABAS testing of Mr. Phillips in prison in 2000 and in 2018 and his 2018 administration of the Independent Living Scales Testing to Mr. Phillips in prison; and, (iii) Dr. Keyes ABAS studies of family members in 2000 and 2018, including Harry's brother and sister, who maintained contact with Mr. Phillips while he was incarcerated.

Since May 7, 1974 Mr. Phillips has been in continual state custody except for about a total of 8 months, from June 17, 1980 until January 5, 1981 and then from August 10, 1982 until September 14, 1982. The self-limited work history record in the past 45 years is simply insufficient for anyone to make a reasonable or credible determination about Mr. Phillips's work capabilities.[5] The Answer states that "[i]t is

[4] 2/14/2006 Evidentiary hearing T. 227-36; 324-27.

[5] The Answer implicitly recognizes the conundrum presented by the lower court's reliance on Mr. Phillips's alleged adaptive strengths in the community outside of prison to refute prong 2 in violation of *Moore*. However, the State clings to both using adaptive strengths and prison evaluations to refute adaptive functioning deficits because, unlike the prior determinations in 2006 and 2008 by the circuit court and this Court, the lower court in 2018 has found Dr. Suarez and his methods and findings to be not credible. ("Although Appellant's concurrent adaptive

clear that this Court noted Appellant's behavior prior to his incarceration." Answer at 41. This is only true in so far as there was reliance in denying adaptive deficits on a limited pre-prison work history, a focus on criminal behavior including the murder for which Mr. Phillips was sentenced to death, and fragmentary school records from a segregated public school system.

This Court took no account of Dr. Keyes's findings as to adaptive functioning in 2008 because of this Court's position that they were not "concurrent". However, this Court in 2008 and the circuit court in 2006 and in 2018 did rely on these non-concurrent areas of criminal behavior and alleged adaptive strengths – such as his limited work history, based solely on his self-report, as a "short-order cook", as a dishwasher and as a garbage man during the limited time he was out of prison, to refute or negate any adaptive functioning deficits.

The State and the lower court introduced the concept of "executive functioning" into the case with regard to lower court's finding of no adaptive deficits based on findings of adaptive strengths. Answer at 42. The State's brief stated that "[t]he 2018 postconviction court found Mr. Phillips's statements during

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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." Answer at 41. (emphasis added).

interrogations by Detective Greg Smith, his refusal to confess, as well as lay stated witnesses' testimony refuted any claim that he had adaptive deficits, which included evidence of the "Bro. White" Letter." Answer at 42. The findings mentioned in the State's brief and the lower court's order failed to mention that measures of executive functioning are best understood as a component of IQ testing, rather than being associated with adaptive functioning. The term executive functioning is not referenced in either the DSM-5 Glossary of Technical Terms or Index. The concept of executive functioning is most relevant in the ID context as part of intelligence testing under Criterion A of the Diagnostic Features in DSM-5:

> Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.

Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), American Psychiatric Association 2013, at page 37.

Mr. Phillips obtained a full scale WAIS III IQ score of 74 on Dr. Keyes' 2005 test results. Corr. Supp. 2018R at 420. The IQ scores noted during the instant briefing proved to be sufficient in the opinion of the lower court to meet prong one of the ID

definition. 2018R at 288. In other words, based on the IQ testing results, Mr. Phillips has impairments in reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. However, the lower court order found that: "According to the DSM, in an ID adult, abstract thinking and executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility) are impaired." 2018R at 290. The lower court relates this to the crime for which Mr. Phillips was sentenced to death, finding that "the planning, execution and subsequent cover-up of the murder are indicative of highly adaptive behavior." *Id.* This analysis is fatally flawed. The basis for the finding is rooted in Mr. Phillips's criminal behavior and maladaptive behavior, not on an objective analysis of the adaptive deficits revealed in Dr. Keyes' work-up in conjunction with his IQ scores.

The circuit court's order found that "there is simply no evidence to suggest that the Defendant was not the author of the [Bro. White] letter." 2018R at 291; *See also* Answer at 42, footnote 12. Dr. Keyes' concerns about the authorship and source of the Bro. White letter along with the other alibi documents used by the State at trial were not unreasonable. Mr. Phillips's case is highly rare in that he was convicted of murder without physical evidence connecting him to the crime, without an eye witness and without a murder weapon. He was convicted based solely on the testimony of jailhouse informants, who testified that Mr. Phillips made unsolicited

admissions in their presence. Without their testimony, there was no case against him. The circuit court was apparently unaware that the jailhouse witnesses at trial including, Mr. Scott/Smith, Mr. Farley and Larry Hunter were revealed to have manipulated Mr. Phillips in multiple ways in order to obtain favors from the State and the prosecutor for assisting to obtain his conviction for first degree murder.

Hunter testified at trial falsely as to his motivations for testifying and the existence of a deal with the State. Hunter testified that the trial prosecutor offered to go before Hunter's sentencing judge on Hunter's behalf if Hunter was convicted on pending charges, but Hunter refused because he did not need or want the State's help. (R. 653.) Hunter testified that Mr. Phillips related to him a detailed account of the offense. Hunter's recitation of those specific details at trial was as precise as a police report. Hunter related the layout of the scene, relative locations of various landmarks, and directions of travel, etc. (R. 649-50.) Hunter also testified that Mr. Phillips attempted to enlist his support for his alibi and over a period of time provided the details of the alibi to Hunter in a series of notes. (R. 650-52.)

Mr. Phillips has not argued that letter writing is in and of itself maladaptive. Threatening witnesses, if that is what the Bro White letter does, is maladaptive behavior. The extent to which any act is infused with criminal intent may make such an act anti-social. But it is important to remember that there were no witnesses to the alleged murder in this case. Trying to paint Harry Phillips as a criminal mastermind

would be laughable but for the success of the State in manipulating the jailhouse witnesses and their testimony.

The State's brief sets up criminal behavior as a disqualifier for a diagnosis of ID, and that simply is not the existing diagnostic criteria for experts in the field: "As shown above, letter writing is not maladaptive behavior…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." Answer at 45. Calling the crime and its surrounding events a "complex crime spree" does not make it so. "[T]he 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*." Answer at 43. The briefing by Mr. Phillips disagrees with the analysis advocated by the State: "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." Answer at 44. There is little additional analysis in the lower court's order as to what additional consideration was given to the actual adaptive deficit evidence provided by Dr. Keyes in circumstances where Dr. Suarez's evidence was found to be biased, result oriented and incredible.

In the pending and currently stayed appeal before the Eleventh Circuit Court of Appeals in Mr. Phillips's case, a certificate of appealability addressed to the District Court was granted as to one issue: "whether the state courts' determination that Mr. Phillips' *Brady v. Maryland* and *Giglio v. United States* claim was without merit resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts." *Phillips v. Secretary Florida DOC*, Case No. 15-15714-P.

c. The lower court's finding as to prong 3 is dispositive.

The State's blanket statement that no evidentiary hearing is required in the instant case despite postconviction court's "improper" finding of onset of intellectual disability prior to age 18 is incorrect. Answer at 47. The Initial Brief and the instant brief have already addressed the State's position that" Appellant presents no new evidence within Dr. Keyes' 2018 report on this [adaptive functioning] prong." Answer at 47. The State also complains that "[t]he 2018 postconviction court did not have the benefit of seeing the testimony first hand to make the appropriate credibility determinations." Answer at 48. That is another reason for evidentiary development.

The State's claim that Dr. Keyes expressly admitted in prior testimony that the definition of intellectual disability required that the adaptive functioning deficits exist at the same time as the sub-average intellectual functioning was simply an

admission that the word concurrent was part of the Florida ID definition. As shown previously, he did not fail to analyze Appellant's concurrent adaptive deficits. Answer at 49. *DSM-5*, which does not include the word concurrent in its diagnostic criteria, points out two concepts that are applicable in this context:

> Adaptive 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.
>
> * * *
>
> Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition (in which case the diagnosis of intellectual disability may no longer be appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

DSM-5 at 38, 39. In the instant circumstances, where the lower court has found that Mr. Phillips met the criteria for ID prior to the age of 18, both of these considerations come into play where a 70+ long term inmate is being evaluated. Surely being in a maximum security prison for life or until you are either executed or obtain relief is a circumstance where "improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate)." So it is with Mr. Phillips.

As argued in the Initial Brief, the lower court's order and findings below as to the second prong of the ID definition were not based on competent and substantial evidence where court failed to engage with the evidence in a holistic analysis or to comment on the specific findings of adaptive deficits by the defense expert.

CONCLUSION

Here the lower court has found that Mr. Phillips was ID before the age of 18. That finding has been offset by findings of subsequent adaptive strengths and maladaptive behavior held to negate any adaptive deficits that existed in the developmental period. The finding that he no longer meets the criteria for ID. and thus is not protected from the death penalty by the 8th amendment through *Atkins* is a violation of *Moore* and 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 criterial 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.

Respectfully submitted,

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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 January 7, 2019.

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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).

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