NO. 17-9520

IN THE SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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CIRCUIT CRIMINAL DIV

STATE OF FLORIDA,
Plaintiff,

v.

HARRY FRANKLIN PHILLIPS,
Defendant.
_____/

CASE NO.: CASE NO. F83-435
DIVISION: F061
JUDGE NUSHIN G. SAYFIE

ORDER DENYING SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

This cause having come before the court on Defendant's Successive Motion to Vacate Judgment of Convictions and Sentence of Death, filed on February 28, 2018, and this Court having reviewed the Defendant's Motion, the State's Answer filed on March 27, 2018, and having heard argument of the parties at the *Huff* hearing held on April 19, 2018, finds as follows:

The facts and procedural history are set forth in the Defendant's Motion and the State's Answer. For purposes of this motion, the relevant facts are that the Defendant was sentenced to death pursuant to a jury recommendation of 7 to 5. His death sentence became final in 1998. *Phillips v. Florida*, 525 U.S. 880 (1998). Subsequently, the Defendant filed a motion for determination of mental retardation (now referred to as intellectual disability). After a lengthy evidentiary hearing the motion was denied (see order of Judge Israel Reyes, 5/5/06) and the denial was affirmed. *Phillips v. State*, 984 So.2d 503 (Fla. 2008). The Defendant subsequently filed a motion to vacate pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), which was denied because Defendant's sentence of death, though based non-unanimous jury recommendation, was final in 1998, prior to *Ring v. Arizona*, 536 US 584 (2002), the bright line that the Florida Supreme Court has drawn for the retroactivity of *Hurst*. This denial was affirmed. *Phillips v. State*, 234 So.3d 547 (Fla. 2018).

The Defendant contends that the prior denial of his claim of Intellectual Disability (ID) must be reheard and determined under new constitutional law that requires that a court holistically consider all three prongs of the definition of ID, not just IQ scores. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Walls v. State*, 213 So.3d 340 (Fla. 2016). Additionally, in 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 v. Texas*, 137 S. Ct. 1039 (2017).

A case management conference/*Huff* hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993), was held on April 19, 2018. 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.

ANALYSIS

The definition of intellectual disability (hereinafter referred to as ID) is (1) subaverage intellectual functioning with (2) concurrent deficits in adaptive functioning and (3) onset before the age of 18. Dr. Glenn Caddy testified on behalf of the Defendant in 2006. Dr. Caddy administered the WAIS-III and obtained a full scale score of 70. Dr. Caddy also relied on the report of Dr. Dennis Keyes, who obtained a full scale score of 74 on the same test in 2000. Dr. Carbonell tested the Defendant in 1987 and also obtained a full scale score of 75. Dr. Caddy

testified that Defendant is functioning at an IQ of 70. Dr. Enrique Suarez, the State's expert, while disagreeing with all scores obtained by the other experts, still found that at best the Defendant was functioning in the borderline range.

Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007), abrogated by *Hall v. Florida*, 134 S. Ct. 1986 (2014). However, in *Hall, supra*, it became clear that the standard error of measurement should be taken into account. The standard error of measurement is plus or minus five points. An IQ up to 75 would meet the definition of ID. The Defendant has clearly proven the first prong by clear and convincing evidence.

Moving to the third prong, onset before age 18, the Court finds that Dr. Keyes testimony from the 2006 hearing is credible and sufficient to prove onset before 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 at "T").

The second prong of the test is concurrent deficits in adaptive behavior. Adaptive behavior is the ability to function normally in daily life. The Diagnostic Manual of Mental Disorders-5 (DSM-5) defines and gives examples of deficits in adaptive behavior. The chart is attached.

The Court notes that Dr. Denis Keyes reviewed the reports of all experts in preparation

for testifying in the case in 2006. (T at 222-223). He agreed with all of the experts with the exception of Dr. Suarez, the State's expert. (T at 223-224, 227-236). 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 appear to be geared towards 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.

In the practical domain, 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. Defendant knew how to drive. He had two jobs as a dishwasher and a job as a short order cook. Dr. Keyes testified that 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 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 the police. (T242). 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 himself 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. (T257-260).

CONCLUSION

The Defendant does meet both the first and third prongs of intellectual disability. However, in 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. At all stages of his life there are indications that he has some adaptive behaviors. He has been employed for sustained periods of time at jobs that include pressured environments. He is not easily manipulated, even in circumstances where a person who is not ID would succumb to coercion. And finally, the planning, execution and subsequent cover-up of the murder are indicative of highly adaptive behavior. The idea that the Defendant could "learn" this behavior

also seems to suggest functioning well above someone who could be considered ID. 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. And while the Court understands Dr. Keyes concern with the "Bro White" letter as an aberration in the Defendant's behavior, there is simply no evidence to suggest that the Defendant was not the author of the letter.

WHEREFORE, it is ORDERED AND ADJUDGED that Defendant's Successive Motion for Vacate Judgments of Conviction and Sentence is DENIED.

Done and Ordered in Miami-Dade County this 14th day of June, 2018.

NUSHIN G SAYFIE
CIRCUIT COURT JUDGE

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APPENDIX B

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

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO. F83-435**

HARRY FRANKLIN PHILLIPS,

Defendant.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the DEFENDANT, **HARRY FRANKLIN PHILLIPS**, takes and enters his appeal to the Florida Supreme Court for review of the Final Order Denying Successive Motion to Vacate entered by the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, on June 14, 2018, denying relief and all other rulings, actions, or acts rendered adversely to the Defendant.

The nature of the order being appealed is a final judgment dismissing Appellant/Defendant's successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to all counsel of record via the Florida Courts e-filing portal on July 11, 2018.

/s/William M. Hennis III
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