IN THE SUPREME COURT OF FLORIDA
State of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC17-1150
L.T. NO.: 16-2006-CF-015566

GALANTE ROMAR PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Fourth
Judicial Circuit, in and for Duval County, Florida

Honorable Mallory Cooper
Judge of the Circuit Court, Division CR-G

APPELLANT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENTS IN REPLY

Issue One. The appellee has failed to demonstrate that this appeal should be dismissed as both moot and not ripe for review. The appellant's claim of ineffective assistance of counsel, for failure to investigate and present evidence of his intellectual disability, is not moot because it presents an issue that can be resolved by judicial determination, or in the alternative, presents an issue that is capable of repetition. Furthermore, the appellant's claim of intellectual disability is ripe for review because the appellant has not presented a claim of possible future incompetence to be executed, but a claim of intellectual disability that is not contingent upon future review.

Issue Two. The appellee has not shown the trial court correctly denied Appellant's Motion for Postconviction Relief based on Newly Discovered Evidence, as the appellant demonstrated he is intellectually disabled, pursuant to Hall v. State; the state's expert, Dr. Prichard, did not perform the correct analysis or offer dispositive testimony of the appellant's intellectual disability.

Issue Three. The trial court erred in determining Appellant's trial counsel was not ineffective at the guilt and penalty phases of his trial for failing to discover and argue he was intellectually disabled and therefore, barred from execution under the Eighth Amendment to the United States Constitution.

ARGUMENTS

ISSUE I

IN REPLY: THIS APPEAL SHOULD NOT BE DISMISSED AS MOOT AND NOT RIPE BECAUSE THE APPELLANT HAS ALREADY BEEN GRANTED A NEW PENALTY PHASE.

The appellee argues the appellant's "claim of ineffective assistance of counsel" should be dismissed as moot, and his "claim of intellectual disability" is not ripe, because the appellant has been granted a new penalty phase (Answer Brief at 14-16.) The appellant respectfully disagrees.

The appellant's claim of ineffective assistance of counsel, as related to uncovering evidence of his intellectual disability, and raising at the trial court level to preclude a death sentence, does not present an issue that is moot. "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992)(*citing* Dehoff v. Imeson, 153 Fla. 553, 15 So. 2d 258 (1943). Regardless of whether the trial court granted the appellant a new penalty phase, the appellant's death sentence stands and thus, the controversy has not been "fully resolved that a judicial determination [would] have no effect."

Should this Honorable Court consider the appellee's argument that the ineffective assistance of counsel claim as moot, it is notable that an otherwise moot case will not be dismissed: (1) when the questions raised are of great public

importance, or (2) are likely to recur; or (3) if collateral legal consequences that affect the rights of the party flow from the issue to be determined." Id. This case presents an issue that is "capable of repetition" and therefore, not moot. *See* Turner v. State, 120 So. 3d 187, 188 (Fla. 2d DCA 2013 (holding the defendant's postconviction motion to vacate conviction was not rendered moot because he had completed his sentence); Hagan v. State, 853 So. 2d 595, 597 (Fla. 5th DCA 2003) (holding defendant's appeal not moot because the sentencing errors where "capable of repetition, and thus, not moot.")

Appellee also alleges a determination of whether the appellant is intellectually disabled is not ripe for review because a death warrant has not been signed. This argument is incorrect and misplaced, as the appellee appears to be addressing ripeness in the context of insanity and possible incompetence to be executed under Rule 3.811(c), Florida Rules of Criminal Procedure. *See* Hunter v. State, 817 So. 2d 786, 798-99 (Fla. 2002) (holding a claim that the defendant may be incompetent at the time of execution is premature and not ripe for review); Gamble v. State, 877 So. 2d 706, 720 (Fla. 2004) ("a claim of competency to be executed is not ripe for review until the governor signs the death warrant.") The appellant has not presented a claim of possible future incompetence to be executed, but a claim of intellectual disability that is not contingent upon future review. Therefore, the appellant's claim of intellectual disability is ripe for review.

ISSUE II

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

The appellee concedes the appellant's claim of intellectual disability, as newly discovered evidence, in light of Hall v. Florida, 134 S. Ct. 1986 (2014), was timely filed and properly considered by the trial court. (Answer Brief at 17-18.) The appellee is incorrect, however, in its contention that the appellant failed to meet prong two of the newly discovered evidence claim because "the post-conviction trial court properly found that Appellant is not disabled, [and therefore] Appellant cannot demonstrate that the evidence related to intellectual disability would yield a less severe sentence." (Answer Brief at 18.) "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." Tompkins v. State, 994 So. 2d 1072, 1086 (Fla. 2008) (*citing* Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)).

The appellee's logic is flawed because the appellee makes the assumption the "trial court properly determined that the Appellant is not disabled," and as such, it can also be presumed that the appellant cannot demonstrate his intellectual disability would affect his sentence. The appellant disputes both assumptions and reasserts the trial court erred in its analysis.

In Hall, the Court noted "the medical community defines intellectual disability according to three criteria: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances); and (3) the onset of these deficits during the developmental period." Id. at 1994.

The first prong is demonstrated by IQ scores, prior to age 18. It bears repeating that Dr. Ouaou found Mr. Phillips's IQ scores, prior to age 18, ranged from 68 to 89. The appellee notes the state's expert, Dr. Prichard, "did not mention the IQ score of 68, [and] the postconviction court had no evidence that this score should not be considered as meeting the requirements of prong one of the intellectual disability test." (Answer Brief at 20.)

Dr. Prichard's testimony, however, reflected that he did not believe the IQ prong was satisfied, and as such, he did not consider adaptive functioning and manifestation prior to age 18, in direct contrast to the holding in Hall. (1 R 2835-36.) In short, Dr. Prichard did not perform a complete analysis of the appellant's intellectually disability and his testimony should not be dispositive in determining whether the appellant presented competent and substantial evidence of adaptive functioning and manifestation prior to age 18.

ISSUE III

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

In the Answer Brief, the appellee again applies circular – and incorrect – logic to the appellant's argument that trial counsel was ineffective for failing to investigate or raise a claim of intellectual disability. The appellee claims, "since the post-conviction trial court properly found that the 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." (Answer Brief at 23.) Again, this argument incorrectly presumes the trial court was correct in determining that the appellant is not intellectually disabled. Furthermore, as noted in the appellant's Initial Brief, had the appellant's trial counsel done their due diligence in investigating intellectual disability mitigation, it is probable "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. at 695. The evidence presented in Mr. Phillips's evidentiary hearing—much of what was not discovered by trial counsel but would have been critical for the jury to hear—is sufficient to undermine confidence in the death sentence in this case, establishing the prejudice prong under Strickland.

CONCLUSION

In following the United States Supreme Court and the Florida Supreme Court's holdings above, Phillips's requests this Court to find the lower court erred in determining that Mr. Phillips is not intellectually disabled, remand to the lower court with instructions to find Mr. Phillips's intellectually disabled, and sentence him accordingly.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Frank Tassone_____
FRANK TASSONE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via electronic mail to the Office of the Attorney General at Jennifer.donahue@myfloridalegal.com, and capapp@myfloridalegal.com, Attorney for Appellee, and the Office of the State Attorney, to Meredith Charbula at mcharbula@coj.net, this 2nd day of April, 2018.

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