IN THE SUPREME COURT OF FLORIDA

GALANTE ROMAR PHILLIPS,

Appellant,

v.

CASE NO. SC17-1150
Lower Tribunal No.
2006CF015566
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was convicted "of first-degree premeditated murder during the commission of a robbery, and armed robbery." Phillips v. State, 39 So. 3d 296, 301 (Fla. 2010). Phillips went to the Builder's First Source lumber yard to rob an employee.

> Phillips pointed the gun at Mr. Sweet and demanded money. At first, Mr. Sweet said he did not have any money. But in fact Mr. Sweet had $3,100 with him that day, which he intended to use to purchase a car for his son. When Phillips continued to point the gun at Mr. Sweet and demand money, Mr. Sweet put his hands up, and Phillips went into Mr. Sweet's pocket and took his money and his wallet.
>
> According to another employee who witnessed the events, when Phillips approached Mr. Sweet, Mr. Aligada began running towards them and yelling. The employee then heard two gun shots and saw Mr. Aligada fall to the ground. Mr. Sweet testified that as soon as Phillips removed the money from his pocket, Phillips turned and fired his gun two times. When Mr. Sweet saw that Phillips had shot Mr. Aligada, Mr. Sweet took off running, and Phillips began shooting at him. Phillips then jumped in Mr. Sweet's vehicle and drove off.
>
> Officers testified that Mr. Sweet's abandoned vehicle was located in the middle of the road about a block away from Builder's First. Subsequent testing of the vehicle revealed that DNA consistent with Phillips's DNA was on the gearshift. Further, a DNA analyst testified that the possibility of finding someone in the population who had the same DNA profile as that found on the gearshift in Mr. Sweet's truck was approximately one in two trillion Caucasians, one in 9.5 trillion African-Americans, and one in 6.1 trillion Southeastern Hispanics.

Id. at 299 (footnote omitted). Phillips also made admissions to his girlfriend and to the police. Id. at 299-300.

At the penalty phase, "the jury recommended, by a vote of seven to five, that Phillips be sentenced to death." Phillips, 39 So. 3d at 301.

> The trial court found three aggravating factors: (1) Phillips was convicted of another capital felony or of a felony involving the use or threat of violence to the person on December 17, 1996, and of grand theft on February 27, 2006(great weight); (2) the crime for which Phillips was to be sentenced was committed while the defendant was engaged in the commission of the crime of armed robbery (great weight); and (3) the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody (great weight).
>
> In addition, while the trial court found no statutory mitigating circumstances, it noted the following nonstatutory mitigating circumstances and assigned each a relevant weight: Phillips (1) frequently changed homes and schools as a child (slight weight); (2) suffered from childhood mental illness (slight weight); (3) suffered from adult mental illness (no weight); (4) suffered childhood learning disabilities (slight weight); (5) did not take or was not properly administered drugs prescribed to him for childhood attention-deficit disorder (slight weight); (6) had a difficult birth (slight weight); (7) was raised in drug and crime-infested neighborhoods (slight weight); (8) was raised by a mentally ill mother (some weight); (9) was raised without any stable father figure (slight weight); (10) was openly disfavored as a child (slight weight); (11) was deprived of food and clothing as a child (little weight); (12) suffered physical abuse as a child (some weight); (13) suffered mental abuse as a child (moderate weight); (14) suffered the loss of a grandmother who was the only adult who loved him as a child (moderate weight); (15) was raised in poverty (slight weight); (16) suffered a devastating on-the-job injury (slight weight); (17) is reverent (slight weight); (18) is trustworthy with family members (no

> weight); (19) is supportive of family members (no weight); (20) is protective of family members (no weight); (21) respects and helps elderly people (slight weight); (22) is kind to animals (slight weight); (23) respects the jury and the judicial system (slight weight); (24) is friendly (slight weight); and (25) is remorseful (no weight).

Id. at 301-02 (footnote omitted). On direct appeal, Phillips raised the following claims:

> (A) the trial court erred in finding and instructing the jury on the avoid arrest aggravator; (B) the trial court erred in instructing the jury during the penalty phase; (C) the death sentence is not proportionate; and (D) the trial court erred in not either striking the jury panel or granting a new trial after some jurors observed Phillips wearing shackles, handcuffs, and a jail uniform. In addition to addressing each of these claims below, we also address (E) whether the evidence was sufficient to sustain Phillips's conviction.

Id. at 302 (footnote omitted).

On direct appeal, this Court affirmed Appellant's conviction and sentence of death. Phillips, 39 So. 3d at 309. The United States Supreme Court denied Appellant's petition for writ of certiorari on November 1, 2010. Phillips v. Florida, 562 U.S. 1010 (2010).

On October 28, 2011, Appellant filed a Motion to Vacate Judgements of Conviction and Sentence Under Rule(s) 3.850/3.851 with Special Request for Leave to Amend. On March 14, 2012, Appellant filed an Amended Motion (Motion). On July 20, 2012, the post-conviction trial court conducted a Huff[1] hearing. An

[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

evidentiary hearing was conducted September 9-11, 2014. On May 12, 2015, Appellant filed a "Motion for Postconviction Relief Based on Newly Discovered Evidence." The evidentiary hearing continued on July 10 and December 14, 2015, and January 26 and April 11, 2016. On January 12, 2017, Appellant filed an additional Motion to Amend, raising Hurst. Hurst v. Florida, 136 S.Ct. 616 (2016); Hurst v. State, 202 So. 3d 40 (Fla. 2016).

Appellant raised seven claims during post-conviction. The claims are as follows: (1) ineffective assistance of counsel for failing to investigate and present mitigation; (2) ineffective assistance of counsel for failing to raise intellectual disability; (3) ineffective assistance of counsel for failing to object to prosecutors statements during jury selection and jury instructions; (4) ineffective assistance of counsel for failing to object to improper statements during the penalty phase; (5) ineffective assistance of counsel for failing to prepare for all potential aggravators; (6) prosecutorial misconduct for failing to list one of the aggravating factors prior to closing argument; and (7) the sentence is unconstitutional pursuant to Hurst. The Appellant also raised a claim of newly discovered evidence of intellectual disability in light of Hall. Hall v. Florida, 134 S.Ct. 1986 (2014).

On April 18, 2017, the post-conviction trial court granted Appellant a new penalty phase based on ineffective assistance of

counsel related to the investigation and presentation of mitigation and based on the Hurst error. The post-conviction trial court denied all other claims.

At the evidentiary hearing, competing experts testified and presented evidence related to intellectual disability. Additionally, Appellant's trial counsel testified regarding the claims of ineffective assistance of counsel.

For the evidentiary hearing, Appellant employed a defense expert, Dr. Ouaou, a licensed psychologist, who testified regarding intellectual disability. (P.C. Vols. III 9-17, 25; V 46-47). In 2013, Dr. Ouaou administered a Wechsler Adult Intelligence Scale-Fourth Edition test, and at the age of thirty-four, Appellant received a Full Scale IQ score of 79. (P.C. Vols. III 17, 24-29, 93; V 60-61). Dr. Ouaou explained that psychological testing uses a confidence interval, which generally is plus or minus five, so that Appellant's true score would fall between 75 to 83, with a 95 percent confidence interval. (P.C. Vol. V 61). A 95 percent confidence interval means that 95 percent of the time when the test is repeated the score will fall between 75 and 83. (P.C. Vol. V 62). Before Dr. Ouaou's test, the following IQ tests were administered to Appellant prior to age eighteen: WISC-III, Full Scale IQ score of 68, at age fifteen; Stanford-Binet, Full Scale IQ score of 80, at age six; WISC- R, Full Scale IQ score of 89, at age six.

(P.C. Vol. III 54-56, 61-62, 67, 113-14).

Prior to the decision in Hall, Dr. Ouaou would have opined that Appellant was not intellectually disabled and as such, Dr. Ouaou did not explore Appellant's adaptive functioning. (P.C. Vol. III 93). After Hall, Dr. Ouaou evaluated Appellant's adaptive functioning prior to age 18 by asking individuals who knew him as a minor to recollect deficits in communication, daily living skills, and socialization. (P.C. Vol. V 48-73, 86-87, 107). Based on his post-Hall assessment of Appellant's adaptive functioning and the IQ score of 68 prior to age eighteen, Dr. Ouaou opined that Appellant meets all three prongs of the test for intellectual disability. (P.C. Vols. V 61-65, 72-77, 86-87, 107, 109-10; VI 53, 107).

The State expert, Dr. Prichard, a licensed clinical psychologist, also assessed Appellant to determine if he is intellectually disabled. (P.C. Vol. VII 5-11). In his opinion, Appellant is not intellectually disabled, and that the most appropriate diagnosis for Appellant would be antisocial personality disorder as seen in his issues with stealing, being aggressive, his commitment to Dozier School for Boys for conduct and criminal problems, and his prison sentences beginning when he was seventeen and behavioral issues in prison. (P.C. Vol. VII 59-60). Dr. Prichard was also of the opinion Appellant had substance abuse issues. (P.C. Vol. VII 59-60).

Dr. Prichard did not mention Appellant's IQ score of 68. (Order at X). Based on Appellant's score of 79, Dr. Prichard concluded that Appellant did not meet prong one of the intellectual disability test. (P.C. Vol VII 18, 42). As such, Dr. Prichard did not believe that adaptive functioning needed to be explored because the issue of intellectual disability was moot. (P.C. Vol VII 18, 42).

However, Dr. Prichard did review Dr. Ouaou's research and testing as related to Appellant's adaptive functioning. Dr. Prichard called into question certain aspects of Dr. Ouaou's testing of Appellant's adaptive functioning. Dr. Prichard was concerned about the reliability of data gathered from close relatives after a death sentence has been imposed as such witnesses tend to be biased in favor of the Appellant. (P.C. Vol. VII 49-50). Additionally, retrospective assessments are generally unreliable as individuals generally do not have a good recollection of the adaptive skills of an individual from over twenty years prior to being asked to recall. (P.C. Vol. VII 56-58). As an example, Dr. Prichard pointed to one family member who placed Appellant's expressive and receptive language skills at a one- to three-year-old level. (P.C. Vol. VII 58, 70-71). Dr. Prichard explained that this assessment is in direct contradiction to the majority of evidence he reviewed about Appellant, including audio recordings of Appellant. (P.C. Vol.

VII 58, 70-71). Additionally, Dr. Prichard pointed out that the composite score on Dr. Ouaou's adaptive assessment places Appellant at a profound level of intellectual disability most often found in individuals who are generally in diapers, cannot change, clean, or feed themselves and are generally institutionalized due to these limitations. (P.C. Vol. VII 54). Again, this was in direct contradiction to the evidence that Dr. Prichard reviewed. (P.C. Vol. VII 58, 70-71).

Dr. Prichard testified that Appellant had a lot of substance abuse problems that contributed to his adaptive deficits, and that Appellant's specific adaptive issues usually go together with antisocial orientation or conduct disorder orientation. (P.C. Vol. VII 60). While evidence demonstrated Appellant did not have socially appropriate behavior consistent with his peers in that he was destructive, lied, stole, and as a result spent time in the juvenile justice system and prison, this was also explained as evidence of a conduct disorder. (P.C. Vols. III 33; VII 25, 49, 59-60).

Overall, conflicting evidence was presented at the evidentiary hearing related to Appellant's adaptive deficits. Testimony was presented that Appellant had difficulty with emotions, behavior, interpersonal relationships, independence, motivation, maintaining employment, and appropriate communication. (P.C. Vols. I-VII). In contrast, however,

Appellant conducted his behavior appropriately during court proceedings, and at his trial he effectively communicated to the court about his counsel's failure to file a motion he wanted filed with the court. (R.O.A. Vols. VIII 1414-22; XIX 1208; Supp. R.O.A. Vol. I 34-36; P.C. Vol. III 88, 103-04). Additionally, the judge observed Appellant act appropriately during the guilt phase, penalty phase, sentencing, and post-conviction proceedings. (Order at 525).

Other information that indicated Appellant is not deficient in adaptive functioning includes teaching himself, since his mother was absent, to wash clothes, cook, etc. while growing up. (P.C. Vol. VII 61). This ability to self-teach is demonstrative adaptive capacity that is inconsistent with being intellectually disabled. (P.C. Vol. VII 61-61). Additionally, Appellant helped an individual fill out applications and discussed books with his sister while incarcerated. (P.C. Vols. I 197; III 35; V 77; VII 50-51). Also, Appellant was employed at various times, though he did have difficulty maintaining employment. (P.C. Vol. II 58; V 17-18, 93-94, VII 47, 93). Appellant also had a girlfriend who he lived with for a short period of time. (P.C. Vol. I 58, 195). As for Appellant's ability to live independently, evidence was presented that Appellant lived with and cared for his sister as an adult and gave her money after the offense. (R.O.A. Vol. XVIII 1105). Appellant told one expert he had his own place and

paid rent while working at the railroad. (P.C. Vol. V 16, 24, 94). Additionally, Appellant planned to commit the offense for which he was found guilty, and had an escape plan, which exhibited self-preserving behavior after the crime. (P.C. Vols. I 40, 72; III 33, 86-87, 97-98; IV 50-51, 54, 71; V 74-75, 118, 122-24; VII 25, 49, 59-60).

Based on this evidence, the post-conviction trial court concluded that Appellant is not intellectually disabled. (Order at 255-56). Specifically, the court found Appellant's "deficits in adaptive functioning did not occur concurrently with significant subaverage generally intellectual functioning." (Order at 256).

Appellant's trial counsel did not file a motion for determination of intellectual disability as a bar to execution prior to the guilt phase or penalty phase proceedings. Fla. R. Crim. P. 3.203. However, prior to the guilt phase, the trial court appointed a mental health expert, Dr. Bloomfield, who conducted a psychological evaluation of Appellant for competency purposes. (P.C. Vol. II 39). Dr. Bloomfield stated in his communication with Appellant that he spoke clearly, understood there is a guilt and sentencing phase of the proceeding; was rational, lucid, coherent, and able to provide coherent information about the crime; had the capacity to testify relevantly and coherently; was alert and oriented to all domains;

coherently answered questions; presented his thoughts in an appropriate and relevant manner; and Appellant's thoughts were clear, coherent, well organized, and relevant. (P.C. Vol. II 40-42). Although Dr. Bloomfield did not analyze Appellant for intellectual disability or assess him for brain damage, no issues about either were raised in his mind; however, Dr. Bloomfield did advise counsel of issues relevant to Appellant's mental health that might be useful for the penalty phase in terms of mitigating circumstances. (P.C. Vol. II 42-43). Based on this advice, two additional doctors were retained to provide mental health mitigation during the penalty phase. (P.C. Vol. I 125).

At trial, Appellant was represented by Mr. Shea and Mr. Anderson. At the evidentiary hearing, Mr. Shea testified that in his dealings with Appellant for more than a year and a half, Appellant never demonstrated any characteristics of intellectual disability. (P.C. Vol. I 58). Mr. Shea testified he listened to Appellant's jail call recording and interview with police, and did not have concerns about Appellant's comprehension of what was being asked, and that Appellant's statements were coherent. (P.C. Vol. I 100). Based on these observations, Mr. Shea said he had no reason to believe Appellant was intellectually disabled. (P.C. Vol. I 58). Similarly, Mr. Anderson stated he had no problem whatsoever communicating with

Appellant during their meetings, and did not feel that Appellant met the requirements for intellectual disability. (P.C. Vol. I 165-66). Mr. Anderson reviewed the transcript of Appellant's interview with police and his recorded statement to his sister while in jail and stated that Appellant did not have any problem understanding what he was being asked or discussing what occurred. (P.C. Vol. I 195). Appellant also alerted defense counsel to jurors seeing him in jail clothing prior to the start of trial and effectually testified about the incident during the trial. (P.C. Vol. I 101-02; State's Ex. 1).

Trial counsel did not have the IQ test from the Dozier school at the time of trial. Mr. Shea testified they did not know Appellant had been administered an IQ test at Dozier. (P.C. Vol. I 41-43). Mr. Anderson testified he did not obtain the records from the Dozier School for Boys, although he attempted to but was told they were lost. (P.C. Vol. I 129, 134).

SUMMARY OF THE ARGUMENT

Since Appellant is receiving a new penalty phase and Appellant's claims on appeal all relate to his penalty phase, this appeal should be dismissed as unripe and moot. Appellant was granted a new penalty phase pursuant to the post-conviction court's finding of ineffective assistance of counsel during the penalty phase and finding of Hurst error. Appellant's two claims on appeal relate to the sentencing portion of his trial, which has now been

vacated. As such, his claim of ineffective assistance of counsel during the penalty phase is moot. Appellant's claim of intellectual disability is not ripe for appellate consideration unless Appellant is re-sentenced to death. As such, this appeal should be dismissed.

The post-conviction trial court properly denied the claim of newly discovered evidence of intellectual disability. The post-conviction trial court found that Appellant's deficits in adaptive functioning did not occur concurrently with significant subaverage general intellectual functioning. As such, Appellant did not demonstrate that he is intellectually disabled. Thus, the post-conviction trial court was correct in holding that the evidence presented was not of a nature that would yield a less severe sentence. This Court should deny Appellant's claim of intellectual disability.

The post-conviction trial court properly denied the claim of ineffective assistance of trial counsel for not filing a motion to preclude the death penalty based on intellectual disability. Appellant failed to demonstrate that his trial counsel was both deficient and that any deficiency was prejudicial to him for not raising a claim of intellectual disability at trial. The expert testimony presented at the post-conviction hearing demonstrated that Appellant is not intellectually disabled. Because Appellant is not intellectually disabled, trial counsel could not be

considered deficient for failing to raise a motion related to intellectual disability. Nor could this have prejudiced Appellant as only a finding of intellectual disability is a bar to execution. As the post-conviction trial court properly denied Appellant's ineffective assistance of counsel claim, this Court should also deny the claim.

The post-conviction trial court properly denied the remaining claims and the failure to brief the claims constitutes waiver. Appellant failed to brief the additional claims which were denied by the post-conviction trial court. These claims are considered waived. Additionally, the post-conviction trial court did not err in denying the remaining claims.

ARGUMENT

ISSUE I: WHETHER THIS APPEAL SHOULD BE DISMISSED IN LIGHT OF THE POST-CONVICTION TRIAL COURT'S ORDER GRANTING A NEW PENALTY PHASE

Appellant raises two claims on appeal; intellectual disability and ineffective assistance of counsel for failure file a motion for determination of intellectual disability as a bar to execution. Both of these claims relate to the penalty phase proceedings. In the April 18, 2017, Order, the post-conviction trial court granted Appellant a new penalty phase. (Order at 256). Thus, Appellant's claims raised on appeal are moot and unripe as he is receiving a new penalty phase.

A case becomes moot for purposes of appeal where a change of circumstances prior to the appellate ruling makes it impossible for the court to grant a party any effectual relief. See Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings, 948 So. 2d 705, 710 (Fla. 2007) (citing Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992) (holding an "issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect")). Since a new penalty phase has been granted in Appellant's case, a determination of disability will occur prior to sentencing. Additionally, Appellant will be able to present new mitigation evidence, including evidence related to his claim of intellectual disability, during those proceedings. As such, the controversy over whether counsel was ineffective at the vacated penalty phase is no longer of consequence.

Prior to the new penalty phase, Appellant will have the opportunity to litigate whether he is ineligible for the death penalty due to an intellectual disability. Fla. R. Crim. P. 3.203(d) (the Motion "shall be filed not later than 90 days prior to trial. . ."). Appellant will also have the opportunity to challenge the trial court's ruling on intellectual disability during his appeal after completion of the new sentencing phase. The trial court may or may not rely on the post-conviction proceedings in considering intellectual disability. New or

additional evidence may be presented to the trial court prior to the new penalty phase. Additionally, there may never be a new penalty phase if there is a plea or if the State decides not to re-seek the death penalty. As there is no final order on intellectual disability and there is no final death sentence in Appellant's case, an appeal challenging whether Appellant is intellectually disabled and cannot be executed is not ripe for this Court's consideration. See Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citations omitted).

Appellant's two claims relate to the sentencing phase of his trial which has been vacated. Since Appellant has been granted a new penalty phase, his claim of ineffective assistance of counsel is moot and his claim of intellectual disability is not ripe. As such, this appeal should be dismissed.

ISSUE II: WHETHER THE POST-CONVICTION TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF AN INTELLECTUAL DISABILITY

Appellant claims to be intellectually disabled and thus not eligible for execution under Atkins. Atkins v. Virginia, 536 U.S. 304, 320 (2002); Hall, 134 S.Ct. at 1986. However, Appellant does not meet the criteria for intellectual disability. The post-conviction trial court properly denied this claim and this Court should deny Appellant's claim as well.

"In reviewing intellectual disability determinations, this Court has employed the standard of whether competent, substantial evidence supports the post-conviction trial court's determination." Salazar v. State, 188 So. 3d 799, 812 (Fla. 2016) (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007); Brown v. State, 959 So. 2d 146, 149 (Fla. 2007) ("This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.")). "However, to the extent that the [trial] court decision concerns any questions of law, we apply a de novo standard of review." Salazar, 188 So. 3d at 812 (citing Dufour v. State, 69 So. 3d 235, 246 (Fla. 2011)).

During post-conviction, Appellant raised a claim of intellectual disability as a claim of newly discovered evidence in light of Hall. In order to obtain relief in light of newly discovered evidence, an appellant must meet a two-prong test. "First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known it by the use of due diligence." Tompkins v. State, 994 So. 2d 1072, 1086 (Fla. 2008). Further, to "be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence." Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008); Fla. R. Crim. P. 3.851. Since

appellant filed his claim of newly discovered evidence within one year of the decision in Hall, the post-conviction trial court was correct in considering his claim to be timely filed. Thus, Appellant meets prong one of the newly discovered evidence test.

"If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Jimenez, 997 So. 2d at 1064 (citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). Only an affirmative finding of intellectual disability is a bar to the imposition of the death penalty. Fla. R. Crim. P. 3.203. Because the post-conviction trial court properly found that Appellant is not intellectually disabled, Appellant cannot demonstrate that the evidence related to intellectual disability would yield a less severe sentence. Additionally, Appellant is receiving a new penalty phase, during which he can re-raise this issue and/or present the evidence supporting his claim of intellectual disability as mitigation.

Under Florida's three-prong test for intellectual disability, Appellant must demonstrate "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." Glover v. State, 226 So. 3d 795, 808 (Fla. 2017) (citing Salazar, 188 So. 3d at 811); Fla. R. Crim. P. 3.203; Fla. Stat. § 921.137(1). "Although Hall requires courts to consider

all three prongs of intellectual disability in tandem, [this Court has] recently reiterated that '[i]f the defendant fails to prove any one of these components, the defendant will not be found intellectually disabled.'" Quince v. State, case no. SC17-127, 2018 WL 458942, *4 (Fla. Jan. 18, 2018) (citing Salazar, 188 So. 3d at 810).

At the evidentiary hearing, there were two competing expert opinions related as to whether Appellant qualifies as intellectually disabled. The defense expert, Dr. Ouaou, opined that Appellant does qualify as intellectually disabled based on the IQ score of 68 and the results of his testing for adaptive functioning. Conversely, Dr. Prichard, the state's expert, opined that Appellant does not meet the criteria for intellectual disability because he fails to meet the IQ score based on his 79 and prior 89 and 80. (P.C. Vol. VII 42, 59). Dr. Prichard also took issue with the methodology of the testing for determining adaptive functioning and onset prior to age eighteen prongs of the test. (P.C. Vol. VII 42, 59). Ultimately, the post-conviction trial court's opinion finds middle ground, finding some aspects of each expert's testimony as more reliable than the other aspects.

The first prong of the test for intellectual disability requires an appellant to demonstrate subaverage intellectual functioning, which is most often demonstrated by an IQ test below 70. "Significantly subaverage general intellectual functioning is

defined as performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." Jones v. State, 231 So. 3d 374, 375 (Fla. 2017) (citing Fla. Stat. § 921.137(1) (quotations omitted)). A failure to meet the first prong of the intellectual disability test means that an appellant cannot meet "his burden to demonstrate that he is intellectually disabled." Quince, 2018 WL 458942 at *4.

The post-conviction court concluded that there was no evidence that undermined Dr. Ouaou's interpretation of the range of Appellant's IQ scores and no evidence to undermine Dr. Ouaou's opinion that Appellant has at least one IQ score which falls within the qualifying range of significantly subaverage general intellectual functioning. (Order at 214). Since Dr. Prichard did not mention the IQ score of 68, the post-conviction court had no evidence that this score should not be considered as meeting the requirements of prong one of the intellectual disability test.

The second prong of the test for intellectual disablity relates to adaptive functioning. "Adaptive behavior means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibly expected of his or her age, cultural group, and community." Jones, 231 So. 3d at 375 (citing Fla. Stat. § 921.137(1) (quotations omitted)). Even if an appellant has a low IQ score, he is not intellectually

disabled if he does not demonstrate deficits in adaptive functioning. See Snelgrove v. State, 107 So. 3d 242, 253 (Fla. 2012) (no adaptive deficit where an appellant can maintain significant family relationships, communicate well with others, register complaints while in prison, and request medical assistance); Hodges v. State, 55 So. 3d 515, 533-37 (Fla. 2010) (ability to copy letters, sign his name, and perform employment as a cook, garbage collector, and dishwasher demonstrate no deficit in adaptive functioning despite IQ scores of 62, 66, and 69); see also Dufour, 69 So. 3d at 244-49; Jones v. State, 966 So. 2d 319, 323, 328 (Fla. 2007); Rogers v. State, 948 So. 2d 655, 666-68 (Fla. 2006); Burns v. State, 944 So. 2d 234, 248-49 (Fla. 2006); Rodriguez v. State, 919 So. 2d 1252, 1266 (Fla. 2005).

Despite conflicting testimony about Appellant's adaptive functioning at the post-conviction evidentiary hearing, the post-conviction trial court concluded that Appellant failed to demonstrate a deficit in adaptive functioning. The court relied on specific evidence in arriving at this conclusion, including the fact that the Appellant had a girlfriend, that he was employed, that he was able to learn how to care for himself during the absence of his mother, that he helped another individual fill out applications, and that he lived independently.

The court also found Dr. Prichard's testimony persuasive regarding the flaws and unreliability in Dr. Ouaou's research and

conclusions as related to adaptive functioning. (Order at 525). Appellant also planned to commit the robbery in the instant case, had an escape plan, and exhibited self-preservation in the aftermath of the crime. (Order at 251). Additionally, the judge's own observations of Appellant's conduct during various court proceedings and Appellant's ability to communicate with the Court was persuasive in finding that Appellant failed to meet prong two of the intellectual disability test. (Order at 525).

The third prong of the intellectual disability test relates to onset of the intellectual disability. The Appellant must demonstrate that the "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" manifested between the time of "conception to age 18." Jones, 231 So. 3d at 375 (citing Fla. Stat. § 921.137(1) (quotations omitted)). The post-conviction court found that Appellant failed to demonstrate manifestation of subaverage intellectual functioning concurrent with deficits in adaptive behavior prior to age eighteen.

On the third prong, the court found Dr. Prichard's testimony that Appellant has an antisocial personality disorder persuasive in explaining some of Appellant's maladaptive behavioral behaviors, such as stealing and being aggressive. (Order at 254). The post-conviction trial court concluded that in conjunction with

prong two, Appellant failed to establish that any intellectual deficiencies manifested before age eighteen. (Order at 254).

The post-conviction court conducted a very thorough review of the evidence related to intellectual disability. The court's conclusions are in accord with and not contrary to this evidence. Competent and substantial evidence supports the post-conviction trial court's determination that Appellant is not intellectually disabled. Thus, this Court should affirm the post-conviction trial court and deny Appellant's claim of intellectual disability.

ISSUE III: WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF INTELLECTUAL DISABILITY

Appellant claims that his trial counsel "conducted an inadequate investigation into Mr. Phillips's mental mitigation," and specifically "did not initiate any investigation into a possible mental deficiency." (Brief at 29-30). Since the post-conviction trial court properly found that Appellant is not intellectually disabled, Appellant cannot demonstrate that his trial counsel was deficient or that he was prejudiced by his counsel's failure to raise intellectual disability.[2] Therefore,

[2] Appellant raised four separate ineffective assistance of counsel claims to the post-conviction trial court: (1) failure to investigate and provide sufficient background information to his mental health expert and present mitigation at the penalty phase, (2) failure to investigate and call witnesses in the penalty phase, (3) failing to discover and argue intellectual disability, and (4) failure to present any known mitigation at the Spencer hearing. The post-conviction trial court granted relief on three of these four claims. (Order at 256). Thus, the only issue on appeal is whether trial counsel were ineffective in failing to discover and argue intellectual disability.

the post-conviction trial court's denial of Appellant's claim was proper.

This Court reviews the post-conviction trial court's denial of an ineffective assistance of counsel claim as a mixed question of law and fact. This Court must defer to the post-conviction trial court's findings of fact that are supported by competent, substantial evidence, and review the post-conviction trial court's application of the law to those facts de novo. Carter v. State, 175 So. 3d 761, 767 (Fla. 2015).

To establish ineffective assistance of counsel, Appellant must satisfy a two-prong test. Strickland v. Washington, 466 U.S. 668 (1984). To meet this Strickland test, an appellant must demonstrate both that his counsel was deficient and that he was prejudiced by this deficiency. Id. at 687. Here, since Appellant is not intellectually disabled, the post-conviction trial court correctly concluded that Appellant's trial counsel not deficient and Appellant suffered no prejudice from a failure to file a motion for determination of intellectual disability as a bar to execution.

In order to show that "counsel's assistance was so defective as to require reversal" Appellant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The post-conviction trial court

properly determined that trial counsel were not deficient for failing to raise the issue of intellectual disability.

As discussed in Issue II above, Hall was not decided prior to Appellant's case. Thus, at the time of Appellant's trial, "a prisoner deemed to have an IQ above 70" foreclosed "all further exploration of intellectual disability. . . ." Hall, 134 S.Ct. at 1990. At the time of trial, Appellant's trial counsel were in possession of two prior IQ tests for appellant, one with a score of 80 and one with a score of 89. Based on this information alone, trial counsel were not unreasonable in deciding not to file a motion related to intellectual disability at trial.

Additionally, even Dr. Ouaou's own pre-Hall examination concluded that Appellant was not intellectually disabled. Though his post-Hall examination concluded that Appellant was intellectually disabled, a conclusion with which the post-conviction court disagreed, trial counsel was not defective for acting under prevailing standards of intellectual disability during trial. Further, a post-conviction expert's determination that Appellant is intellectually disabled does not establish deficiency. See Brant v. State, 197 So. 3d 1051, 1069 (Fla. 2016) ("we have repeatedly stated that trial counsel is not deficient because the defendant is able to find postconviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel"); Carroll v. State, 815 So. 2d 601,

618 (Fla. 2002) ("The fact that Carroll has now secured the testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient."); Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2000) ("The fact that Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted. . . .").

Though appellant had an IQ test done at age sixteen while at the Dozier school, trial counsel did not have access to this test at the time of trial. Trial counsel requested records from the Dozier school and was told that there were no records. The failure of counsel to obtain this record was not due to a failure of diligence on the part of trial counsel. Thus, Appellant's trial counsel were not deficient in being unaware that Appellant had an IQ score that would have invoked intellectual disability at the time of his trial.

Further, from their interactions with Appellant, trial counsel were not concerned that Appellant was intellectually disabled. Trial counsel testified that Appellant was involved in his defense and appeared to understand and engage in a way that did not cause concern that Appellant was intellectually disabled. Additionally, trial counsel had mental health providers examine Appellant related to other issues such as competency. None of these interactions caused the mental health providers to bring the

issue of intellectual disability to the attention of trial counsel. Surely a mental health provider, even if not specially trained in administering an examination related to intellectual disability, would have recognized and mentioned the issue to trial counsel if they believed there was an intellectual disability.

Based on the foregoing evidence, trial counsel's failure to raise intellectual disability was not unreasonable. Thus, the post-conviction trial court's decision, which was based on competent and substantial evidence, was correct in determining that trial counsel were not deficient when they did not raise the issue of intellectual disability.

In addition to demonstrating deficiency, in order meet the Strickland test, an appellant must also "show that the deficient performance prejudiced the defense" by demonstrating that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. In the context of ineffective assistance of counsel for failing to file a motion for determination of intellectual disability as a bar to execution, an appellant can demonstrate prejudice only if he is, in fact, intellectually disabled and thus execution is barred. Thus, even if trial counsel should have raised the issue of intellectual disability at trial, Appellant cannot demonstrate that he was prejudiced because they did not raise the issue.

A finding of intellectual disability constitutes a bar to imposition of the death penalty. Fla. R. Crim. P. 3.203. Since the post-conviction trial court found that Appellant is not intellectually disabled, Appellant cannot demonstrate that he was prejudiced solely because his counsel did not file a motion related to intellectual disability. Even if the post-conviction trial court's determination that Appellant is not intellectually disabled is incorrect, based on the facts at the time of trial and the requirements pre-Hall, Appellant would not have been considered intellectually disabled at trial. Even Appellant's own expert, Dr. Ouaou, using pre-Hall standards, opined that Appellant was not intellectually disabled. Thus, Appellant cannot demonstrate that his trial counsel's failure to file a motion related to intellectual disability prejudiced him.

Here, the post-conviction trial court properly applied Strickland to Appellant's claim and held that Appellant failed to demonstrate that trial counsel were deficient in not raising a claim of intellectual disability. Appellant also failed to demonstrate how counsel's failure to raise a claim of intellectual disability prejudiced him. Thus, the post-conviction trial court properly denied Appellant's claim of ineffective assistance of counsel. Because the post-conviction court's finding was based on competent and substantial evidence, this Court should also deny Appellant's claim.

ISSUE IV: WHETHER THE POST-CONVICTION TRIAL COURT IMPROPERLY DENIED VARIOUS OTHER CLAIMS BELOW

Appellant seeks to raise four claims by briefly referencing arguments made in his motion for post-conviction relief and submitting them without briefing to this Court. This Court has long held such claims to be deemed waived. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Braddy v. State, 219 So. 3d 803, 825 (Fla. 2017) (quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)); see also Barwick v. State, 88 So. 3d 85, 101 (Fla. 2011) ("general references to other pleadings are not sufficient to preserve a challenge in a collateral proceeding"); Jones v. State, 928 So. 2d 1178, 1182 (Fla. 2006) (claims that contain merely conclusory arguments are insufficient to state an issue). Because Appellant did not brief the four issues raised in Claim III of his brief, this Court should deem them waived.

CONCLUSION

WHEREFORE, this Court should affirm the denial of Appellant's post-conviction motion and affirm the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of February, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Frank Tassone, Esq. at frank@tassonelaw.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ *Jennifer A. Donahue*
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