DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

HARRY FRANKLIN PHILLIPS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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299 So.3d 1013
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,

v.

STATE of Florida, Appellee.

No. SC18-1149
|
May 21, 2020

Synopsis

Background: Prisoner under sentence of death, whose conviction for first-degree murder was affirmed on direct appeal, 705 So. 2d 1320, filed successive motion for postconviction relief. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, Nushin G. Sayfie, J., denied the motion, and prisoner appealed.

Holdings: The Supreme Court held that:

holding of United States Supreme Court in *Hall v. Florida* did not constitute a development of fundamental significance, and therefore did not apply retroactively, receding from *Walls v. State*, 213 So. 3d 340;

federal law did not operate to require retroactive application of the holding of the United States Supreme Court in *Hall v. Florida*; and

the court in *Walls v. State* clearly erred in concluding that the holding of United States Supreme Court in *Hall v. Florida* constituted a development of fundamental significance, and therefore applied retroactively.

Affirmed.

Labarga, J., filed dissenting opinion.

***1014** An Appeal from the Circuit Court in and for Miami-Dade County, Nushin G. Sayfie, Judge - Case No 131983CF0004350001XX

Attorneys and Law Firms

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Opinion

PER CURIAM.

***1015** Harry Franklin Phillips, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Phillips murdered Bjorn Thomas Svenson in 1982, and his conviction and death sentence for that crime became final in 1998. A postconviction court in 2006 fully adjudicated and denied Phillips's claim that he is intellectually disabled and, under the rule of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), constitutionally ineligible for the death penalty. We affirmed the denial of Phillips's intellectual disability claim in 2008. Phillips now seeks yet another determination of his intellectual disability, relying in part on this Court's decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), in which we held that the United States Supreme Court's decision in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), is retroactive to cases where there has already been a finding that the defendant is not intellectually disabled.

For the reasons we explain, we affirm the circuit court's denial of relief. We also recede from our prior decision in *Walls*.

I. BACKGROUND

The facts of the case were summarized on direct appeal as follows:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole

> building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.

Phillips v. State, 476 So. 2d 194, 195-96 (Fla. 1985). Phillips was convicted of the first-degree murder of Svenson and sentenced to death. *Id.* at 197. His conviction and sentence were affirmed on direct appeal, *id.*, but on collateral review, this Court reversed the death sentence and remanded for a new penalty phase based on a finding that counsel was ineffective in the penalty phase, *Phillips v. State*, 608 So. 2d 778 (Fla. 1992). After a new penalty phase in 1994, the jury returned a recommendation of death by a vote of seven to five, and Phillips was again sentenced to death, which was affirmed on appeal. ***1016** *Phillips v. State*, 705 So. 2d 1320, 1321, 1323 (Fla. 1997), *cert. denied*, 525 U.S. 880, 119 S.Ct. 187, 142 L.Ed.2d 152 (1998). We later affirmed the denial of Phillips's initial motion for postconviction relief after resentencing and denied his petition for a writ of habeas corpus. *Phillips v. State*, 894 So. 2d 28, 31 (Fla. 2004). And we have affirmed the denial of his prior successive motions for postconviction relief. *Phillips v. State*, 234 So. 3d 547, 548 (Fla.) (affirming denial of successive motion for postconviction relief based on *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)), *cert. denied*, —— U.S. ——, 139 S. Ct. 187, 202 L.Ed.2d 114 (2018); *Phillips v. State*, 91 So. 3d 783 (Fla. 2012) (affirming denial of successive motion for postconviction relief based on the claim that Phillips's sentence violates the Sixth and Eighth Amendments under *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)); *Phillips v. State*, 996 So. 2d 859 (Fla. 2008) (affirming denial of successive motion for postconviction relief and denial of motion to interview jurors); *Phillips v. State*, 984 So. 2d 503 (Fla. 2008) (affirming finding that Phillips is not intellectually disabled).

During Phillips's initial postconviction proceedings after resentencing, Phillips filed a "Notice of Supplemental Authority and Motion for Permission to Submit Supplemental Briefing" related to the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Atkins*, and this Court permitted supplemental briefing on the intellectual disability issues under *Atkins*. *Phillips*, 894 So. 2d at 34. We affirmed the denial of postconviction relief and denied the habeas petition, but regarding his claim of intellectual disability, we noted that "Phillips [was] free to file a motion under rule 3.203" but expressed "no opinion regarding the merits of such a claim." *Id.* at 40. We later relinquished jurisdiction for a determination of intellectual disability pursuant to Florida Rule of Criminal Procedure 3.203. *Phillips*, 984 So. 2d at 506.

At an evidentiary hearing on Phillips's intellectual disability claim in 2006, the circuit court permitted Phillips to present evidence regarding all three prongs of the intellectual disability standard and concluded that Phillips failed to prove by clear and convincing evidence that he met any of the three prongs of the statutory intellectual disability standard (intellectual functioning, adaptive behavior, and onset before age eighteen) and therefore was not intellectually disabled. *Id.* at 509. In 2008, this Court upheld the circuit court's findings that Phillips failed to establish that he met any of the three prongs and affirmed the denial of relief based on his claim of intellectual disability. *Id.* at 513.

Phillips filed the instant successive motion for postconviction relief in 2018 seeking a new determination of his claim that he is ineligible for the death penalty due to intellectual disability in light of the decisions in *Hall*, *Walls*, and *Moore v. Texas*, —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017). Phillips contended that the prior denial of his intellectual disability claim must be reheard and determined under new constitutional law that, according to Phillips, requires a court to holistically consider all three prongs of the intellectual disability standard.

At a case management conference held in the circuit court on Phillips's motion, Phillips argued that in light of *Hall* and *Walls*, and a new evaluation report prepared by Dr. Denis Keyes, who had testified at the 2006 hearing, he is entitled to a new evidentiary hearing. Alternatively, Phillips requested that the circuit court reevaluate the evidence presented at the 2006 hearing along with Dr. Keyes's new report, although Phillips conceded that ***1017** there was no new evidence of intellectual disability in this case and that Dr. Keyes did not change his opinion in his updated report. The circuit court abruptly decided during the case management conference that it would review de novo the entire record from the 2006 hearing[1] and Dr. Keyes's new report before making any decision on Phillips's motion.

1 Because it is not germane to our analysis or conclusion today, we make no comment on the propriety of the circuit court's decision to conduct a de novo review of the record of the 2006 evidentiary hearing or of the new credibility determinations it made regarding witnesses who testified in 2006 based on the cold record.

On June 14, 2018, the circuit court entered an order denying an evidentiary hearing and denying relief. But in its 2018 order, the circuit court also made new findings regarding the evidence presented at the 2006 evidentiary hearing. First, it concluded that because *Hall* requires that courts take into account the standard error of measurement (SEM), which is "plus or minus five points" and "[a]n IQ of up to 75 would meet the definition of [intellectual disability]," Phillips "has clearly proven the first prong by clear and convincing evidence," because the IQ scores presented in 2006 were 70, 74, and 75.[2] The circuit court also made a new finding that Phillips met the third prong—onset before age eighteen.[3] Nonetheless, the 2018 circuit court ultimately declined to find that Phillips is intellectually disabled based on its agreement with the 2006 circuit court's finding (and this Court's 2008 opinion affirming that finding) that Phillips failed to establish that he met the second prong of the intellectual disability standard—concurrent deficits in adaptive behavior. Phillips now appeals that decision.

2 In reaching this conclusion, however, the 2018 circuit court ignored the fact that the 2006 circuit court found that because neither of the defense experts performed a complete evaluation that tested for malingering, they were not credible on this prong.

3 But in doing so, the 2018 circuit court either ignored or rejected—without explanation—the finding made by the 2006 circuit court (and affirmed by this Court in 2008) that Phillips failed to establish that he met this prong, and simply concluded instead "that Dr. Keyes['s] testimony from the 2006 hearing is credible and sufficient to prove onset before 18."

II. ANALYSIS

First, we review the recent history of intellectual disability as a bar to execution. Then we discuss the clear error in this Court's decision in *Walls* and why *Hall* does not entitle Phillips to relief. Finally, we consider and reject Phillips's claim that he is entitled to relief based on *Moore*.

A. Intellectual Disability as a Bar to Execution

In 2002, the United States Supreme Court held in *Atkins* that the Eighth and Fourteenth Amendments to the United States Constitution forbid the execution of persons with intellectual disability. *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. The Court observed that "clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318, 122 S.Ct. 2242. The *Atkins* Court further noted that an IQ between 70 and 75 or lower "is typically considered the cutoff IQ score for the intellectual function prong of the [intellectual disability] definition," *id.* at 309 n.5, 122 S.Ct. 2242, but it did not define subaverage intellectual functioning as having an IQ of 75 or below or mandate that courts take the SEM into account or permit defendants who present a score of 75 or below to present additional evidence of intellectual disability. Instead, the Court explicitly granted states discretion ***1018** to determine how to comply with its prohibition on execution of the intellectually disabled. *Id.* at 317, 122 S.Ct. 2242 ("As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " (alterations in original)).

Under Florida law, " 'intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2017). "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." *Id.* "Adaptive behavior" "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." *Id.* Thus, to establish intellectual disability as a bar to execution, a defendant must demonstrate (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.

Until *Hall*, Florida law required that a defendant have an IQ of 70 or below in order to meet the first prong of the intellectual disability standard—significantly subaverage intellectual functioning. *See Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007) ("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. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear."), *abrogated by Hall*, 572 U.S. 701, 134 S.Ct. 1986. Thus, a defendant was required to present an IQ score of 70 or below in order to establish the first prong of the intellectual disability standard. Failure to present the requisite IQ score precluded a finding of intellectual disability.

In *Hall*, the Supreme Court held that Florida's "rigid rule" interpreting section 921.137(1) as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. at 704, 134 S.Ct. 1986. The Court further held that when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement of IQ tests, which is five points. *Id.* at 723, 134 S.Ct. 1986. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [±5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

In *Walls*, we considered whether, under the standards set out in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *Hall* warranted retroactive application to cases on collateral review. *Walls*, 213 So. 3d at 346. Under *Witt*, a change in the law "only appl[ies] retroactively if the change '(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.' " *Id.* (quoting *Witt*, 387 So. 2d at 931). We acknowledged that "[i]t is without question that the *Hall* decision emanates from the United States Supreme Court and is constitutional in nature." *Id.* Regarding the ***1019** third prong of the *Witt* analysis, a decision is of fundamental significance when it either (1) places beyond the authority of the state the power to regulate certain conduct or to impose certain penalties or (2) when the rule is of sufficient magnitude to necessitate retroactive application under the retroactivity test of *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). *See id.*; *Hernandez v. State*, 124 So. 3d 757, 764 (Fla. 2012); *Witt*, 387 So. 2d at 929. In concluding that *Hall* met the third prong of the *Witt* analysis, we declared "that *Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Walls*, 213 So. 3d at 346. Based on this declaration, we determined that *Hall* warranted retroactive application. Upon further consideration, we have determined that this Court clearly erred in reaching that conclusion and we now recede from our decision in *Walls*.

B. The Error in the Analysis in *Walls*

Because it remains clear that *Hall* establishes a new rule of law that emanates from the United States Supreme Court and is constitutional in nature, it satisfies the first two prongs of *Witt*. *Witt*, 387 So. 2d at 931. Thus, the question of *Hall*'s retroactivity still turns on the third prong of *Witt*: whether the new rule constitutes a "development of fundamental significance." *Id.*

In *Walls*, this Court determined that the *Hall* decision met the third prong of the *Witt* analysis by "plac[ing] beyond the authority of the state the power to regulate certain conduct or impose certain penalties," because it "removes from the state's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below" and is therefore of fundamental significance. *Walls*, 213 So. 3d at 346. We now conclude that this Court erred in making that determination.

In discussing developments of fundamental significance that fall within the category of changes of law that place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, this Court in *Witt* cited as an example of a decision falling within that category *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the Eight Amendment categorically prohibits the imposition of the death penalty for the crime of rape of an adult woman as cruel and unusual punishment. *Witt*, 387 So. 2d at 929. But contrary to the reasoning of the majority in *Walls*, "*Hall* places no categorical limitation on the authority of the state to impose a sentence of death." *Walls*, 213 So. 3d at 350 (Canady, J., dissenting). The example of *Coker* is totally inapposite.

In *Hall*, the Supreme Court recounted its decisions holding that particular punishments are prohibited by the Eighth Amendment "as a categorical matter," such as the denaturalization of natural-born citizens as a punishment, *Hall*, 572 U.S. at 708, 134 S.Ct. 1986 (citing *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)), the imposition of the death penalty for crimes committed by juveniles, *id.* (citing *Roper v. Simmons*, 543 U.S. 551, 572, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)), "[a]nd, as relevant for [*Hall*]," the imposition of the death penalty on persons who are intellectually disabled, *id.* (citing *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242). The Court then unambiguously set out the issue it was to address: "The question this case presents is *how* intellectual disability must be defined in order to *implement* ... the holding ***1020** of *Atkins*." *Id.* at 709, 134 S.Ct. 1986 (emphasis added). And the holding of *Hall* was limited to a determination that it is unconstitutional for courts to refuse to allow capital defendants whose IQ scores are above 70 but within the test's standard error of measurement to present evidence of their asserted adaptive deficits. *Hall*, 572 U.S. at 723, 134 S.Ct. 1986. Thus, *Hall* merely "created a procedural requirement that those with IQ test scores within the test's standard of error would have the *opportunity* to otherwise show intellectual disability." *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014).[4]

4 The new rule announced in *Hall* is a procedural rule because it "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) ("[R]ules that regulate only the *manner of determining* the defendant's culpability are procedural.").

The categorical prohibition on executing the intellectually disabled was not expanded by *Hall*. *See Walls*, 213 So. 3d at 350 (Canady, J., dissenting) ("*Hall* ... does not preclude death sentences for individuals whose scores fall within the SEM."). The issue addressed in *Hall* was not whether the State is categorically prohibited from executing those intellectually disabled defendants with IQs above 70, but within the SEM. Intellectually disabled persons with IQ scores above 70 are not a distinct class from intellectually disabled persons with IQ scores of 70 or below; all are members of the same class protected by *Atkins*. *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015) ("*Hall* merely provides new procedures for ensuring that States do not execute members of an already protected group."); *Henry*, 757 F.3d at 1161 ("The Supreme Court made clear in *Hall* that the class affected by the new rule—those with an intellectual disability—is identical to the class protected by *Atkins*.... *Hall* did not expand this class; instead, the Supreme Court limited the states' power to define the class ...."); *Elmore v. Shoop*, No. 1:07-CV-776, 2019 WL 5287912, at *4 (S.D. Ohio Oct. 18, 2019) ("[The class of people which is addressed in *Hall*] is the same class of people that *Atkins* found ineligible for the death penalty because that is the definition of mental retardation/intellectual disability the Court used in *Atkins*. What *Hall* did was to preclude the State of Florida from using an IQ score of 70 as an automatic disqualification for proving that a person is in the class of people [who], on account of their intellectual disability, may not be executed if they commit murder.").

The conclusion "that *Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence" because it *may* prohibit execution of intellectually disabled persons "within a broader range of IQ scores than before," *Walls*, 213 So. 3d at 346, is therefore incorrect. *Hall* does not place beyond the authority of the State the power to regulate certain conduct or impose certain penalties; *Hall* merely more precisely defined the procedure that is to be followed in certain cases to determine whether a person facing the death penalty is intellectually disabled. *Hall* is merely an application of *Atkins*. *Kilgore v. Sec'y, Florida Dept. of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015) ("[*Hall*] merely provides new *procedures* for ensuring that states follow the rule enunciated in *Atkins*."). *Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability. Thus, *Hall* does not constitute "a development of fundamental significance that places beyond the State of

Florida the ***1021** power to impose a certain sentence," *Walls*, 213 So. 3d at 346.

C. *Hall* is an Evolutionary Refinement

Although this Court in *Walls* did not consider whether *Hall* falls within *Witt*'s second category of developments of fundamental significance—that is, a change of "sufficient magnitude" under the *Stovall*/*Linkletter* test—having receded from our conclusion that it falls within the first, we do so now.

In order to determine whether a new rule of law is of "sufficient magnitude" to merit retroactive application, this Court considers the following three factors of the *Stovall*/*Linkletter* test adopted in *Witt*: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Witt*, 387 So. 2d at 926. We agree with the reasons given by the *Walls* dissent as to why these factors counsel against the retroactive application of *Hall*:

> *Hall* should not be given retroactive effect under the *Stovall/Linkletter* test based on (a) *Hall*'s purpose of adjusting at the margin the definition of IQ scores that evidence significant subaverage intellectual functioning, (b) the State's reliance on *Cherry*'s holding in numerous cases over an extended period of time, and (c) the ongoing threat of major disruption to application of the death penalty resulting from giving retroactive effect to *Hall* as well as similar future changes in the law regarding aspects of the definition of intellectual disability.

Walls, 213 So. 3d at 351 (Canady, J., dissenting) (footnote omitted).

Moreover, our Court in *Witt* equated new rules of law that are of "sufficient magnitude" to merit retroactive application with "jurisprudential upheavals." *Witt*, 387 So. 2d at 929. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—which first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding—"is the prime example of a law change included within this category." *Witt*, 387 So. 2d at 929. "In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters." *Id.*

Hall is an evolutionary refinement of the procedure necessary to comply with *Atkins*. It merely clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty. *Roybal v. Chappell*, No. 99CV2152-JM (KSC), 2014 WL 3849917, at *2 (S.D. Cal. Aug. 5, 2014) (stating that *Hall* was a clarification of Florida's implementation of *Atkins*). It did not invalidate any statutory means for imposing the death sentence, nor did it prohibit the states from imposing the death penalty against any new category of persons.

Before *Walls*, this Court had been clear that evolutionary refinements do not apply retroactively. *See, e.g.*, *State v. Barnum*, 921 So. 2d 513, 526 (Fla. 2005) ("*Witt* dictates that those decisions constituting 'evolutionary refinements' and not 'jurisprudential upheavals' should not be applied retroactively." (quoting *Witt*, 387 So. 2d at 929)); *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) ("Applying the principles of *Witt*, we conclude that *Carawan* [*v. State*, 515 So.2d 161 (Fla. 1987)] was an evolutionary refinement of the law which should not have retroactive application."). As an evolutionary refinement, *Hall* "do[es] not compel an abridgement of the finality of judgments." *Witt*, 387 So. 2d at 929. It is ***1022** not of sufficient magnitude to warrant retroactive application to cases on collateral review.

In *Walton v. State*, 77 So. 3d 639 (Fla. 2011), we rejected a claim that the United States Supreme Court's decision in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), warranted retroactive application. *Porter* was a fact-intensive decision in which the Supreme Court held that in a particular case, this Court had unreasonably applied the prejudice test for establishing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We held in *Walton* that

> the decision in *Porter* d[id] not concern a major change in constitutional law of fundamental significance. Rather, *Porter* involved a mere application and evolutionary refinement and development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland*. *Porter*, therefore, does not satisfy the retroactivity requirements of *Witt*.

Walton, 77 So. 3d at 644. Similarly, as explained above, *Hall* involved a mere application and evolutionary refinement of the *Atkins* analysis and therefore does not satisfy the retroactivity requirements of *Witt*.

D. Federal Law Does Not Require Retroactive Application of *Hall*

Finally, we must consider whether federal law requires retroactive application of *Hall*. Under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), state courts must give retroactive effect to new substantive rules of federal constitutional law. *Montgomery v. Louisiana*, —— U.S. ——, 136 S. Ct. 718, 728-29, 193 L.Ed.2d 599 (2016) (holding "that when a new substantive rule of [federal] constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule" under the first prong of *Teague*'s retroactivity analysis).[5] Substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. *Id.* at 729. In contrast, procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability and merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. *Id.* at 730. Because we have concluded that *Hall* announced a new procedural rule, which does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability, we conclude that federal law does not require retroactive application of *Hall* as a new substantive rule of federal constitutional law. *Hall* is similar to other nonretroactive "decisions [that] altered the processes in which States must engage before sentencing a person to death," which "may have had some effect on the likelihood that capital punishment would be imposed" but which did not render "a certain penalty unconstitutionally excessive for a category of offenders." *Id.* at 736.

5 Although the federal standard for determining retroactivity under *Teague* is a two-pronged approach stating that courts must give retroactive effect to (1) new substantive rules of federal constitutional law and (2) new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, *Montgomery* held only that substantive rules of federal constitutional law must be applied retroactively by state courts. The Court in *Montgomery* explicitly declined to address "the constitutional status of *Teague*'s exception for watershed rules of procedure." 136 S. Ct. at 729.

1023 E. Receding from *Walls

Having concluded that *Hall* does not satisfy the *Witt* analysis for retroactivity and that it is not a new substantive rule of federal constitutional law requiring retroactive application to cases on collateral review, we are now faced with the question of whether the policy of stare decisis should yield.

We recently discussed the doctrine of stare decisis, stating:

> While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes. In a recent discussion of *stare decisis*, we said:
>
> > *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."
>
> *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)). Similarly, we have stated that "[t]he doctrine of stare decisis bends ... where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). And elsewhere we have said that we will abandon a decision that is "unsound in principle." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)).
>
> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble v. United States* [—— U.S. ——], 139 S. Ct. 1960, 1986 [204 L.Ed.2d 322] (2019) (Thomas, J., concurring).

State v. Poole, 45 Fla. L. Weekly S41, S47-48, 292 So.3d 694, —— – —— (Fla. Jan. 23, 2020), *clarified*, 292 So.3d 659 (Fla. Apr. 2, 2020).

We cannot escape the conclusion that this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively. We say that based on our review of *Hall*, our state's

judicial precedents regarding retroactivity, and the decisions of federal habeas courts concluding that *Hall* does not apply retroactively. Based on its incorrect legal analysis, this Court used *Hall*—which merely created a limited procedural rule for determining intellectual disability that should have had limited practical effect on the administration of the death penalty in our state—to undermine the finality of numerous criminal judgments. As in *Poole*, "[u]nder these circumstances, it would be unreasonable for us *not* to recede from [*Walls*'] erroneous holdings." *Id.* at ——, at S48.

"[O]nce we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent. ... The critical consideration ordinarily will be reliance." *Id.* But

> reliance interests are "at their acme in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 [111 S.Ct. 2597, 115 L.Ed.2d 720] (1991). And reliance interests are lowest in cases—like this one—"involving procedural and evidentiary rules." *Id.*; *see also* ***1024** *Alleyne* [*v. United States*], 570 U.S. [99] at 119 [133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)] (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

Id.

As the expectant potential beneficiary of the erroneous decision in *Walls*, Phillips has no concrete reliance interest; he has in no way changed his position in reliance on *Walls*. In this postconviction context, Phillips's interest as an expectant potential beneficiary of *Walls* is set against all the interests that support maintaining the finality of Phillips's judgment. The surviving victims, society-at-large, and the State all have a weighty interest in not having Phillips's death sentence set aside for the relitigation of his claim of intellectual disability based on *Hall*'s evolutionary refinement in the law.

Thus, we conclude that we should not continue to apply the erroneous reasoning of *Walls*. And because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability standard.

F. *Moore*

Phillips also asserts that he is entitled to a new determination as to whether he meets the adaptive deficits prong of the intellectual disability standard because the circuit court in 2006 and this Court in 2008 improperly relied on his adaptive strengths in concluding that he did not meet the adaptive deficits prong, assertedly in violation of the Supreme Court's recent decision in *Moore*. But because Phillips has conclusively failed to establish that he meets the first prong of the intellectual disability standard, he cannot be found to be intellectually disabled even if he were entitled to a renewed determination on the second prong and could establish that he has deficits in adaptive behavior. As we have repeatedly stated, if a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled. *E.g.*, *Jones v State*, 231 So. 3d 374, 376 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016). Thus, we need not address his *Moore* claim.

III. CONCLUSION

For these reasons, we affirm the circuit court's order denying Phillips's successive motion for postconviction relief. We also recede from our prior opinion in *Walls* and hold that *Hall* does not apply retroactively.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, and MUÑIZ, JJ., concur. LABARGA, J., dissents with an opinion.

LABARGA, J., dissenting.

Yet again, this Court has removed an important safeguard in maintaining the integrity of Florida's death penalty jurisprudence. The result is an increased risk that certain individuals may be executed, even if they are intellectually disabled—a risk that this Court mitigated just three years ago by holding that the decision in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), is to be retroactively applied. *See Walls v. State*, 213 So. 3d 340 (Fla. 2016). I strongly dissent to the majority's decision to recede from *Walls*, and I write to underscore the unraveling of sound legal holdings in this most consequential area of the law.

Before the United States Supreme Court's decision in *Hall*, under Florida law, individuals with an IQ score above 70 were barred from demonstrating that they were intellectually disabled. This "rigid rule," as described by the Supreme Court, ***1025** "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall*, 572 U.S. at 704, 134 S.Ct. 1986. The Supreme Court stated:

> The Florida statute, as interpreted by its own courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishment Clause.

Id. at 723, 134 S.Ct. 1986.

In concluding that Florida's intellectual disability law violated the Eighth Amendment, the Supreme Court pointedly criticized the "mandatory cutoff" that "disregards established medical practice in two interrelated ways": (1) "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and (2) "rel[ying] on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 712, 134 S.Ct. 1986. The "other evidence" to which the Court referred primarily consists of evidence of deficits in adaptive functioning, which is "an essential part of a sentencing court's inquiry." *Id.* at 724, 134 S.Ct. 1986. The Supreme Court concluded: "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723, 134 S.Ct. 1986. The Court admonished that while "the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed," states do not have "unfettered discretion to define the full scope of the constitutional protection." *Id.* at 719, 134 S.Ct. 1986.

The categorical prohibition of the execution of the intellectually disabled is not limited to those whose convictions and sentences became final after a certain date. However, the import of today's decision is that some individuals whose convictions and sentences were final before *Hall* was decided, despite timely preserved claims of intellectual disability, are not entitled to consideration of their claims in a manner consistent with *Hall*. What this means is that an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled.

"Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.' " *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (quoting ABA Standards Relating to Postconviction Remedies 37 (Approved Draft 1968)). If *Hall* is not retroactively applied in a uniform manner, an intellectually disabled individual on Florida's death row may eventually be put to death.

I reject the majority's conclusion that *Hall* was a mere procedural evolution in the law. When the law develops in such a manner as to clarify the criteria for intellectual disability—a status which poses an absolute bar to execution—this cannot simply be deemed "an evolutionary refinement." Majority op. at ——. *Walls* properly concluded that *Hall* was a "development of fundamental significance that places beyond the State of Florida the power to ***1026** impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Walls*, 213 So. 3d at 346.

What is especially troubling is that because this Court held *Hall* to be retroactive more than three years ago in *Walls*, some individuals have been granted relief pursuant to *Walls* and received consideration of their intellectual disability claims under the standard required by *Hall*. However, going forward, similarly situated individuals will not be entitled to such consideration. This disparate treatment is patently unfair.

In justifying its holding, the majority discusses the need for finality in the judicial process. I agree that finality is a fundamental component of a functioning judicial system. However, we simply cannot be blinded by an interest in finality when that interest leaves open the genuine possibility that an individual will be executed because he is not permitted consideration of his intellectual disability claim. "No legitimate penological purpose is served by executing

a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708, 134 S.Ct. 1986 (citation omitted) (citing *Atkins v. Virginia*, 536 U.S. 304, 317-20, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). "This is not to say that under current law persons with intellectual disability who 'meet the law's requirements for criminal responsibility' may not be tried and punished. They may not, however, receive the law's most severe sentence." *Id.* at 709, 134 S.Ct. 1986 (citation omitted) (quoting *Atkins*, 536 U.S. at 306, 122 S.Ct. 2242).

Hall concluded with language that we would all do well to remember:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Hall, 572 U.S. at 724, 134 S.Ct. 1986.

Today's decision potentially deprives certain individuals of consideration of their intellectual disability claims, and it results in an inconsistent handling of these cases among similarly situated individuals.

For these reasons, I dissent.

All Citations

299 So.3d 1013

APPENDIX B

Supreme Court of Florida

FRIDAY, AUGUST 14, 2020

CASE NO.: SC18-1149
Lower Tribunal No(s).:
131983CF0004350001XX

HARRY FRANKLIN PHILLIPS vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.
COURIEL, J., did not participate.

A True Copy
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Clerk, Supreme Court

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HON. BERTILA ANA SOTO, CHIEF JUDGE
CHRISTINE E. ZAHRALBAN

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

HARRY FRANKLIN PHILLIPS,

Appellant,

CASE No.: SC18-1149

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S MOTION FOR REHEARING

Harry Franklin Phillips, by and through undersigned counsel and pursuant to Fla. R. Crim. Pro. 9.330, hereby files a Motion for Rehearing of this Court's decision issued May 21, 2020 in the above-styled case. Mr. Phillips asserts that this Court's *sua sponte* ruling determining that *Hall v. Florida*, 572 U.S. 701 (2014) announced a new non-watershed rule for Eighth Amendment purposes is flawed in several significant respects and results in an unconstitutionally arbitrary system that creates a grave and unacceptable risk that Florida will execute persons with intellectual disability in violation of the Eighth Amendment, including Mr. Phillips, while similarly situated others have received the benefits of *Hall*.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth and Fourteenth Amendments prohibit a state from executing an individual who is intellectually disabled. Following *Atkins*, this Court issued *Cherry v. State*, 959 So.

2d 702 (Fla. 2007), which set Florida as an outlier in death penalty jurisprudence by imposing an unscientific cutoff requiring a capital defendant to present an IQ of 70 or below as a necessary fact to be proven in order to establish intellectual disability. Capital defendants around the State, including Mr. Phillips, had their claims unconstitutionally denied because of this doctrine.[1] Indeed, the *Cherry* opinion and the rule it announced have been widely criticized by legal scholars and experts in intellectual disability. *See* John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J.L. & Pub. Pol'y 689, 697 (2009)("Cherry illustrates a recurring problem after Atkins: the failure of courts to apply the standard error of measurement and other practice effects to all IQ scores."); James W. Ellis, Caroline Everington, and Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases,* 46 Hofstra L. Rev. 1305, 1357-1360 (2018); Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 Hastings L. J. 1203, 1228-1234 (2008); Sarah E. Warlick and Ryan V.P. Dougherty, Hall v. Florida *Reinvigorates Concept of Protection for Intellectually Disabled*, 29-Winter Criminal Justice 4 (2015).

[1] By the end of 2013, Florida courts had denied *every single Atkins* claim presented. John H. Blume et. al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar,* 23 Wm. & Mary Bill Rts. J. 393, 412 (2014)(of the 24 intellectual disability cases identified, every single case had been denied on the merits.)

Seven years later, in *Hall v. Florida*, the United States Supreme Court held that Florida's "rigid rule," as set out in *Cherry*, of an IQ cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall*, 572 U.S. 701, 704 (2014). In *Walls v. State*, 213 So. 3d 340 (Fla. 2016), this Court determined that *Hall* was retroactive to cases where death-sentenced individuals had timely raised intellectual disability as a bar to execution, entitling them to have a holistic assessment of their claim under the appropriate clinical definitions and constitutional standards.

Then-Chief Justice Labarga, and Justices Pariente, Lewis, and Quince concurred in the *per curiam* opinion. Justice Pariente wrote separately to concur, noting that the failure to give Walls the benefit of *Hall* would result in a "manifest injustice." *Walls* at 348. Justice Perry concurred in result.

Then Justice (now Chief Justice) Canady dissented with an opinion, in which Justice Polston joined, writing that "the [majority] decision goes on needlessly to consider *Hall v. Florida*," and "erroneously concludes that *Hall* should be given retroactive effect." *Walls* at 349. The dissenters opined that *Hall* did "not constitute 'a new substantive rule of constitutional law' for which federal law requires retroactive application." *Id*. (citing *Montgomery v. Louisiana*, -- U.S. --, 136 S.Ct. 718, 729, 193 L.Ed. 2d 599 (2016).

Mr. Phillips filed a successive Fla. R. Crim. Pro. 3.851 motion pursuant to *Walls* and *Hall* in which he argued that the court's initial assessment of his *Atkins* claim improperly relied on *Cherry*. (2018R. 77-78). At the *Huff*[2] hearing, the lower court determined that it would 1) review the prior proceedings and apply *Hall* in its analysis and 2) allow Mr. Phillips to submit a new report by Dr. Keyes. After reviewing the prior record and the report by Dr. Keyes, the lower court found that under *Hall* 1) Phillips met both Prong 1 (significantly subaverage intellectual functioning) and Prong 3 (onset before age 18). The court, however, determined that Mr. Phillips could not meet Prong 2 because he could not demonstrate "concurrent adaptive deficits." (2018R. 290).

Mr. Phillips timely appealed to this Court arguing that the circuit court erred as to the adaptive deficits. Mr. Phillips alleged that in denying the existence of concurrent adaptive deficits the lower court improperly focused on "adaptive strengths" to negate the significance of Mr. Phillips' "adaptive deficits" contrary to prevailing medical and clinical standards. *Compare* 2018R. at 289-290 ("Defendant knew how to drive. He had two jobs as a dishwasher and a job as a short order cook… And finally, the planning, execution and subsequent cover-up of the murder are indicative of highly adaptive behavior.") *with Moore v. Texas*, 137 S. Ct. 1039, 1047 (2017) ("Moore had demonstrated adaptive strengths…by living on the streets,

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

playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison. Those strengths, the court reasoned, undercut the significance of Moore's adaptive limitations.") (internal citations omitted).

In response, the State argued Mr. Phillips is procedurally barred from proving his intellectual disability (ID) because he failed to meet the definition of ID under pre-*Hall* Florida law. The State did not argue that *Walls* was incorrectly decided and, in fact, conceded that *Hall* was retroactive. (Answer Brief, p. 27).

During the pendency of Mr. Phillips' appeal before this Court, four of the Justices who formed the majority in *Walls v. State* mandatorily retired, one in 2016 (Justice Perry) and three in 2019 (Justices Lewis, Quince, and Pariente).[3] Two new Justices who were appointed to the Florida Supreme Court were subsequently appointed to the United States Court of Appeals for the Eleventh Circuit. Two other newly appointed Justices, Justice Lawson and Justice Muniz, remain on the Court. Justice Canady became Chief Justice starting July 1, 2018.[4]

[3] The law at the time mandated retirement at age 70. That law was changed to age 75 in 2018 but because the new law did not become effective until July 2019, the Justices were bound by the prior law at the time of their January 2019 retirements.

[4] Our Chief Justice was also Chief Justice from July 2010 through June 2012. He was elected by his colleagues to serve as Chief Justice for a second time starting July 1, 2018, and a third time starting July 1, 2020. There were two vacancies on the Court when *Phillips* was issued May 21, 2020.

On May 21, 2020, the newly constituted five-Justice Florida Supreme Court *sua sponte* revisited *Walls* in this case, *Phillips v. State*, --- So. 3d --- (Fla. May 21, 2020) (SC18-1149) (Slip Op.). The majority–comprised of the dissenters in *Walls v. State* (Chief Justice Canady and Justice Polston) and the two new Justices (Justice Lawson and Justice Muniz)—receded from *Walls v. State* and held that "because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability assessment." *Phillips*, at 22.

Justice Labarga, the only remaining Justice on the Florida Supreme Court who was in the majority in *Walls*, dissented. Justice Labarga wrote that, "Yet again, this Court has removed an important safeguard in maintaining the integrity of Florida's death penalty jurisprudence. The result is an increased risk that certain individuals may be executed, even if they are intellectually disabled[.]" *Phillips*, at 23. The majority's decision produces an "arbitrary result" where an intellectually disabled capital defendant is "completely barred from proving" his intellectual disability "because of the timing of his legal process." *Id*. at *25.

I. THIS COURT ABUSED ITS DISCRETION WHEN IT ADDRESSED AN ISSUE – RETROACTIVITY – THAT WAS NEITHER BRIEFED NOR RAISED BY THE PARTIES.

This Court reached down to reverse settled precedent about the retroactive effect of *Hall* when neither party raised it, and, indeed, the State conceded *Hall* was

retroactive in its Answer Brief. *See* Answer Brief at 27 ("just because *Hall* is now retroactive…"). This Court abused its discretion and departed from its role as a neutral arbiter.

> The Nation's adversarial adjudication system follows the principle of party presentation. *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L.Ed.2d 399. "In both civil and criminal cases, ... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id*., at 243.

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

> "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid*.

Sineneng-Smith, at 1579.

This Court's *sua sponte* ruling undermines confidence in the Florida judiciary. There having been no change between *Walls* and *Phillips* other than the membership of this Court, Appellant respectfully suggests that by *sua sponte* addressing the application of *Walls*, this Court "could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court" in *Walls*. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992); *see also id*., citing and quoting *Mitchell v. W. T. Grant Co*., 416 U. S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a

change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

This Court, however, violated the principles identified above when it reversed established precedent not raised or briefed by either party. The Court failed to even notify the parties that it was reaching on its own to consider such an issue. On that fact alone, this Court should reverse its decision.

II. THIS COURT ERRED IN HOLDING THAT *HALL* ANNOUNCED A NEW NON-WATERSHED RULE OF FEDERAL EIGHTH AMENDMENT LAW FOR PURPOSES OF *TEAGUE V. LANE*, 498 U.S. 288 (1989) AND *WITT V. STATE*, 387 So. 2d 982 (Fla. 1980).

This Court's May 21, 2020 holding in Mr. Phillips' case - that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague* and *Witt* - was error. This Court's holding violates *Witt* and *Teague*. As this Court stated:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (internal quotations and citations omitted). But this is precisely what this Court has done in holding in this case that *Hall* announced a new, non-watershed rule of law for Eighth Amendment purposes. The reasoning of this Court's analysis applying the *Witt* factors to *Hall* in *Walls* should not be disturbed.

The Court's holding raises a grave risk that Florida will execute intellectually disabled capital defendants. This Court's determination that *Hall* announced a new non-watershed rule was error. *See Bousley v. United States*, 523 U.S. 614, 620 (1998). This Court should reverse.

III. THIS COURT'S HOLDING IS PREDICATED UPON AN ERRONEOUS UNDERSTANDING OF THE DECISION IN *HALL V. FLORIDA* AND IS INCONSISTENT WITH WHAT THE UNITED STATES SUPREME COURT ACTUALLY HELD IN *HALL*.

Mr. Phillips was initially denied the relief to which he was entitled under *Atkins v. Virginia* because this Court in *Cherry* placed an unconstitutional interpretation on Florida's intellectual disability statute. *See Hall v. State*, 109 So. 3d 704, 708 (2012) ("In *Cherry* . . . *we determined the proper interpretation of section 921.137*." (emphasis added)); *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008) ("Section 921.137(1) defines subaverage general intellectual functioning 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.' *We have consistently interpreted this definition* to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below." (emphasis added)).

The United States Supreme Court's effective overruling of *Cherry* did not hold the statute itself unconstitutional. It merely held that *Cherry*'s glossing of the statute was federally impermissible. In consequence, this Court must now apply the statute without the *Cherry* gloss. Decisions explicating statutes favorably to criminal defendants are – and as a matter of federal constitutional due process and equal protection must be –applied retroactively. *See Bousley v. United States, supra,* at 620-621; *Schriro* v. *Summerlin,* 542 U.S. 348, 351 (2004) (distinguishing "decisions that narrow the scope of a criminal statute by interpreting its terms" from "constitutional determinations"). Ignoring this point, the *Phillips* decision of May 21, 2020 confuses statutory interpretation with constitutional innovation.

IV. THIS COURT'S HOLDING WILL RESULT IN A DEATH PENALTY SYSTEM THAT VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST ARBITRARY IMPOSITION OF THE DEATH PENALTY AND EQUAL PROTECTION OF THE LAWS.

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia,* 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *see also id*. at 313 (White, J., concurring) ("[T]he

death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

Other Florida inmates, challenging their sentences on collateral review, have been resentenced to life imprisonment based on *Hall* and *Walls*. There is no non-arbitrary, rational basis that justifies this Court ordering that Mr. Phillips -but not other similarly-situated defendants - be denied the benefit of *Hall*. Factors such as slow moving court calendars in heavily populated areas of the State such as Miami-Dade, or the proclivities of prosecutors to move cases quickly or slowly, should not determine whether a capital defendant lives or dies. There is no meaningful difference between Mr. Phillips' case and those cases in which a capital defendant was able to press his claim under *Hall* and a life sentence was obtained. A death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24(1983)). To deny Mr. Phillips the benefit of *Hall* simply because of a change in the make-up of this Court violates his right to equal protection

of the law under the Fourteenth Amendment to the United States Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). The unevenness that flows from this decision, inconsistent with the results in similarly-situated cases, flouts the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of Due Process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.").

V. THIS COURT'S DECISION AMOUNTS TO AN EX POST FACTO CHANGE IN THE LAW.

Article I, § 10 of the federal Constitution prohibits state ex post facto laws. *See, e.g.*, *Weaver v. Graham*, 450 U.S. 24 (1981); *Lindsey v. Washington*, 301 U.S. 397 (1937). Federal Due Process erects the same prohibition against state judicial action. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. at 353-354. *See also Marks v. United States*, 430 U.S. 188 (1977).

Bouie notes the thematic connection between the prohibition of ex post facto liability and the doctrine of vagueness, citing Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 541 (1951), and Amsterdam, Note, 109 U. PA. L. REV. 67, 73-74, n. 34. It is true that one of the traditional concerns of both the Ex Post Facto Clause and the void-for-vagueness precept – the danger of punishing an individual for acts which s/he had no notice would be criminal – is inapplicable here. But that is not the only concern of either doctrine. Both also stand to protect against malleable legal rules which "inject[ ] into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically – responsive to whim or discrimination . . . ." Amsterdam, *supra*, at 90. It is a commonplace of ex post facto history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. *See Calder v. Bull*, 3 U.S. 386, (1798) (opinion of Justice Chase). Protection against retroactive punishment resulting from regime change was very much in the mind of the Framers when they included two ex post facto clauses in the federal Constitution. *See Cummings v. Missouri*, 71 U.S. 277, 322 (1866).[5]

[5] There is another as well: "The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people

In *Calder*, "Justice Chase explained that the reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987). No lesser restraint is imposed upon state judicial action by the ex post facto component of federal Due Process.

WHEREFORE, Mr. Phillips respectfully requests this Court grant rehearing and reconsider the ruling of May 21, 2020 holding that *Hall* announced a new non-watershed rule for Eighth Amendment purposes.[6]

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until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations. "It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck* [10 U.S. 87, 137-138], Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.'"

[6] At the time of this filing, this Court has not yet ruled on the Motion for a 15-Day Extension of Time in which to file a Motion for Rehearing or the Motion to Toll Time. Therefore, in an abundance of caution, Mr. Phillips now files this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by electronic service to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, on June 12, 2020.

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APPENDIX D

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

2018 JUN 14 PM 3:32

CLERK CIRCUIT & COUNTY COURTS
DADE COUNTY, FLA.
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

Copies to:
William Hennis III, counsel for Defendant
Marta Jaszczolt, counsel for Defendant
Melissa Roca Shaw, AAG
Christine Zahralban, ASA

984 So.2d 503
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,
v.
STATE of Florida, Appellee.

No. SC06–2554.
|
March 20, 2008.
|
Rehearing Denied June 12, 2008.

Synopsis

Background: After defendant's death sentence was affirmed, 705 So.2d 1320, and denial of postconviction relief was affirmed, 894 So.2d 28, defendant filed motion for mental retardation determination. The Circuit Court, Dade County, Israel U. Reyes, J., determined that defendant was not mentally retarded. Defendant appealed.

Holdings: The Supreme Court held that:

defendant did not satisfy "significantly subaverage intellectual level" prong of definition of mental retardation;

defendant did not satisfy "deficits in adaptive behavior" prong of definition of mental retardation;

defendant failed to prove "onset before age 18" prong of definition of mental retardation; and

competent, substantial evidence supported trial court's determination that defendant was not mentally retarded.

Affirmed.

Attorneys and Law Firms

***505** Neal Dupree, Capital Collateral Regional Counsel, William M. Hennis, III, Assistant CCRC, Southern Region, Fort Lauderdale, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, FL, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

Opinion

PER CURIAM.

Harry Franklin Phillips, an inmate sentenced to death, appeals an order denying his successive motion to vacate his judgment and sentence and an order concluding that he is not mentally retarded under Florida Rule of Criminal Procedure 3.203. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the circuit court's finding that Phillips is not mentally retarded and affirm its denial of relief.

I. FACTS AND PROCEDURAL HISTORY

Phillips was convicted of first-degree murder for the 1982 shooting death of his parole supervisor, Bjorn Thomas Svenson, and sentenced to death. On direct appeal, ***506** this Court affirmed his conviction and sentence. *See Phillips v. State,* 476 So.2d 194, 197 (Fla.1985).[1] After his death warrant was signed, Phillips filed a petition for habeas corpus alleging a violation of his rights under *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and the Eighth and Fourteenth Amendments. This Court denied the petition as procedurally barred. *Phillips v. Dugger,* 515 So.2d 227, 228 (Fla.1987).

1 Phillips raised five issues: (1) the trial court erred in allowing the State to elicit collateral crimes testimony; (2) prejudicial comments elicited by the State deprived Phillips of a fair trial; (3) the trial court erred in refusing to give a requested alibi instruction; (4) the trial court erroneously found the HAC aggravator; and (5) the trial court improperly found the CCP aggravator.

Phillips filed an amended motion for postconviction relief, raising twenty-four claims. *See Phillips v. State,* 894 So.2d 28, 33–34 (Fla.2004).[2] After a *Huff*[3] hearing, the trial court summarily denied the amended motion. Phillips appealed the denial and petitioned for a writ of habeas corpus. *See Phillips,* 894 So.2d at 34.[4] Phillips filed a "Notice of Supplemental Authority and Motion for Permission to Submit Supplemental Briefing" related to the United States Supreme Court's decisions in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Atkins v. Virginia,* 536

U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and this Court permitted supplemental briefing on the mental retardation issues. We affirmed the denial of postconviction relief and denied the habeas petition. *Phillips,* 894 So.2d at 34. Regarding the mental retardation determination, we noted that "Phillips is free to file a motion under rule 3.203," but expressed "no opinion regarding the merits of such a claim." *Id.* at 40. We later relinquished jurisdiction for a determination of mental retardation pursuant to Florida Rule of Criminal Procedure 3.203.

2 *See id.* at 34 n. 4 (listing claims).

3 *Huff v. State,* 622 So.2d 982 (Fla.1993).

4 Phillips raised eleven claims on appeal, and filed a habeas petition raising four claims of ineffective assistance of appellate counsel. *Id.* at 34–35, 40 (listing claims).

The Evidentiary Hearing

The trial court conducted a two-day evidentiary hearing on Phillips's mental retardation claim. At the hearing, the defense presented two expert witnesses: Dr. Glen Caddy and Dr. Denis Keyes. The State presented the expert testimony of Dr. Enrique Suarez. Dr. Joyce Carbonell's intellectual evaluation of Phillips was also introduced through the testimony of Dr. Caddy.[5] The evidence is summarized below.

5 Dr. Carbonell was requested to evaluate Phillips to "assess his current level of functioning as well as his functioning as it may have related to his 1983 case." Specifically, Dr. Carbonell was to focus on Phillips's competency to stand trial and the existence of mitigating factors.

Phillips was born in Belle Glade, Florida, and moved to Miami accompanied by his parents and two siblings when he was about six years old. Before moving to Miami, Phillips's parents made their living picking vegetables or working in the fields. Phillips's father eventually obtained employment as a truck driver and was frequently gone from home. The family did not benefit much from the improvement in the father's employment as they did not "see much, if any, of his paycheck."

Phillips lived his life in serious poverty, suffered emotional and physical abuse from his father, suffered the loss of his only male role models (both the father and older brother left the home) and had academic ***507** difficulties. Phillips dropped out of school during the tenth grade. While in school he earned "mostly D's and C's." Phillips's academic trouble related partly to his absenteeism—he often skipped school and was suspended on a number of occasions.

As a juvenile Phillips briefly was incarcerated in a youth home. After dropping out of school, he worked as a dishwasher at the Miami Heart Institute. In 1962, he was convicted and sentenced as an adult for the first time and paroled in 1970. Upon his release, he worked for the Department of Sanitation in Dade County, where he was described as helpful and a good worker.[6] He was later arrested and convicted on an armed robbery charge, for which he was incarcerated until 1982. He was released, and records indicate that he violated his parole. Shortly thereafter, Phillips was convicted of murder and has been incarcerated on death row since 1983.

6 Phillips's employment history also includes a position in the produce section of a grocery store, lawn maintenance, and multiple years as a short order cook.

Dr. Joyce Lynn Carbonell

In 1987, Dr. Joyce Carbonell was asked to assess Phillips's current level of functioning as well as his functioning as it related to his case. Her assessment was based on affidavits from family and friends, an interview with a former teacher, the court and Department of Corrections' records, and other available materials.

Dr. Carbonell performed several tests on Phillips: the Wechsler Adult Intelligence Scale (WAIS)—Revised; the Wide Range Achievement Test–Revised (WRAT–R2); the Peabody Individual Achievement Test (PIAT); the Weschsler Memory Scale (WMS); and the Rorschach Test. Based on Phillips's test performance, Dr. Carbonell concluded that while he was functioning in the borderline range of intellectual functioning, his IQ score of 75 "technically ... would not qualify as mental retardation."

Dr. Denis Keyes

In 2000, Dr. Keyes, an Associate Professor of Special Education at the College of Charleston in South Carolina, examined Phillips for the defense. Dr. Keyes tested Phillips's intellectual functioning utilizing the following tests: Draw–

a–Person test; a Developmental Test of Visual–Motor Integration; the Bender–Gestalt test-which also tests visual and motor integration; the Woodcock–Johnson—testing cognitive achievement; and the WAIS–III. Based on Phillips's test performance, Dr. Keyes opined that he performed at a significantly subaverage intellectual level.

In concluding that Phillips had significant deficits in adaptive functioning, Dr. Keyes conducted a retrospective diagnosis.[7] To evaluate Phillips's adaptive behavior, Dr. Keyes interviewed Phillips, his mother and sister, and Phillips's childhood friend and fellow death row inmate, Norman Parker.[8] Dr. Keyes also reviewed Phillips's school records. Those records revealed that while Phillips attended ***508** school from elementary to tenth grade, he earned C's, D's and F's. Phillips's school history also revealed that he attended school when the system was segregated and special education was not available to him.

7 Although Dr. Keyes claims to have assessed deficits in Phillips's adaptive functioning that existed *concurrently with* his subaverage intellectual quotient, the record does not support his contention. In 2000, Phillips did have an IQ of 70; however, his adaptive functioning was assessed by evaluating his behavior at or around age eighteen. As stated above, Dr. Keyes interviewed Phillips's family and friends, who admittedly had not had any significant contact with him since at least his incarceration for this crime in 1983. Immediately before his current incarceration, Phillips had served seventeen years of a twenty-year sentence.

8 Parker has been incarcerated since 1981.

From these record observations and tests, Dr. Keyes concluded that Phillips's full scale IQ was 74 and that the onset of his intellectual functioning and adaptive deficits occurred before age 18. Even though Dr. Keyes's evaluation did not establish that Phillips had deficits in his adaptive functioning existing concurrent with his subaverage intellect, he opined that Phillips is mentally retarded.

Dr. Glen Caddy

Dr. Caddy, a Ph.D. in clinical psychology, testified as a defense expert. To assess Phillips's current intellectual functioning, Dr. Caddy administered the WAIS–III. Dr. Caddy did not test Phillips's adaptive functioning. Phillips achieved a full-scale IQ of 70 on the WAIS–III, placing him in the borderline range of mental retardation. Dr. Caddy described the different categories of intellectual functioning as follows: an IQ score below 70 is formally labeled mentally retarded and now called "extremely low"; an IQ between 70 and 79 is borderline, and generally borderline is not retarded; an IQ between 80 and 89 qualifies as a low normal intellect; and an IQ score within the 90 and 110 range is average.

When asked whether he had an opinion as to whether Phillips was mentally retarded, Dr. Caddy answered: "I have an opinion that he is functioning at an IQ of 70. I have an opinion that says that this condition has existed since very early in his life. I have not done personally those tests that look at adaptive functioning. I have simply read those from others." Dr. Caddy ultimately concluded that based on his evaluations and everything he read, he would place Phillips in the retarded category in some areas and the borderline category in others.

Dr. Enrique Suarez

Dr. Enrique Suarez, a specialist in neuropsychology, was the State's only expert. Dr. Suarez holds a Ph.D. in psychology and has conducted over 3000 forensic psychiatric evaluations. Dr. Suarez defined the criteria for mental retardation as significantly subnormal intellectual functioning, concurrent and present impairments in adaptive functioning in at least two areas,[9] and onset before age 18.

9 The defendant must suffer from deficits or impairments in adaptive functioning in at least two of the following areas: communication, self-care, home living, social interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.

To assess Phillips's intellectual functioning, Dr. Suarez administered the Test of Nonverbal Intelligence–III (TONI–III). He did not utilize the WAIS–III test because Phillips had previously been administered the WAIS and Dr. Suarez was concerned that Phillips had become familiar with the format. Phillips scored an IQ of 86 on the TONI–III, which is in the low average range.[10]

10 The court did not consider the results of Dr. Suarez's intellectual testing in its determination because the only two testing instruments provided for under Florida Rule

of Criminal Procedure 3.203 and Florida Administrative Code Rule 65G–4.011 are the Stanford–Binet and the WAIS–III.

To determine whether Phillips was malingering, Dr. Suarez also administered various validity tests. Based on the inconsistent scores obtained, Dr. Suarez opined that Phillips was not putting forth sufficient effort or was actively attempting to ***509** provide incorrect information. Dr. Suarez suggested that Phillips malingered on these tests because to do otherwise "could have dire negative effects on the examinee's life."

Dr. Suarez was the only expert to conduct validity testing on Phillips. He opined that "if you do a cognitive or neurocognitive evaluation and you don't do validity testing, you've done an incomplete assessment." The other doctors disagreed and did not believe that validity testing was necessary.

Based on his evaluations, Dr. Suarez opined that although Phillips is functioning at a low average level of intelligence, he is not mentally retarded. Phillips has neither the requisite IQ to classify him as mentally retarded nor the necessary concurrent deficits in adaptive functioning. Dr. Suarez also noted that

> [t]he information that's available prior to my evaluating him in and of itself would suggest that he's not mentally retarded, and that a lot of the results that have been obtained by previous evaluators [have] been obtained without the benefit of concurrent validity testing, which eliminates the ability to specify whether those instances reflected good efforts and an intention to do the best one can on these tests.

After hearing the testimony and reviewing the evidence, the trial court concluded that Phillips did not prove mental retardation by clear and convincing evidence. Phillips appeals that decision, raising the issues discussed below.

II. ANALYSIS

Phillips challenges the circuit court's determination that he is not mentally retarded in accordance with the definitions outlined in Florida Rule of Criminal Procedure 3.203 and section 921.137(1), Florida Statutes (2006). The Florida Legislature enacted section 921.137 in 2001. It exempts the mentally retarded from the death penalty and establishes a method for determining whether capital defendants are mentally retarded. *See* § 921.137, Fla. Stat. We adopted rule 3.203 in response to the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held it unconstitutional to execute the mentally retarded.

Pursuant to both the statute and the rule, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. § 921.137(1), Fla. Stat.; *see also* Fla. R.Crim. P. 3.203(b). The circuit court concluded that Phillips failed to prove any of these factors by clear and convincing evidence. We review the circuit court's decision to determine whether it is supported by competent substantial evidence. *See Cherry v. State,* 959 So.2d 702, 712 (Fla.2007) ("In reviewing mental retardation determinations in previous cases, we have employed the standard of whether competent, substantial evidence supported the circuit court's determination.") We review each of the factors in turn.[11]

11 Phillips also argues that the clear and convincing evidence standard of section 921.137(4), Florida Statutes (2001) (prohibiting the execution of a mentally retarded defendant), which the trial court applied, is unconstitutional. However, we do not address this claim. *Singletary v. State,* 322 So.2d 551, 552 (Fla.1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds."). Here, there was *no* evidence demonstrating Phillips has significant subaverage intellectual functioning *existing concurrently* with deficits in his adaptive behavior. Therefore, Phillips's claim fails even under the more lenient preponderance-of-the-evidence standard.

***510** A. Intellectual Functioning

Phillips first argues that the circuit court erred in finding that he does not function at a significantly subaverage intellectual level. Phillips claims that because there is a measurement error of about five points in assessing IQ, mental retardation can be diagnosed in individuals with IQs ranging from 65 to 75. We disagree, and affirm the trial court's finding that Phillips did not satisfy the first prong of the mental retardation definition.

Section 921.137(1) defines subaverage general intellectual functioning 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." We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. *See Cherry,* 959 So.2d at 711–714 (finding that section 921.137 provides a strict cutoff of an IQ score of 70); *Zack v. State,* 911 So.2d 1190, 1201 (Fla.2005) (finding that to be exempt from execution under *Atkins,* a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below); *see also Jones v. State,* 966 So.2d 319, 329 (Fla.2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below.")

Phillips's scores on the WAIS were as follows: 75 (1987), 74 (2000), and 70 (2005). Based on these scores, the defense experts opined that Phillips has "significantly subaverage intellectual functioning." The State's expert concluded to the contrary, finding that Phillips's low intellectual scores were a result of malingering, not mental retardation. Because both defense experts failed to perform a complete evaluation of Phillips—i.e., they did not test for malingering—the court accepted the state's expert's opinion over that of the defense's experts. Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions. *See Brown v. State,* 959 So.2d 146, 149 (Fla.2007) ("This Court does not ... second-guess the circuit court's findings as to the credibility of witnesses." (citing *Trotter v. State,* 932 So.2d 1045, 1050 (Fla.2006))); *Bottoson v. State,* 813 So.2d 31, 33 n. 3 (Fla.2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State,* 788 So.2d 917, 923 (Fla.2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.").

Even were we to disregard the circuit court's credibility finding, Phillips's IQ scores do not indicate that he is mentally retarded. In *Jones,* 966 So.2d at 329, we found that IQ scores ranging from 67 to 72 did not equate to significantly subaverage general intellectual functioning. *See also Rodgers v. State,* 948 So.2d 655, 661 (Fla.2006) (finding that the defendant did not prove he was retarded under section 921.137 despite the defense expert's finding that the defendant had an IQ of 69 and was mentally retarded); *Burns v. State,* 944 So.2d 234, 247 (Fla.2006) (finding that even though the defendant scored an IQ of 69 on one of the expert's IQ tests, the defendant did not meet the first prong of the mental retardation determination because the more credible expert scored the defendant's IQ at 74).

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

B. Adaptive Behavior

Next, Phillips argues that the trial court erred in concluding that he failed to demonstrate deficits in adaptive functioning sufficient for a diagnosis of mental retardation. In Florida, defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior. *Rodriguez v. State,* 919 So.2d at 1252, 1266 (Fla.2005) ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)). "Adaptive functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.' " *Id.* at 1266 n. 8 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed.2000)). To be diagnosed mentally retarded, Phillips must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Id.*

The State's expert, Dr. Suarez, was the only mental health expert to test Phillips's adaptive functioning contemporaneously with his IQ. Dr. Keyes, the only defense expert to evaluate Phillips's adaptive functioning, relied on the technique of retrospective diagnosis, focusing on Phillips's adaptive behavior before age 18. However, in *Jones,* 966 So.2d at 325–27, we held retrospective diagnosis insufficient to satisfy the second prong of the mental retardation definition. We found that both the statute and the rule require significantly subaverage general intellectual

functioning to exist *concurrently with* deficits in adaptive behavior. *Id.* (citing § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b)). Dr. Keyes tested Phillips's intellectual functioning in 2000; however, he did not assess Phillips's adaptive functioning as of that date.

Moreover, the record contains competent substantial evidence that Phillips does not suffer from deficiencies in adaptive functioning. Phillips supported himself. He worked as short-order cook, a garbage collector, and a dishwasher. The mental health experts generally agreed that Phillips possessed job skills that people with mental retardation lacked. Specifically, the defense's expert admitted that Phillips's position as a short-order cook was an "unusually high level" job for someone who has mental retardation.

Phillips also functioned well at home. He resided with his mother. According to her, he paid most of the bills and did the majority of the household chores. Phillips was also described as a great son, brother, and uncle. Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.

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

Also, while in jail, Phillips authored an alibi letter and a letter dubbed the "Bro White" letter. In the "Bro White" letter, Phillips informed the recipient that he was aware of the State's witnesses against him and that he had sent the names and addresses of their family members to a "reliable source on the outside world." He further penned, "I hate like hell to do that. But the innocent must suffer."

Phillips's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings. Also noteworthy is that Phillips killed the parole officer in a cold, calculated, and premeditated manner. A cold, calculated, premeditated murder is "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Franklin v. State,* 965 So.2d 79, 98 (Fla.2007). A CCP killing demonstrates "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident ...; that the defendant exhibited heightened premeditation." *Id.* The actions required to satisfy the CCP aggravator are not indicative of mental retardation. *See Atkins,* 536 U.S. at 319–20, 122 S.Ct. 2242 ("Exempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.")

It is clear from the evidence that Phillips does not suffer from adaptive impairments. Aside from personal independence, Phillips has demonstrated that he is healthy, wellnourished and wellgroomed, and exhibits good hygiene. Likewise, there was "no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure." Thus, as the foregoing illustrates, competent substantial evidence supports the trial court's conclusion that Phillips failed to prove the second prong—impairments in adaptive functioning.

C. Onset Before Age Eighteen

The final factor in determining mental retardation is onset before age 18. Ample evidence supports the trial court's conclusion that Phillips failed to prove this prong. Phillips's school history does not suggest onset before the age of 18. While it is true that Phillips achieved C's and D's in school, his poor performance is easily attributed to his truancy, his repeated suspensions from school, and his juvenile delinquency. As the trial court found, "there was no evidence [t]o support the Defendant's contention that his poor grades were a result of mental retardation."

***513** Moreover, anecdotes about Phillips's childhood do not suggest a manifestation of low IQ and adaptive deficits before age 18. For example, the defense suggests that Phillips was adaptively impaired because he would swim in his clothes rather than in his underwear when he and his childhood friends broke into pool areas. However, as the defense expert agreed, Phillips could have swum fully clothed due to shyness rather than because of any mental retardation. In short, Phillips does not meet the third criterion, onset of significantly subaverage general intellectual functioning with deficits in adaptive behavior before age 18. Thus, contrary to Phillips's contentions, he is not so impaired as to fall within the range of mentally retarded offenders exempt from the death penalty.

III. CONCLUSION

For the reasons discussed above, we affirm the trial court's order denying Phillips's successive 3.851 motion and concluding that Phillips is not mentally retarded.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

984 So.2d 503, 33 Fla. L. Weekly S219

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

CRIMINAL DIVISION

THE STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 83-435
JUDGE ISRAEL REYES

HARRY PHILLIPS,

Defendant.
_____/

ORDER
DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF SENTENCE

THIS CAUSE having come on to be heard on Defendant Harry Phillips' Motion to Vacate Judgment of Sentence and Request for Evidentiary Hearing, and the Court having reviewed said motion, taken testimony during an evidentiary hearing on said motion from three expert witnesses, having examined the file, heard argument of counsel, examined all of the admitted exhibits, reviewed memoranda of law, read the transcripts of said hearing, and being otherwise fully advised in the Premises, it is hereby:

CONSIDERED, ORDERED AND ADJUDGED that the Defendant's Motion to Vacate Judgment of Sentence is DENIED. The Defendant has not proven by clear and convincing evidence that he is mentally retarded.

DEFENDANT'S CLAIMS/ARGUMENTS

DEFENDANT'S CLAIMS

The Defendant's primary claim is that he is mentally retarded. Thus, he alleges that pursuant to the holding of *Atkins v. Virginia*, 536 U.S. 304 (2004), his death sentence is in conflict with his right not be subjected to cruel and unusual punishment as guaranteed by the

Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Accordingly, he is requesting that this Court find that he is mentally retarded, enter a written order prohibiting the imposition of the death penalty, resentence him to life imprisonment, and set forth its findings specially in a written order.

The Defendant also claims that the procedure provided by Fla. R. Crim. P. 3.203 violates the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

DEFENDANT'S ARGUMENTS

The Defendant argues that the controlling definition of mental retardation is that of the American Association on Mental Retardation (AAMR), which published the 10th Edition of their text, *Mental Retardation, Definition, Classification, and Systems of Support*, in 2002 and reads as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

Additionally, the Defendant argues that although he is proceeding as required under Fla. R. Crim. P. 3.203, he objects to certain omissions and procedures contained in the rule that render the rule violative of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He adds that these issues must be resolved before an evidentiary hearing takes place so he has notice of the procedures which will be followed in his case. The Defendant states that Fla. R. Crim. 3.203, as currently written, does not provide a constitutionally adequate procedure for resolution of mental retardation claims presented by those persons whose death

sentences were final before the United States Supreme Court decided *Atkins v. Virginia,* 536 U.S. 304 (2002).

The Defendant adds that because of this constitutionally-infirmed procedure, any pending death sentence must be vacated where a prima facie showing of mental retardation is made, and a criminal trial that comports with the Sixth Amendment must be ordered to determine whether the Defendant is, in fact, mentally retarded.

The Defendant adds that Fla. R. Crim. P. 3.203 does not contain a standard of proof. Therefore, the omission of a standard of proof from that rule gives him no notice regarding what standard will be applied to his claim and this violates his due process rights. He objects to the clear and convincing evidence standard contained in Section 921.137, Fla. Stat. (2005). The Defendant concludes this argument by stating that the jury should make the decision and the burden should be on the State to prove beyond a reasonable doubt that the Defendant is not mentally retarded. However, if he is required to provide proof of his mental retardation, his burden of proof should be no higher than the preponderance of the evidence standard.

STATE'S CLAIMS/ARGUMENTS

The Defendant's motion should be denied because he is collaterally estopped from claiming he is mentally retarded.

Even if the Defendant is not collaterally estopped, the Defendant has not proven by clear and convincing evidence that he has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive behavior, and that his condition originated before he reached the age of 18.

Lastly, the correct standard of proof is clear and convincing evidence.

FACTS

The facts of this case are contained in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004). During the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. *Id.* An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. *Id.* Svenson was the victim of multiple gunshot wounds. *Id.* There apparently were no eyewitnesses to the homicide. *Id.*

As parole supervisor, the victim had responsibility over several probation officers in charge of the Defendant's parole. *Id.* The record indicates that for approximately two years prior to the murder, the victim and the Defendant had repeated encounters regarding the Defendant's unauthorized contact with a probation officer. *Id.* On each occasion, the victim advised the Defendant to stay away from his employees and the parole building unless making an authorized visit. *Id.* After one incident, based on testimony of the victim and two of his probation officers, the Defendant's parole was revoked and he was returned to prison for approximately twenty months. *Id.*

On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against the Defendant. *Id.* Neither was injured in the incident, for which the Defendant was subsequently charged. *Id.*

Following the victim's murder, the Defendant was incarcerated for parole violations. *Id.* Testimony of several inmates indicated that the Defendant told them he had killed a parole officer. *Id.*

The sentencing order reflects additional facts:

> Mr. Svenson was the last person to leave the parole office, shortly after 8:30 p.m. The last person who left before Mr. Svenson had left at 8:30 p.m. There was only one car in the parking lot at the time of the homicide and large piles of sand. At the time he was killed, Mr. Svenson was carrying old phone books and depositing them in a...dumpster garbage bin, located in the rear parking lot. The evidence showed that Mr. Svenson was shot three times by the [dumpster]: twice in the left side of the chest, and once, a graze wound to the head. The evidence indicates that the Defendant hid and waited for Mr. Svenson before he shot him. Mr. Svenson then ran approximately one hundred (100) feet and was then shot four times in the head, and once in the spine. The evidence indicated that because eight shots were fired, from a six-shot revolver and witnesses heard two volleys of shots the defendant had reloaded between the two volleys. In addition, the murder weapon was taken from the scene and never recovered, nor were at least seven of the spent casings. Furthermore, there was evidence at the trial that prior to the homicide; the Defendant told an acquaintance that "I'm not going to jail again" and that he wanted to put an end to his problem with his parole officer. The Defendant had threatened to "get them" if he was violated, and he bragged about the killing shortly thereafter and said it was because they were harassing him.

The Defendant was thereafter indicted for first-degree murder.

PROCEDURAL HISTORY

PRIOR TO FILING OF INSTANT MOTION

The procedural history of this case, prior to the filing of the instant motion, is thoroughly outlined in *Phillips v. State*, 894 So. 2d 28 (Fla. 2005). In that opinion, the Florida Supreme Court remarked that it was not precluding the Defendant from addressing the potential merits of a mental retardation claim under *Atkins v. Virginia,* 536 U.S. 304 (2002) or Fla. R. Crim. P. 3.203. *Id.* The Florida Supreme Court added that the Defendant was free to file a motion to vacate death sentence under the aforementioned rule. *Id.* However, the Court did not express any opinion regarding the merits of such a claim. *Id.*[1]

[1] Section 921.137, Fla. Stat. (2004), the statute prohibiting the execution of mentally retarded defendants, was enacted on June 12, 2001, and therefore did not exist at the time of the Defendant's resentencing or subsequent direct appeal. *Phillips v. State*, 894 So. 2d 28, 40 (Fla. 2004). *See* Section 921.137 (8), Fla. Stat. (2004) (This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.) As the Sentencing Order reflects, the Defendant was resentenced on April 20, 1994.

On November 30, 2004, the Defendant filed a motion requesting the Florida Supreme Court to relinquish jurisdiction to this Court for determination of mental retardation.

On January 27, 2005, the Florida Supreme Court denied the Defendant's motion to relinquish jurisdiction to the circuit court for a determination of mental retardation without prejudice to file a motion under Fla. R. Crim. P. 3.203 within sixty (60) days.

INSTANT MOTION'S
PSYCHOLOGICAL EVALUATIONS IN SUPPORT THEREOF
AND
EVIDENTIARY HEARING

Subsequently, on March 28, 2005, the Defendant, as a result of the Florida Supreme Court's ruling, filed the instant motion.

On February 13, 14, 15, and 16, 2006, this Court granted the Defendant's request and conducted an evidentiary hearing. At the commencement of the hearing counsel for the Defendant announced that the instant motion was actually a Fla. R. Crim. P. 3.851 motion relying on Fla. R. Crim. P. 3.203.[2]

During said evidentiary hearing, the following witnesses testified and exhibits were admitted:

Defense Witnesses

Glenn Ross Caddy, Ph.D., A.B.P.P.,
a clinical psychologist.

Denis Keyes, B.S., M.Ed., M.S., Ed.S., Ph.D., NCSP, FAAMR,
Associate Professor of Special Education

[2] Fla. R. Crim. P. 3.851(d)(4).

Defense Exhibits

Defense Exhibit A: Dr. Caddy's Brief Intellectual Assessment of the Defendant dated 2/1/06 documenting an examination conducted on 5/10/05

Defense Exhibit B: Dr. Keyes' Psychoeducational Report of the Defendant dated 10/21/05 along with a letter explaining his findings and containing his opinions

Defense Exhibit C: Letter dated 11/10/87 written by Dr. Carbonell

Defense Exhibit D: Dr. Suarez' Psychological Evaluation of the Defendant dated 09/21/05 signed 12/8/05

Defense Exhibit E: Dr. Hyde's Comprehensive Behavioral Neurological Evaluation of the Defendant dated 10/17/05

Defense Exhibit F: Defendant's Department of Corrections Medical Records

Defense Exhibit G Dr. Keyes' Curriculum Vitae

Defense Exhibit H: Blue Binder of Background Materials Volume 2 Supplement containing:

- Tab 1: Police Report and Note Concerning Larry Hunter
- Tab 2: School Records, 1958-59, 1959-60 (multiple copies)
- Tab 3: Miramar Police Report re: Shooting Incident
- Tab 4: Prison Medical Records as of 1990
- Tab 5: FDLE Rap Sheet: 10/29/87
- Tab 6: Brevard County Records: 1963-64
- Tab 7: Selected DDC and Probation Records: 1963-1984
- Tab 8: Witness Affidavits and Testimony and Personnel Records
  - a. Julius Phillips
  - b. Ida Stanley
  - c. Laura Phillips
  - d. Reverent Jenkins
  - e. Mary Williams
  - f. Samuel Forde
  - g. Robert Cummings
  - h. City of Miami Work Records
  - i. Neighbors Restaurant Work Records
  - j. Ocilla Curry
  - k. Georgia Ayers
- Tab 9: Fla. R. Crim. P. 3.203
- Tab 10: Section 921.137, Fla. Stat. (2005)
- Tab 11: Fla. Admin. Code R. 65B-4.032 (2005)

Defense Exhibit I: Blue Binder of Background Materials Supplemental Volume

Tab 1: Florida Statute: Aggravating and Mitigating Circumstances
Tab 2: Florida Supreme Court Opinion on Direct Appeal
Tab 3: Sentencing Order (Dated April 20, 1994)
Tab 4: Supplemental Police Report dated 11/124/82
Tab 5: Transcript of Clemency Hearing dated June 12, 1987
Tab 6: Bro White Letter (See State's Exhibit 2)
Tab 7: Psychological reports
Dr. Haber
Dr. Miller
Dr. Carbonell
Tab 8: Letter to Dr. Jethro Toomer re: background materials
Tab 9: Hearing Transcripts
Dr. Haber: 1988 Evidentiary Hearing
1994 Re-sentencing
Dr Miller: 1988 Evidentiary Hearing
1994 Re-sentencing
Dr. Carbonell: 1988 Evidentiary Hearing
1994 Re-sentencing
Dr. Toomer: 1988 Evidentiary Hearing
1994 Re-sentencing
Tab 10: Department of Corrections Records

Defense Exhibit J: White Binder of Background Materials Volume 3
Tab 1: DOC Medical Records 1990-2005

Defense Exhibit K: Dr. Keyes' Dissertation on Malingering

Defense Exhibit L: Article: Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation, AAMR, Vol. 42, No. 2; April 2004

Defense Exhibit M: Defendant's TONI-3 [3] Score Sheet

Defense Exhibit N: Examiner's Manual TONI-3 (Preface/ 27-32)

Defense Exhibit O: Defendant's WRAT-3 [4] Score Sheet dated 9-20-05

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[3] The TONI-3, a major revision of the...*Test of Nonverbal Intelligence*, is a norm-referenced measure of intelligence, aptitude, abstract reasoning, and problem solving that is completely free of the use of language. The test requires no reading, writing, speaking, or listening on the part of the test subject. It is completely nonverbal and largely motor-free, requiring only a point, nod, or symbolic gesture to indicate response choices. AGS Publishing, Products, TONI-3: Test of Nonverbal Intelligence, Third Edition *at* http://www.agsnet.com/Group.asp?nGroupInfoID=a19100 (last visited on March 26, 2006).

Defense Exhibit P: Technical Assistance PaperTONI-3

Defense Exhibit Q: Defendant's General Corrections Interpretive Report for the MMPI-2 for an Assessment Dated 9/21/05

Defense Exhibit R: Defendant's VIP[5] Raw Data; Test Date of 09/21/05

Defense Exhibit S: ABAS[6] Form: Off. Garry Paxton dated 11/16/05

Defense Exhibit T: ABAS Form: Jerome Lee dated 11/17/05

Defense Exhibit U: ABAS Form: Demetress Williams dated 11/16/05

Defense Exhibit V: ABAS Form: Off. Thomas Harvey dated 11/17/05

Defense Exhibit W: ABAS Form: Sgt. Henry Walker dated 11/16/05

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[4] The...*WRAT-3* allows educators to examine students' development of reading, spelling, and arithmetic. Spelling and arithmetic may be administered to groups or individuals; reading, to an individual only. The *WRAT-3* can be used to diagnose learning disabilities in reading, spelling, and arithmetic when given with a comprehensive test of ability. The *WRAT-3* subtests include recognizing and naming letters, pronouncing printed words, writing letters and words from dictation, counting, reading number symbols, and oral and written computation. Super Duper Publications for Education Materials, Wide Range Achievement Test - 3rd Edition, *at* http://www.superduperinc.com/TUV_Pages/tm589.htm (last visited on March 26, 2006).

[5] Designed to help meet the increasing need for a well-validated, psychometrically sound test that can provide empirical support in courtrooms and other legal institutions, the Validity Indicator Profile (VIP) test provides a broad spectrum of information about an individual's performance on an assessment battery. As a measure of response styles, test results help assess whether the results of cognitive, neuropsychological or other types of testing should be considered representative of an individual's overall capacities. The VIP test is a validity indicator designed to be administered with tests that assess cognitive capacity. The individual's response style is classified into one of four categories: Compliant, Inconsistent, Irrelevant, or Suppressed. Results of the VIP test indicate whether the individual's performance on other tests of cognitive capacity should be considered a valid representation of his or her abilities. http://www.pearsonassessments.com/tests/vip.htm (last visited on May 3, 2006).

[6] Adaptive Behavior Assessment System®—Second Edition (ABAS®—Second Edition). A *complete assessment of adaptive skills functioning*. Now including ages birth to five years, the Adaptive Behavior Assessment System™-Second Edition (ABAS™-Second Edition) is the only instrument to: incorporate current American Association of Mental Retardation (AAMR) guidelines for evaluating the three general areas of adaptive behavior (Conceptual, Social, Practical) and assess all 10 specific adaptive skills areas specified in the DSM-IV. It is used to: determine how individual is responding to daily demands; develop treatment and training goals; determine eligibility for services and Social Security benefits; assess individuals with mental retardation, learning difficulties, ADD/ADHD, or other impairments; and assess capability of adults to live independently. Harcourt Assessment, *at* http://harcourtassessment.com/haiweb/Cultures/en-US/Products/Product+Detail.htm?CS_ProductID=015-8004-507&CS_Category=SPsychological&CS_Catalog=TPC-USCatalog (last visited on March 26, 2006).

Defense Exhibit X: ABAS Form: Lisa Wiley dated 11/16/05

State Witness

Enrique Suarez, Ph.D., Neurophysiologist

State Exhibits

State's Exhibit 1: Alibi Note

State's Exhibit 2: Letter written by Defendant a/k/a Bro White Letter

State's Exhibit 3: TONI-3 Validity & Mental Measurement Citation/Examiner's Manual *(Pages 26-70 are omitted) (See Court Exhibit 2)*

State's Exhibit 4: Position Paper of the National Academy of Neuropsychology on Symptom validity assessment: Practice issues and medical necessity; accepted 02/28/05

State's Exhibit 5: TONI-3 Examiner's Manual Page 32

State's Exhibit 6: Fifteen Item Memory Test Chart

State's Exhibit 7: Defendant's Fifteen Item Memory Test Results

State's Exhibit 8: Defendant's Recognition Test Results

State's Exhibit 9: AAMR Manual Pages 75 and 79

Court Exhibits

Court Exhibit 1: Peer to Peer Review of TONI-3
Court Exhibit 2: TONI-3 Pages 26-70 *(See State's Exhibit 3)*
Court Exhibit 3: Handbook of Nonverbal Assessment

CONCLUSION

On February 24, 2006, the State submitted to this Court its Post Hearing Memorandum.

On February 27, 2006, the Defendant filed with the Court his Post Evidentiary Hearing Memorandum.

Counsel for all parties declined this Court's offer to allow for oral argument on the merits of the motion.

FINDINGS OF FACT

In addition to the facts developed during the evidentiary hearing, this Court is adopting/taking judicial notice of the facts as outlined in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004), and the facts contained in the Sentencing Order dated April 20, 1994.[7]

Additionally, on April 29, 1982, the Defendant wrote an alibi note as evidenced by State's Exhibit 1. The Defendant wrote a letter as evidenced by State's Exhibit 2, the Bro White Letter. On November 10, 1987, Dr. Carbonell prepared a letter documenting her findings. On April 2, 2004, the AAMR published an article on the Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation as evidenced by Defense Exhibit L. On February 28, 2005, a Position Paper of the National Academy of Neuropsychology on Symptom validity assessment: Practice issues and medical necessity was accepted as evidenced by State's Exhibit 4. On May 10, 2005, Dr. Caddy conducted an intellectual assessment of the Defendant. During May, of 2005 the Bureau of Exceptional Education and Student Services prepared a Technical Assistance Paper for the TONI-3 as evidence by Defense Exhibit P. On September 20, 2005, the Defendant underwent a Wide Range Achievement Test (WRAT-3) as evidenced by Defense Exhibit O. On September 21, 2005, Dr. Suarez prepared his Psychological Evaluation of the Defendant. A General Corrections Interpretive Report for the MMPI-2 for an Assessment Dated 9/21/05, Defense Exhibit Q, was also generated. On September 21, 2005, the Defendant underwent a VIP as evidenced by Defense Exhibit R. On October 17, 2005, Dr. Hyde prepared his Comprehensive

Behavioral Neurological Evaluation of the Defendant. On October 21, 2005, Dr. Keyes prepared his Psycho Educational Report of the Defendant explaining his findings and containing his opinions. On November 16, 2005, Officer Gary Paxton underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit S. On November 16, 2005, Officer Demetress Williams underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit U. On November 16, 2005, Sgt. Henry Walker underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit W. On November 16, 2005, Officer Lisa Wiley underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit X. On November 17, 2005, Officer Jerome Lee underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit T. On November 17, 2005, Officer Thomas Harvey underwent an Adaptive Behavior Assessment System Test as evidenced by Defense Exhibit V. On February 1, 2006, Dr. Caddy drafted his report documenting his findings from the May 5, 2005 intellectual assessment of the Defendant. In 2005, the Defendant underwent a Test of Nonverbal Intelligence as evidenced by Defense Exhibit M. In 2005, the Defendant underwent a Fifteen Item Memory Test as evidenced by State's Exhibit 7. In 2005, the Defendant underwent a Recognition Test as evidenced by State's Exhibit 8.

[7] Section 90.202(6), Fla. Stat. (2005) states that a court may take judicial notice of the records of any court of this state.

EXPERT WITNESS TESTIMONY[8]

Three witnesses (two for the Defendant and one for the State) testified during the subject evidentiary hearing. For the reasons stated below, this Court finds that all three are experts in their fields and thus, their opinions are admissible.[9] However, the weight this Court will accord the testimony is discussed in the Legal Analysis section of this Order.

Defendant's Two Experts

Dr. Caddy

Dr. Caddy, the Defendant's expert, holds a Ph.D. in clinical psychology and is licensed in the State of Florida. He is also a Fellow of the American Academy of Clinical Psychology and certified in Behavioral Medicine. He is also board-certified in Forensic Psychology.

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[8]It is a trial court's duty to decide what weight to give conflicting testimony. *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). In making these findings of fact, this court, based on the in court testimony, considered whether: each witness seemed to have an opportunity to see and know the things about which the witness testified, each witness seemed to have accurate memory, the witness was honest and straightforward in answering the attorneys' questions, the witness had some interest in how the case should be decided, the witness' testimony agreed with the other testimony and other evidence in the case, the witness had been offered or received any money, preferred treatment or other benefit in order to get the witness to testify, whether any pressure or threat been used against the witness that affected the truth of the witness' testimony, the witness at some other time make a statement that is inconsistent with the testimony he gave in court, it was proved that the witness had been convicted of a crime, and/or it was proved that the general reputation of the witness for telling the truth and being honest was bad. *See Fla. Std. Jury Instr. (Crim.) 3.9 and 3.9(A).* ("Expert witnesses are like other witnesses, with one exception - the law permits an expert witness to give his opinion. However, an expert's opinion is reliable only when given on a subject about which you believe him to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.")

[9] If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial. Section 90.702, Fla. Stat. (2004). There is a four-prong test for the admissibility of expert testimony. *See CSX Transp., Inc. v. Whittler,* 584 So. 2d 579, 584 (Fla. 4th DCA 1991), *review denied*, 595 So.2d 556 (Fla.1992) (Setting forth the "four-prong test for the admissibility of expert testimony: (1) the opinion evidence must be helpful to the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion evidence must be applied to evidence offered; and (4) the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value."). Whether a witness possesses adequate qualifications to submit expert testimony is a question of fact to be decided by the trial court."). *See Wright v. Schulte,* 441 So.2d 660, 662 (Fla. 2d DCA 1983) ("Our supreme court has commented that the rule is very well settled that, to give an opinion on medical questions, one may be qualified by study without practice, or by practice without study .... Florida courts have made it clear that one need not be of the same specialty or branch of medicine, yet may be qualified to give expert testimony.").

At the evidentiary hearing, Dr. Caddy testified for the Defendant. Dr. Caddy testified that half of his practice consists of forensic work, with one-third of the forensic work relating to criminal law matters. He has been hired approximately fifteen times in fifteen years by CCR[10] throughout the state. He has never been hired as an expert by the State.

On May 10, 2005, Dr. Caddy conducted an intellectual assessment of the Defendant. The instrument he used as part of his comprehensive intellectual assessment was the Wechsler Adult Intelligence Scale III (WAIS-III) and he took about three hours to administer the test to the Defendant. He testified that the WAIS-III is the substantially used single measure of intellectual assessment. He added that it is an interactive administration process where you follow very specific guidelines for the administration. There are a series of subtests and in the series of subtests the examinee responds to questions that are either administered orally, or in some instances the tasks are performance based tasks that the person is required to complete. When they have completed these tasks and have answered the questions, the answers and the nature of their completion activities is scored against the standard. Then that score is translated into a score against the distribution of IQ's in the normative population.

On the WAIS-III, the Defendant achieved a full-scale score of 70, which placed him in the borderline range of mental retardation. His verbal dimension score was 69, overall score was 69, and his performance Intelligence Quotient (IQ) score was 76. Dr. Caddy explained that the difference in the verbal and IQ scores could be due to the fact that low functioning individuals have reduced capacities to express themselves verbally due to educational and cultural

[10] To facilitate the expeditious resolution of collateral appeals, the Florida legislature created the Office of Capital Collateral Representative (CCR), in 1985, as a State agency. Attorneys were employed to represent those on death-row in State and Federal collateral proceedings. http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/c!010303.htm (last visited May 3, 2006).

disadvantages.

Dr. Caddy also relied upon a report by Dr. Keyes, who administered the WAIS-III to the Defendant in 2000. The scores obtained by Dr. Keyes were a full scale score of 74, a performance index of 76, and a verbal index of 75. Dr. Caddy stated that these scores are consistent with the scores he obtained.

Dr. Caddy also testified that he had Dr. Joyce Carbonell's November 10, 1987 report. Dr. Carbonell also gave the Defendant the WAIS-III. The results of Dr Carbonell's administration of the WAIS-III were a full-scale score of 75, verbal score of 75, and performance score of 77.

Dr. Caddy testified that people who have severe mental limitations tend to function much better in a highly-structured environment than if they were living on the streets. However, there is no clear and convincing evidence in the record that the Defendant has severe mental limitations. Dr. Caddy added that living within a structured environment could actually have the effect of increasing some intellectual assessment scores due to the tendency for there to be more opportunities to read in such a setting. It should be noted that the Defendant told Dr. Caddy he does not read very often.

When asked on cross examination if he has an opinion regarding whether the Defendant was mentally retarded, Dr. Caddy stated: "I have an opinion that he is functioning at an IQ of 70. I have an opinion that says that this condition has existed since very early in life. I have not done personally those tests that look at adaptive functioning."

Dr. Caddy further testified that an IQ range of 70 through 79 is borderline and that generally, borderline is not retarded. When asked if he would put Harry Philips into the borderline category or the mentally retarded category based on his evaluations and everything he

read, Dr. Caddy equivocated: "In some areas I put him in the retarded category and some areas I put him in the borderline category."

Dr. Keyes

Dr. Keyes is an Associate Professor of Special Education at the College of Charleston in South Carolina. He has 31 years of experience working with mental retardation. He has never been hired by the State as an expert. When hired by the defense, he has found defendants to be mentally retarded approximately half of the time. Regarding other cases, he has told CCR several times that the defendant is not mentally retarded and that he would not be able to help. Dr. Keyes is not licensed in Florida. Dr. Keyes taught a class for the Florida Prosecuting Attorneys Association in 2001 on how to recognize mental retardation. He stated that prosecutors should look for poor planning and coping skills.

In order to determine adaptive functioning, Dr. Keyes first had to determine if there was an onset of mental retardation before the age of 18. He looked at the Defendant's school and work records and spoke with his family and friends. As a result of his conversations with the Defendant's friend, he came to believe that the Defendant demonstrated significant adaptive deficits before the age of 18. Dr. Keyes also administered the Scale of Independent Behavior test.

It is the opinion of Dr. Keyes that the Defendant is mentally retarded. Dr. Caddy's test results were similar. Dr. Keyes agrees with Dr. Hyde's report that the Defendant has brain damage. It should be noted that Dr. Suarez's test results were based on different information.

Dr. Keyes stated that he would not have administered the same tests as those given by Dr. Suarez. Dr. Keyes believes that the ABAS test results are invalid and that the MMPI should

never be administered on persons with mental retardation. However, there is no clear and convincing evidence that the Defendant is mentally retarded.

State's Expert Dr. Suarez

Dr. Enrique Suarez, a specialist in Neuropsychology, was called by the State. Neuropsychological tests are geared towards impairments that may reflect physical brain damage. Impairments may be due to organic or anatomical trauma.

Dr. Suarez has done approximately 3,000 forensic evaluations. The overwhelming majority of these evaluations have been for the defense. He currently has cases where he has been hired by the Public Defender's Office. He also does evaluations for the CCR. It should be noted that Dr. Suarez is not particularly fond of the death penalty.

Based on all the tests he ran, and the review of the full record in this case including the testimony of Dr. Keyes and Dr. Caddy, Dr. Suarez does not think that the Defendant is mentally retarded. However, there is substantial indication that he probably functions in the low average range.

LEGAL ANALYSIS

PROCEDURE
Written Motion

A defendant who intends to raise mental retardation as a bar to execution must file a written motion that includes (1) a statement that the defendant is mentally retarded and, (2) if the defendant has been previously tested, evaluated, or examined by one or more experts, the names and addresses of those experts, as well as copies of any expert reports. Fla. R. Crim. P. 3.203(c)(2); 3.851(d)(4). If the defendant has not been previously tested, evaluated, or examined by an expert, he must include a statement to that effect. Fla. R. Crim. P. 3.203(c)(3).

In its opinion promulgating Rule 3.203, the Florida Supreme Court also noted that Rule 3.203 divides into three categories the types of cases in which a defendant/inmate may avail himself of a determination of mental retardation as a bar to execution including mental retardation claims that arise in cases where the conviction for first-degree murder and sentence of death have been affirmed on direct appeal on or before the effective date of the rule. *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565 (Fla. 2004); Fla. R. Crim P. 3.203(a) (This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant's mental retardation becomes an issue.)

Here, the Defendant's claims arose before the effective date of Fla. R. Crim. P. 3.203, (May 20, 2004) in that, his first-degree murder and sentence of death were affirmed on direct appeal on August 30, 1985. Thus, the Defendant's case is a final case and subject to Fla. R. Crim. P. 3.203 by operation of Fla. R. Crim. P. 3.851(d)(4). *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565 (Fla. 2004); *Walls v. State*, 2006 WL 300665 (Fla. 2006) ("A death-sentenced prisoner is permitted to file a motion for a determination of mental retardation in cases where the prisoner's direct appeal is final.").

Defendant's Evaluation

After the defendant has filed a motion for a determination of mental retardation as a bar to execution, the court must appoint two experts who must "promptly test, evaluate, or examine" the defendant and submit a written report of any findings to the parties and to the court. Fla. R. Crim. P. 3.203(c)(3).

Here, the Defendant was examined/evaluated by the three aforementioned experts.

Evidentiary Hearing

The court must conduct an evidentiary hearing on the motion for a determination of mental retardation, at which time it must consider the findings of experts and any other evidence regarding the defendant's mental retardation. Fla. Crim. P. 3.203(e); § 921.137(4), Fla. Stat. (2006).

This Court conducted an evidentiary hearing on February 13, 14, 15, and 16, 2006. During the aforementioned hearing, the above three expert witnesses testified and the above listed exhibits and documents were admitted.

Court Order/Findings

If the court finds that the defendant has not established mental retardation, it must enter a written order providing its specific findings in support of that determination. Fla. R. Crim. P. 3.203(e).

Herein is the written order providing this Court's specific findings in support of its determination that the Defendant has not established by clear and convincing evidence that he is mentally retarded.

DUE PROCESS
Substantive and Procedural

The United States Constitution protects the right to substantive and procedural due process. Substantive due process protects fundamental rights from unwarranted encroachment from the government. *See Department of Law Enforcement v. Real Property,* 588 So. 2d 957, 960 (Fla. 1991). In cases where substantive due process rights are at issue, procedural due process protects an individual's right to a fair judicial proceeding. *See id.* Nevertheless, a

Defendant has no right to a jury determination of whether he is mentally retarded. *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). The reason for that is that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. *Hildwin v. Florida,* 490 U.S. 638 (1989). Additionally, sentencing matters are within the sole province of judges. *Grage v. State*, 717 So. 2d 547 (Fla. 5th DCA 1998).

Therefore, the Defendant is incorrect when he states that the jury should make the decision as to whether he is mentally retarded. Here, the death sentence has already been imposed and affirmed. The Defendant is trying to vacate his sentence, not oppose its imposition. Nowhere in our jurisprudence is there a provision for juries to make legal determinations as to whether a motion to vacate a sentence should be granted. That is strictly within the province of the Court.

Regarding the Defendant's Eighth Amendment argument, while it is true that the *Atkins*[11] Court opined that executing a mentally retarded offender is unconstitutionally cruel and unusual punishment, it is axiomatic that there is no constitutional violation if the Defendant cannot prove by clear and convincing evidence that he is mentally retarded. *Id.* As explained in this Order, the Defendant has not proven by clear and convincing evidence that he is mentally retarded. Thus, there is no Eighth Amendment violation.

Although, the Defendant is correct that Fla. R. Crim. P. 3.203 does not contain a standard of proof, the omission of a standard of proof from that rule has no bearing on his notice regarding what standard will be applied to his claim due to the Florida Supreme Court's opinion in *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565 (Fla. 2004). The aforementioned opinion placed the Defendant on constructive

notice of the standard of proof that would be applied to his claim. In fact, the Defendant cited to the opinion in the subject motion. Clearly, he was on notice. Therefore, the Defendant's due process rights have not been violated.

MENTAL RETARDATION
Background

In 2001, the Florida Legislature adopted Section 921.137 of the Florida Statutes, prohibiting the imposition of the death penalty upon mentally retarded defendants who are sentenced to death after the statute's effective date of June 12, 2001, and providing procedures to determine whether a defendant is mentally retarded. § 921.137, Fla. Stat. (2005). One year later, the United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304 (2002), found the imposition of the death penalty upon mentally retarded offenders to be an unconstitutionally excessive punishment.

In an effort to integrate the United States Supreme Court's holding in *Atkins* (citations omitted) into Florida law, the Florida Supreme Court in 2004 promulgated a new rule of criminal procedure, Fla. R. Crim. P. 3.203, which prohibits the execution of all mentally retarded defendants, including those convicted of a capital offense prior to the effective date of Section 921.137, and provides new procedures for determining mental retardation. Fla. R. Crim. P. 3.203; *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure,* 875 So. 2d 563 (Fla. 2004). Section 921.137(1), of the Florida Statutes, and Rule 3.203(b) of the Florida Rules of Criminal Procedure share the same definition of mental retardation discussed *infra.* The Defendant, however, argues that the governing definition of mental retardation is the definition promulgated by the American Association on Mental Retardation (AAMR).

[11] 536 U. S. 304 (2002)

American Association on Mental Retardation (AAMR)
Definition of Mental Retardation

The American Association on Mental Retardation (AAMR) defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18."[12] The AAMR states that an IQ score of 75 is "approximately 2 standard deviations below the mean, considering the standard error of measurement."[13] Under the AAMR definition of mental retardation, limited intellectual functioning requires that an individual have impairment in general intellectual functioning that places him/her in the lowest category of the general population. Intelligence Quotient (IQ) scores alone are not precise enough to identify the upper boundary of mental retardation. Some experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but the definition also includes some individuals with IQ scores in the low to mid-70s.[14] Clinical judgments by experienced diagnosticians are necessary to ensure accurate diagnoses of mental retardation.[15]

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[12] American Association on Mental Retardation, AAMR Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on Aug. 23, 2005); *see also* AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly sub average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18").

[13] American Association on Mental Retardation, AAMR Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on Aug. 23, 2005).

[14] *See* James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on Aug. 23, 2005). Ellis notes that "relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation." *Id.* at 7 n.18; *see also* American Association of Mental Retardation, Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on Aug. 23, 2005) (noting that "an obtained IQ score must always be considered in light of its standard error of measurement," thus making the IQ ceiling for mental retardation rise to 75. However, "an IQ score is only one aspect in determining if a person has mental retardation."); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed.

The AAMR definition of mental retardation includes adaptive behavior limitations, which produce real-world disabling effects on a person's life, designed to ensure that an individual is truly disabled and not simply a poor test-taker.[16] Under this definition, adaptive behavior is "expressed in conceptual, social, and practical adaptive skills" and focuses on broad categories of adaptive impairment, not service-related skill areas.[17]

The AAMR also requires that mental retardation be manifested during the developmental period, which is generally defined as up until the age of 18. This does not mean that a person must have been IQ tested with scores in the mentally retarded range during the developmental period, but instead, there must have been manifestations of mental disability, which at an early age generally take the form of problems in the area of adaptive functioning.[18] The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.[19]

1992) ("Mental retardation is characterized by significantly sub average intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) ("This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

[15] This fact is reflected in *Atkins v. Virginia*, 536 U.S. 304 (2002) where the Court noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. 304, 309 n.5 (2002).

[16] Ellis, *supra* note 11, at 8.

[17] *Id.*

[18] Ellis, *supra* note 11.

The Governing/Applicable Definition of Mental Retardation from Fla. R. Crim. P. 3.203

The Defendant is incorrect when he argues that the AAMR definition of mental retardation is governing in this instance. Having found, *supra*, that the Defendant's case is subject to Fla. R. Crim. P. 3.203, this Court must apply the definition espoused in the applicable governing rule. Fla. R. Crim. P. 3.851(d)(4); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565 (Fla. 2004); *Walls v. State*, 2006 WL 300665 (Fla. 2006) (A death-sentenced prisoner is permitted to file a motion for a determination of mental retardation in cases where the prisoner's direct appeal is final.).

Florida Rule of Criminal Procedure 3.203(b) defines the term "mental retardation" as: (1) "significantly sub average general intellectual functioning," (2) "existing concurrently with deficits in adaptive behavior," and (3) which has "manifested during the period from conception to age 18." Fla. R. Crim. P. 3.203(b); *see Rodriguez v. State,* 919 So. 2d 1252 (Fla. 2005) n 8. (According to the Diagnostic and Statistical Manual of Mental Disorders, mental retardation is "characterized by significantly sub average intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 39 (4th ed. 2000)); *see* also §§ 393.063(38), 916.106(12), Fla. Stat. (2005) (both defining mental retardation in the same manner as defined in Section 921.137, Fla. Stat. (2005)).

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[19] *Id.*

Significantly Sub Average
General Intellectual Functioning

"Significantly sub average 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 Department of Children and Family Services." Fla. R. Crim. P. 3.203(b) (noting that the intelligence tests authorized by the Department of Children and Family Services are found in Fla. Admin. Code R. 65B-4.032 (2005); Fla. Admin. Code R. 65B-4.032 (2005) (Requiring the Stanford-Binet Intelligence Scale[20] and the Wechsler Intelligence Scale[21] tests to be administered to defendants convicted of a capital felony who are suspected of being

[20] The Stanford-Binet intelligence scale is a standardized test that assesses intelligence and cognitive abilities in children and adults aged two to 23. The Stanford-Binet intelligence scale is used as a tool in school placement, in determining the presence of a learning disability or a developmental delay, and in tracking intellectual development. In addition, it is sometimes included in neuropsychological testing to assess the brain function of individuals with neurological impairments. The Stanford-Binet intelligence scale should be administered and interpreted by a trained professional, preferably a psychologist. The Stanford-Binet intelligence scale is a direct descendent of the Binet-Simon scale, the first intelligence scale created in 1905 by psychologist Alfred Binet and Dr. Theophilus Simon. This revised edition, released in 1986, was designed with a larger, more diverse, representative sample to minimize the gender and racial inequities that had been criticized in earlier versions of the test. The Stanford-Binet scale tests intelligence across four areas: verbal reasoning, quantitative reasoning, abstract/visual reasoning, and short-term memory. The areas are covered by 15 subtests, including vocabulary, comprehension, verbal absurdities, pattern analysis, matrices, paper folding and cutting, copying, quantitative, number series, equation building, memory for sentences, memory for digits, memory for objects, and bead memory. All test subjects take an initial vocabulary test, which along with the subject's age, determines the number and level of subtests to be administered. Total testing time is 45-90 minutes, depending on the subject's age and the number of subtests given. Raw scores are based on the number of items answered, and are converted into a standard age score corresponding to age group, similar to an IQ measure. Health A to Z, Your Family Health Site *at* http://www.healthatoz.com/healthatoz/Atoz/ency/stanford-binet_intelligence_scales.jsp. (last visited on March 6, 2006).

[21] The Wechsler adult intelligence scale (WAIS) is an individually administered measure of intelligence, intended for adults aged 16–89. The WAIS is intended to measure human intelligence reflected in both verbal and performance abilities. Dr. David Wechsler, a clinical psychologist, believed that intelligence is a global construct, reflecting a variety of measurable skills and should be considered in the context of the overall personality. The WAIS is also administered as part of a test battery to make inferences about personality and pathology, both through the content of specific answers and patterns of subtest scores. Besides being utilized as an intelligence assessment, the WAIS is used in neuropsychological evaluation, specifically with regard to brain dysfunction. Large differences in verbal and nonverbal intelligence may indicate specific types of brain damage. The WAIS is also administered for diagnostic purposes. Intelligence quotient (IQ) scores reported by the WAIS can be used as part of the diagnostic criteria for mental retardation, specific learning disabilities, and attention-deficit/hyperactivity disorder (ADHD). The Wechsler Adult Intelligence Scale *at* http://www.minddisorders.com/Py-Z/Wechsler-adult-intelligence-scale.html (last visited March 6, 2006). This test is the standard instrument for assessing intellectual functioning. *Atkins*, 536 at 309, fn 5.

mentally retarded); *see Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005)* (finding that in order to be exempt from execution under *Atkins,*[22] a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below). Thus, this Court in determining the Defendant's IQ is limited to relying on the results contained in the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale and no other evaluation instrument.[23] Also, the term "significantly", the adverb of significant, means "of a noticeably or measurably large amount." Merriam-Webster Online Dictionary http://www.m-w.com/dictionary/significant (last visited May 5, 2006); *L.B. v. State*, 700 So. 2d 370 (Fla. 1997 (If not defined in a statute, a court may refer to a dictionary to ascertain the plain and ordinary meaning that the legislature intended to ascribe to a term.). Therefore, the sub average general intellectual functioning must be of a noticeably or measurably large amount.

Existing Concurrently
With Deficits in Adaptive Behavior

Similar to the AAMR, Florida law defines the term "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fla. R. Crim. P. 3.203(b). In addition to having an IQ score that is "two or more standard deviations

[22] 536 U.S. 304 (2002)

[23] Although it would appear that this Court can consider other valid tests and evaluation materials to determine the Defendant's level of intellectual functioning, the Florida Administrative Code authorizes this Court to consider these tests and materials only if the subject motion is filed pursuant to Section 921.137, Fla. Stat. (2005). *See* Fla. Admin. Code R. 65B-4.032(2) (2005) (Notwithstanding this rule, the court, pursuant to subsection 921.137(4), Florida Statutes, is authorized to consider the findings of the court appointed experts or any other expert utilizing individually administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials. The results of the evaluations submitted to the court shall be accompanied by the published validity and reliability data for the examination. *Specific Authority 921.137(1) FS. Law Implemented 921.137(1) FS. History–New 1-13-04).* Here, since the instant motion was filed pursuant to Fla. R. Crim. P. 3.203, this section of the administrative code is not applicable.

from the mean score on a standardized intelligence test," the State of Florida requires the defendant to have "deficits in adaptive behavior" that exist concurrently with the requisite IQ score. Fla. R. Crim. P. Crim. P. 3.203(b).[24] Similar to the AAMR definition, the Florida Supreme Court has stated that the "deficit in adaptive behavior" component is equally as important as a low IQ score. *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). Even where an individual's IQ is lower than 70, mental retardation would not be diagnosed if there are no significant deficits or impairments in adaptive functioning. *Id.* Adaptive functioning refers to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." *Id.* In order for mental retardation to be diagnosed, there must be significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, and use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Id.* The United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304 (2002) indicated that a limitation in adaptive behavior was comprised of deficits in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. 536 U.S. at 309 n.3 (2002). The *Rodriguez* Court held that a low IQ is not, by itself, sufficient to establish mental retardation; there must also be deficits in the defendant's adaptive functioning. *Id.* (noting that the defendant was able to run a drug trafficking operation, balance a bank account, and understand how to finance a new car, which indicates a level of adaptive functioning sufficient to counter his IQ of 64).

[24] But neither the rule nor the statute setting out the definition of mental retardation in Florida make any reference to

Manifested During the Period from Conception to Age 18

The State of Florida, like the AAMR, similarly requires the sub average intellectual functioning and concurrent deficits in adaptive behavior to "manifest[] during the period from conception to age 18." Fla. R. Crim. P. 3.203(b).

IT IS THE DEFENDANT WHO BEARS THE BURDEN OF PROOF IN A MOTION TO VACATE A DEATH SENTENCE BASED ON MENTAL RETARDATION

Since Fla. R. Crim. P. 3.203 governs, this Court must now determine the appropriate standard of proof and identify the party with the burden. Because of concerns about whether the burden of proof is a substantive or procedural issue and further concerns about the constitutionality of the clear and convincing evidence standard used in section 921.137, Fla. Stat. (2004) for a mental retardation determination, the Florida Supreme Court left Rule 3.203 silent as to the burden of proof. Fla. R. Crim. P. 3.203(d); *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d 563, 566-67 (Fla. 2004) (Pariente, J., concurring) (noting that the combination of *Atkins* and *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which held that a state law requiring a defendant to establish incompetence to stand trial by clear and convincing evidence was unconstitutional, raises the issue of whether use of the same clear and convincing evidence standard in a mental retardation determination is constitutional). Justice Pariente notes that the omission of the standard of proof in Rule 3.203 obligates trial courts to either (1) apply the clear and convincing evidence standard that is required by Section 921.137(4), or (2) find that standard unconstitutional in a particular case, which would give the Florida Supreme Court a case or controversy to decide the constitutionality

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the standard error of measurement. *See* Section 921.137, Fla. Stat. (2006); Fla. R. Crim. P. 3.203.

of the standard rather than doing so in a non-adversarial rulemaking proceeding. *Id.* at 567. Significantly, the *Atkins*[25] Court stated that it was leaving the task of developing appropriate ways to enforce the constitutional restriction upon their execution of a death sentence to each individual state. Accordingly, the Defendant bears the burden of proof and the standard is clear and convincing evidence. *See* § 921.137(4), Fla. Stat. (2006) ("If the court finds, by clear and convincing evidence, that the defendant has mental retardation...the court may not impose a sentence of death....")

Additionally, this Court finds the Defendant's clear and convincing burden of proof to be constitutional. *Id.; see Bush v. Holmes*, 31 Fla. L. Weekly S1 (Fla. 2006) (Court should give a statute a constitutional construction where such a construction is reasonably possible.); *Whitsett v. State*, 30 Fla. L. Weekly D2442 (Fla. 4th DCA 2005) (An act must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score.); *Sunset Harbour Condominium Ass'n v. Robbins*, 30 Fla. L. Weekly S548 (Fla. 2005) (If at all possible, a statute should be construed to be constitutional.); *Michelson v. State*, 30 Fla. L. Weekly D1128 (Fla. 4th DCA 2005) (If it is reasonably possible to do so, a court is obligated to interpret statutes in such a manner as to uphold their constitutionality.); *State v. Hanna*, 30 Fla. L. Weekly D816 (Fla. 5th DCA 2005) (Statutes and ordinances are presumed to be constitutional, and all reasonable doubts regarding the statute or ordinance must be resolved in favor of constitutionality and the defendant who challenges the constitutional validity of a statute bears a heavy burden of establishing its invalidity.); *Humana Medical Plan, Inc. v. State, Agency For Health Care Admin.*, 30 Fla. L. Weekly D765 (Fla. 1st DCA 2005) (A statute is presumed to be constitutional and in determining the constitutionality of a statute, if any state of fact, known or

[25] 536 U.S. 304 (2002)

to be assumed, justifies the law, the court's power of inquiry ends; questions as to the wisdom, need or appropriateness are for the legislature.); *State v. Nichols*, 30 Fla. L. Weekly D446 (Fla. 1st DCA 2005) (There is a presumption of constitutionality inherent in any statutory analysis.); *Department Of State, Division Of Elections v. Martin*, 29 Fla. L. Weekly D2380 (Fla. 1st DCA 2004) (If at all possible, the court must construe a statute in such a way as to uphold its constitutionality.); *East-European Ins. Co. v. Borden*, 29 Fla. L. Weekly D1784 (Fla. 4th DCA 2004) (Courts have a duty to interpret a legislative act so as to effect a constitutional result if it is possible to do so.); *State v. Rose*, 29 Fla. L. Weekly D1548 (Fla. 4th DCA 2004) (Statutes are presumed to be constitutional, and all reasonable doubts as to their validity are resolved in favor of their constitutionality.); *B.S. v. State*, 28 Fla. L. Weekly D2198 (Fla. 2d DCA 2003) (Under ordinary scrutiny, a legislative act is presumed constitutional; to withstand such scrutiny, the law must bear some rational relationship to legitimate state purposes.).

Definition Of
Clear and Convincing Evidence

Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. *In re Standard Jury Instructions-Civil Cases (No. 00-2)*, 797 So. 2d 1199 (Fla. 2001). "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. *Id.* In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. *Id.* Additionally, clear and convincing evidence is an "intermediate level of proof [that] entails both a qualitative and quantitative standard." *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The evidence must be credible; the memories of the witnesses must be clear and without confusion;

and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. *Id. In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995), *cert. denied*, 516 U.S. 1051, 116 S.Ct. 719, 133 L.Ed.2d 672 (1996).

Thus, to prevail on this motion, the Defendant has the burden of proving by clear and convincing evidence that:

(1) he had noticeable sub average general intellectual functioning, as evidenced by a score of 70 or lower on the Stanford-Binet Intelligence Scale and the Wechsler Adult Intelligence Scale (WAIS);

(2) existing concurrently with deficits in his effectiveness or degree with which he meets the standards of personal independence and social responsibility expected of his age, cultural group, and community evidenced by significant limitations in adaptive functioning in at least two of the following skill areas:

communication
self-care,
home living,
social/interpersonal skills, and
use of community resources,
self-direction,
functional academic skills,
work,
leisure,
health,
safety;

(3) that were manifested during the period from his conception until he reached age 18.

THE DEFENDANT HAS NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT HE HAS SIGNIFICANTLY SUB AVERAGE GENERAL INTELLECTUAL FUNCTIONING

Dr. Caddy testified that the Defendant's WAIS-III full scale IQ score after testing by Dr. Keyes was 74. When tested by Doctor Carbonell, the Defendant's WAIS-III full scale IQ score was 75. However, Dr. Caddy testified that the Defendant's WAIS full scale IQ score when he

tested him was 70. He added that this places the Defendant in the borderline range of intellectual functioning.

In attempting to explain the differences in scores, Dr. Caddy opined that people who have very severe mental limitations tend to function a lot better in highly structured environments than they do on the streets. The consequence of that structure may actually have the capacity to advance some intellectual assessment scores, in part because on the streets chances are they do not do any reading. But, the Defendant says that he does not really do any reading. Dr. Caddy also stated that access to chronic use of television or simply being connected to a group of inmates has the potential of giving the Defendant slight increases in knowledge. The problem with this aspect of Dr. Caddy's opinion is that there was no testimony in the record to support his contention that the Defendant had access to chronic use of the television or was connected to a group of inmates. Thus, there is no factual basis for his explanation of the Defendant's above borderline IQ scores of 74 and 76.

Dr. Caddy testified that Dr. Carbonell administered a PIAT.[26] This Court is dismissing the results of this instrument. The only two instruments provided for by Fla. R. Crim. P. 3.203 and the applicable portion of the Florida Administrative Code to determine if a Defendant has significantly sub average general intellectual functioning are the Stanford-Binet and the WAIS-

[26] Peabody Individual Achievement Test-Revised-Normative Update (PIAT-R/NU) is an efficient individual measure of academic achievement. Reading, mathematics, and spelling are assessed in a simple, non-threatening format that requires only a pointing response for most items. This multiple-choice format makes the PIAT-R ideal for assessing low functioning individuals or those with limited expressive abilities. AGS Publishing, Products, PIAT-R/NU: Peabody Individual Achievement Test-Revised-Normative Update, *at* http://www.agsnet.com/group.asp?nGroupInfoID=a29060 (last visited on March 14, 2006).

III. Pursuant to Fla. R. Crim. P. 3.203, the PIAT is not one of the recognized examinations or instruments.

Despite that fact that on the WAIS-III, the Defendant achieved a verbal score of 74, a performance score of 76, and full-scale score of 74, Dr. Keyes still felt that the Defendant met the first prong of the test for mental retardation, even though the Defendant tested higher in skills than Dr. Keyes thought he would have given his IQ of 74. On cross-examination, the State reviewed some of the answers Defendant provided on the WAIS-III test. For example, Defendant received a zero score on the question "Gandhi." His answer was "ruler of India." The test manual's failure to recognize the word "ruler" resulted in the Defendant's dismal performance on this question. Similar results were reached on other questions where the Defendant had knowledge of the subject, but failed to use the precise word required by the manual. Significantly, Dr. Keyes admitted that there are reasons other than mental retardation that can cause a person to have a low IQ.

The Defendant achieved a full-scale score of 70, which placed him in the "borderline" range. His verbal dimension score was 69, overall score was 69, and his performance Intelligence Quotient (IQ) score was 76. Dr. Caddy explained that the difference in the verbal and IQ scores could be due to the fact that low functioning individuals have reduced capacities to express themselves verbally due to educational and cultural disadvantages.

Dr. Caddy also relied upon a report by Dr. Keyes, who administered the WAIS-III to the Defendant in 2000. The scores obtained by Dr. Keyes were a full scale score of 74, a performance index of 76, and a verbal index of 75. Dr. Caddy stated that these scores are consistent with the scores he obtained.

Dr. Caddy also testified that he had the report of Dr. Joyce Carbonell, dated November

10, 1987. Dr. Carbonell also gave the Defendant the WAIS-III. The results of Dr Carbonell's administration of the WAIS-III were a full-scale score of 75, verbal score of 75, and performance score of 77 putting the Defendant in the "borderline" range. Dr. Toomer also found Defendant to be functioning in the borderline range.

Therefore, the Defendant's borderline IQ scores of 74, 75, and 70 are not precise, explicit, lacking in confusion, or of such weight that they produced in this Court's mind a firm belief or conviction, without hesitation, that the Defendant has noticeable sub average intellectual functioning. The Defendant's own experts place the Defendant in the "borderline" range of sub average intellectual functioning. The American Heritage Dictionary of the English Language 161 (Third Edition, 2000) defines "borderline" as "of questionable nature or quality; dubious." "Dubious" means that something is fraught with uncertainty or doubt; undecided. American Heritage Dictionary of the English Language 424 (Third Edition, 2000). Accordingly, anything that is dubious or questionable cannot be precise, or explicit, or lacking in confusion, and or of such weight as to produce a firm belief or conviction, without hesitation. Additionally, the Defendant's sub average intellectual functioning must be noticeable. Therefore, the Defendant has not proven by clear and convincing evidence that he has significantly (noticeable) sub average general intellectual functioning. There are additional reasons why the Defendant has not met his burden of proof as to this first prong.

Malingering
Validity Testing

The DSM IV TR states that malingering should be strongly suspected if the person has an anti-social personality. The Defendant's crime can certainly be considered an anti-social act. Additionally, the Defendant possesses one other trait that is indicative of malingering, that is, he

was referred by an attorney to the clinicians for examination. Dr. Keyes admitted that these two categories are present. Thus, in formulating their opinions, the three expert witnesses should have taken into account and ruled out by objective testing any malingering on the part of the Defendant.

Nevertheless, Dr. Keyes did not suspect that the Defendant was malingering. He opines that it would be virtually impossible for the Defendant to come up with the exact answers again and again during the amount of time that it would take to hear the question, formulate the correct answer, and give the incorrect answer in the same way previously given. Strangely, although Dr. Keyes has in the past given tests to other death row inmates to determine if they are malingering, he did not give one to the Defendant. Thus, Dr. Keyes opinion is based on insufficient data. Even though an expert opinion is inadmissible when it is apparent that the opinion is based on insufficient data, this Court is instead finding that Dr. Keyes' opinion as to the issue of sub average intellectual functioning is not credible because he did not perform a complete evaluation that included testing for malingering. *See Young-Chin v. City of Homestead*, 597 So. 2d 879, 882 (Fla. 3d DCA 1992). A fact finder may disbelieve all or any part of an expert's testimony. *Fla. Std. Jury Instr. (Crim.) 3.9 and 3.9(A).*

Dr. Caddy agreed that one should do something with regard to validity (determining if the Defendant is malingering). Nevertheless, Dr Caddy did not test for malingering, as he was hired to test intelligence. Although Dr. Caddy could have given the Stanford-Binet for purposes of comparison, he chose not to administer this instrument. Similarly, this Court finds Dr. Caddy's opinion as to the issue of sub average intellectual functioning not to be credible because he did not perform a complete evaluation that included testing for malingering. *Young-Chin*, 597 So. 2d at 882; *Fla. Std. Jury Instr. (Crim.) 3.9 and 3.9(A).*

On the other hand, Dr. Suarez gave the Defendant three validity tests.

Dr. Suarez administered the Memory 15-Item Test which shows the examinee stimuli, which is then taken away, and the examinee draws however many of the items they recall. Defendant was able to recall 9 items. Dr. Suarez remarked that the literature on the test indicates that the examiner should begin to suspect the possibility that someone is not giving their full effort (malingering) with scores of 12 and under.

Dr. Suarez next gave Defendant the recognition test. There are 30 items, 15 of which were shown to the Defendant initially, and 15 items he has not seen. Defendant remembered six of them from the previous test, a very poor score. He would be expected to remember a higher number as he has seen them before and is looking at them again. The test results indicate that the Defendant was not putting forth full effort.

Dr. Suarez also gave the Defendant the test of memory malingering ("TOMM"). Here, the Defendant did well. Dr. Suarez opined that most people would be expected to do well on the TOMM, with the exception of those folks with severely diminished capacity in the moderate to severe stages of conditions like Alzheimer's. The recognition test indicated that he is malingering, while the TOMM indicates he is giving his full effort. Because of those outcomes, Dr. Suarez gave Defendant the Validity Indicator Profile (VIP). This test looks at whether the examinee is putting forth full effort, and whether or not it is a sustained effort. With regard to both his nonverbal and verbal subtests, the test results were classified as invalid. The summary states that caution must be used in interpreting other tests of similar content that have been administered concurrently. The other tests likely underestimated the Defendant's abilities. Dr. Suarez opined that this was based on the Defendant's low effort or malingering.

Dr. Suarez also administered the Adaptive Behavior Assessment System (ABAS) to six different staff members at Union Correctional Institute to test for the Defendant's concurrent deficits in adaptability. Dr. Suarez asked for people who are familiar with the Defendant so that they could answer questions about concurrent deficits or no deficits about the Defendant's adaptive behavior. None of the staff members reported that they had ever seen the Defendant exhibit any type of abnormal or confused behavior or behavior problem. The staff reported that they saw the Defendant pack his personal belongings to go to court overnight. Some responses were guesses while others were based on observations. One person rated the Defendant lower on his adaptive skills than the other five, who were nevertheless consistent in their ratings. Dr. Suarez did not find any deficit that would go to the level of impairment needed to classify the Defendant as mentally retarded. Because the Defendant has been incarcerated for so many years, family members, who do not interact with the Defendant on a daily basis, could not answer the questions asked of the staff. He opines that to get concurrent deficits, you have to find people who know the person now.

Therefore, based on the credible testimony of Dr. Suarez, buttressed by the results of the objective testing, this Court finds that the Defendant was malingering as opined by Dr. Suarez.

THE DEFENDANT HAS NOT PROVEN
BY CLEAR AND CONVINCING EVIDENCE
THAT HE HAS DEFICITS IN ADAPTIVE BEHAVIOR

Dr. Caddy did not evaluate the Defendant's adaptive functioning. He explained that he was specifically asked to do an intellectual assessment measure or an IQ measure. Because he did not look at adaptive functioning, Dr. Caddy cannot say if the Defendant is mentally retarded.

Dr. Keyes regretfully admitted that the planning of the murder in this case and the planning of the cover up are inconsistent with a finding that the Defendant suffers from mental

retardation. He admitted that the note the Defendant wrote formulating an alibi suggests planning skills. Dr. Keyes attempted to explain that maladaptive behavior does not constitute adaptive behavior. However, according to Dr. Suarez, the concept that adaptive skills exclude maladaptiveness, only positive skills, is not tenable. Whether an individual has goal-directedness, can do what he or she intends to do, and has the ability that it takes to plan, shows that a person has adaptive skills. For example, the planning that went into the 9/11 attacks would be considered maladaptive by Dr. Keyes. Yet the sophistication, the incredible planning, resources, coordination and collaboration show planning skills.

The AAMR definition of mental retardation takes into account that one can have adaptive functioning, and the fact that they produce maladaptive behavior does not mean that they don't have adaptive abilities. Maladaptation cannot be used to infer lack of adaptive skills or adaptive ability. The AAMR further states that the presence of problem behavior is not considered to be a limitation in adaptive behavior.

Dr. Keyes was shown the note Defendant wrote to his friend in an effort to construct an alibi. Dr. Keyes agreed that the note evidenced adaptive functioning if it had been written without assistance. He admitted that the note suggests planning skills. There is no evidence that the Defendant had any assistance in writing the letter.

The Defendant held two jobs as a dishwasher, worked as a garbage collector for the City of Miami, and was a short-order cook. The Defendant's performance reviews when he was a garbage collector were average. The Defendant worked as a short-order cook at Neighbor's Restaurant for 2 ½ to 3 years. Dr. Keyes admitted that this was an unusually high level job for someone who suffered from mental retardation. Defendant received average performance

reviews scale when he worked as a sanitation collector.

Apparently, one of the Defendant's friends interviewed by Dr. Keyes told of having to accompany the Defendant to the bathroom, as the Defendant could not determine which bathroom was appropriate to use. Defendant repeatedly got thrown out of the pool because the Defendant would swim in his clothes instead of just his underwear. Dr. Keyes agreed that Defendant could have repeatedly stepped into the pool in his clothes, rather than just his underwear due to shyness rather than mental retardation. The Defendant's ability to hold a high-stress job, drive a car, and purchase items admittedly required skill. Also, the Defendant had at times been trusted by his sister to take his nieces and nephews to the ice cream shop.

When questioned by the court, Dr. Keyes stated that the collection of shell casings at the scene of the homicide indicates planning and a high level of adaptive functioning. Dr. Keyes also found the Defendant's subsequent discussions with the officer disturbing. Dr. Keyes stated that if there was no learning going on prior to the instant crime, then the facts would show adaptive behavior. There was no evidence of learning occurring prior to the commission of the murder. Therefore, the facts tend to show adaptive behavior.

Dr. Suarez concluded that the Bro White letter, written in cursive, shows that the Defendant has graphomotor ability. The letter also demonstrates that he is able make innuendos which takes understanding of the situation, the people involved, and what needs to be done. In general, that is inconsistent with someone who is mentally retarded, although some people may be able to do it. He did not believe you could find a lot of mentally retarded people who can orchestrate, identify who needs to be eliminated, who to send the letter to, where their location is, and what collateral damage can be perpetrated to help eliminate witnesses.

Dr. Suarez opines that the Defendant's actions on the night of the homicide, particularly

his gathering up of the spent shell casings, shows a keen instinct toward self-preservation and forethought. Similarly, the subject murder could not have happened absent planning on the part of the Defendant. Notably, the Defendant also lacks the tendency to acquiesce. Acquiescence is a common trait of people with mental retardation. For example, lead Homicide Detective Greg Smith interviewed the Defendant three times and asked him to give a statement each time. He refused. If the defendant were indeed mentally retarded, one might have expected him to readily acquiesce and give some sort of statement to police.

Dr. Suarez opines that the Defendant's work history similarly fails to indicate a lack of adaptive skills. The various day-to-day tasks the Defendant performed at his places of employment could not have been done without planning skills.

During the evidentiary hearing, this Court had ample opportunity to view and observe the Defendant, including the manner in which he moved, walked, and his general demeanor. There were no deficiencies in his behavior and presentation to indicate that he had any significant limitations in adaptive functioning concerning this area. He appeared healthy, well-fed, and well-groomed, and there were no detectable hygienic deficiencies.

Lastly, because the Defendant has been on death row for a number of years, there was no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure. Based on all the above and the record in this case, the Defendant has not proven by clear and convincing evidence that he has deficits in his adaptive behavior.

THE DEFENDANT HAS NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT HE HAS SIGNIFICANTLY SUB AVERAGE GENERAL INTELLECTUAL FUNCTIONING EXISTING CONCURRENTLY WITH DEFICITS IN ADAPTIVE BEHAVIOR WHICH MANIFESTED DURING THE PERIOD FROM CONCEPTION TO AGE 18

Norman Parker, the individual who provided Dr. Keyes with early anecdotes about the Defendant, has been on Death Row since 1978. Dr. Keyes questioned him because he was the only friend who came forward. Dr. Keyes agreed that Defendant could have repeatedly stepped into the pool in his clothes, rather than just his underwear due to his shyness rather than mental retardation. Thus, this does not suggest a manifestation of adaptive behavior deficits before the Defendant reached the age of 18.

Defendant's school history also does not suggest an onset before the age of 18. He skipped school. He reported that he was suspended three or four times for truancy, auto theft, and breaking and entering. Defendant received C and D grades. Rather than mental retardation, poor effort and nonattendance could be the reasons for the Defendant's poor school performance. There was no evidence so support the Defendant's contention that his poor grades were a result of mental retardation. Thus, the Defendant has not proven by clear and convincing evidence that he has significantly sub average general intellectual functioning existing concurrently with deficits in his adaptive behavior which manifested during the period from conception to age 18.

CONCLUSIONS OF LAW

The Defendant is not collaterally estopped from claiming that he is mentally retarded. Nevertheless, the Defendant has not proven by clear and convincing evidence that he is mentally retarded. The testimonial and documentary evidence was not precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, in this Court that the Defendant is mentally retarded. Additionally, as explained by this Court, the sum total of the evidence was not of sufficient weight to convince this Court without hesitancy of the Defendant's mental retardation. Thus, pursuant to the holding of *Atkins v. Virginia*, (citations

omitted), the Defendant's death sentence is not in conflict with his right not be subjected to cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution

The procedure provided by Fla. R. Crim. P. 3.203 does not violate the Defendant's Sixth, Eighth, and Fourteenth Amendments rights under the United States Constitution.

The controlling definition of mental retardation is found in Fla. R. Crim. P. 3.203. The Defendant is incorrect when he argues that the controlling definition of mental retardation is that of the American Association on Mental Retardation (AAMR), which published the 10th Edition of their text, *Mental Retardation, Definition, Classification, and Systems of Support*, in 2002.

Florida Rule of Criminal Procedure 3.203 contains no omissions or procedure that renders it violative of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Defendant was at all times on notice as to the procedures to be followed in his case prior to the evidentiary hearing as noted in his motion.

Florida Rule of Criminal Procedure 3.203 as currently written provides a constitutionally adequate procedure for resolution of mental retardation claims presented by those persons whose death sentences were final before the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Defendant's death sentence need not be vacated where a prima facie showing of mental retardation is made and a criminal trial that comports with the Sixth Amendment is not ordered to determine whether the Defendant is in fact mentally retarded in that the Defendant has the burden of proof, by clear and convincing evidence, to demonstrate that he is mentally retarded.

Although, the Defendant is correct that Fla. R. Crim. P. 3.203 does not contain a standard of proof, the omission of a standard of proof from that rule has no bearing on his notice regarding what standard will be applied to his claim due to the Florida Supreme Court's opinion in *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565 (Fla. 2004). Therefore, the Defendant's due process rights have not been violated.

The jury should not make the decision and the burden should not be on the State to prove beyond a reasonable doubt that the Defendant is not mentally retarded.

The record in this case is replete with mitigation testimony from both of Phillips' mental health experts, each of whom comprehensively evaluated Phillips and provided significant testimony concerning Phillips' possible mental retardation and organic brain damage, such that the record conclusively establishes that counsel was not ineffective in investigating and presenting evidence on this issue.

Both Dr. Joyce Carbonell and Dr. Jethro Toomer testified at Phillips' initial evidentiary hearing in 1988, his case was remanded for new sentencing proceedings. *See Phillips*, 608 So. 2d at 778. Dr. Carbonell interviewed Phillips for 4 1/2 hours and reviewed his prison records, personnel records, parole records, school records, jail records, his attorney's file, testimony and depositions, police reports, and affidavits from his family, friends, and a school teacher. She even spoke personally to one of Phillips' teachers. Dr. Carbonell administered a battery of tests, including the Wechsler Adult Intelligence Scale Revised (WAIS-R), the Wide Range Achievement test, Level 2 Revised (WRAT-R-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt, and the Minnesota Multiphasic Personality Inventory (MMPI).

Although Dr. Carbonell did not testify personally at Phillips' resentencing, her testimony from the 1988 hearing was read into evidence-apparently not due to any lack of diligence on the part of defense counsel. Prior to resentencing, defense counsel asked the trial court to appoint Drs. Toomer and Carbonell as his experts. Defense counsel subsequently indicated that he was having trouble with Dr. Carbonell because she was ill, and was unable to schedule another evaluation by Dr. Carbonell until the middle of trial. The State objected to the lateness of this reevaluation, and the trial court refused to grant a continuance to have Dr. Carbonell reexamine Phillips. On the day resentencing commenced, defense counsel again moved for a continuance because Dr. Carbonell was unavailable. However, the parties agreed to have Dr. Carbonell testify at a time certain, alleviating the need for a continuance. The next day, defense counsel indicated that he would be either introducing Dr. Carbonell's testimony telephonically or having her prior testimony read because her testimony had not changed. Counsel later indicated that Phillips had agreed to use Dr. Carbonell's prior testimony instead of her telephonic testimony. The trial court asked Phillips about this agreement, and Phillips confirmed it.

Dr. Jethro Toomer did testify at the resentencing. He testified that he evaluated Phillips in 1988 and again in 1994. Dr. Toomer met with Defendant for 3 to 3 1/2 hours in 1988 and for an hour in 1994. During his interview, Dr. Toomer gave Phillips the revised Beta IQ test, the Carlson Psychological Survey, the Rorschach test, the Bender Gestalt Design test and the verbal reasoning portion of the WAIS. In preparing to testify, Dr. Toomer also reviewed affidavits from Phillips's family, friends, teachers and coworkers, his school records, DOC records, personnel file, documents used during his interviews with Phillips, Phillips's trial attorney's file and the transcript of his prior testimony and of the original trial. Dr. Toomer reviewed the affidavits and

records to corroborate the history Phillips had provided. Therefore, for the reasons cited herein, Defendant Harry Phillips' Motion to Vacate Judgment of Sentence is DENIED.

DONE AND ORDERED in Miami, Miami-Dade County, Florida on this 5 day of MAY, 2006.

ISRAEL REYES
CIRCUIT JUDGE

Copies furnished to: Penny Brill, ASA
Sandra Jaggard, AAG
William Hennis, Esq.
David Waksman, ASA

I CERTIFY that a copy of this order has been furnished to the MOVANT, HARRY PHILLIPS by mail this day MAY 05 2006

Deputy Clerk

894 So.2d 28
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,
v.
STATE of Florida, Appellee.
Harry Franklin Phillips, Petitioner,
v.
James V. Crosby, Jr.,
etc., et al., Respondents.

Nos. SC00-2248, SC01-1460.
|
Oct. 14, 2004.
|
As Revised on Denial of Rehearing Jan. 27, 2005.

Synopsis

Background: Petitioner was convicted in the Circuit Court, Dade County, Arthur I. Snyder, J., of first-degree murder and was sentenced to death. On his appeal, the Supreme Court, Adkins J., 476 So.2d 194, affirmed. Motion was filed for post-conviction relief. The Circuit Court, Arthur I. Snyder, J., denied the petition. Petitioner appealed. The Supreme Court, 608 So.2d 778, reversed and remanded for resentencing. The Circuit Court, Arthur I. Snyder, J., sentenced petitioner to death, and he appealed. The Supreme Court, 705 So.2d 1320, affirmed. Petitioner again sought post-conviction relief. The Circuit Court Miami-Dade County, Alex Ferrer, J., denied motion. Petitioner appealed and sought writ of habeas corpus.

Holdings: The Supreme Court held that:

failure to exercise two remaining peremptory challenges was not ineffective assistance of counsel;

attorney did not render ineffective assistance in investigation and presentation of evidence concerning claim of mental retardation and organic brain damage; and

expert's testimony to rebut defendant's evidence of mental mitigation was admissible at resentencing despite expert's prior evaluation of competency.

Affirmed; petition denied.

Wells, J., concurred and filed opinion joined by Bell, J.

Cantero, J., concurred and filed opinion.

Pariente, C.J., concurred in part, dissented in part, and filed opinion joined by Anstead, J.

Attorneys and Law Firms

***31** William M. Hennis, III, Assistant CCRC and Leor Veleanu, Staff Attorney, Law Office of the Capital Collateral Regional Counsel, Ft. Lauderdale, FL, for Appellant/Petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, FL, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Harry Franklin Phillips, an inmate under the sentence of death, appeals an order of the circuit court denying his amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1),(9), Fla. Const. For the reasons that follow, we affirm the denial of Phillips's postconviction motion and deny the petition for habeas corpus.

I. PROCEEDINGS TO DATE

We have explained the facts of the case in a previous opinion:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn ***32** Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years

prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.

On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.

Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.

Phillips v. State, 476 So.2d 194, 195-96 (Fla.1985).

In 1983, Phillips was convicted of one count of first-degree murder in the death of a parole supervisor named Bjorn Svenson and sentenced to death. On direct appeal, we affirmed that sentence. *See Phillips,* 476 So.2d at 194.[1]

1 Phillips raised five issues on direct appeal: (1) the trial court erred in allowing the State to elicit testimony relative to collateral uncharged crimes; (2) the prejudicial comments elicited by the State deprived the defendant of the fundamental right to a fair trial; (3) the trial court erred in refusing to give the alibi instruction requested by the defendant; (4) the trial court erroneously found the killing to have been especially heinous, atrocious, or cruel; and (5) the trial court improperly found the homicide to have been committed in a cold, calculated and premeditated manner.

On November 4, 1987, Phillips filed a petition for writ of habeas corpus in this Court raising one claim: that comments by the court and prosecutor throughout the course of the proceedings resulting in Phillips's sentence of death diminished the jurors' sense of responsibility for the capital sentencing task that they were to perform, and had an effect on the jury, in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and the Eighth and Fourteenth Amendments. We denied the petition, finding the claim procedurally barred. *See Phillips v. Dugger,* 515 So.2d 227, 228 (Fla.1987).

The same day that Phillips filed his petition for writ of habeas corpus, he also filed in the trial court a motion for postconviction relief raising ten claims.[2] After an ***33** evidentiary hearing, the trial court denied the motion. On appeal, we found that Phillips had received ineffective assistance of counsel at the penalty phase of the trial and vacated his death sentence and remanded for a new sentencing proceeding. *See Phillips v. State,* 608 So.2d 778, 783 (Fla.1992).

2 The ten claims were: (1) the State's use of false and misleading testimony and the intentional withholding of material exculpatory evidence; (2) the State's use of jailhouse informants to obtain statements; (3) deprivation of an individualized sentencing determination due to ineffective assistance at the penalty phase; (4) trial counsel rendered ineffective assistance by allowing an incompetent client to stand trial; (5) comments by the court and the prosecutor throughout the course of the proceedings resulted in Phillips's sentence of death, and diminished the jurors' sense of responsibility in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and the Eighth and Fourteenth Amendments; (6) inconsistent jury instructions relative to the jury's role in sentencing; (7) the trial court's shifting of the burden of proof in its instructions and the prosecutor's similar burden-shifting comments on summation; (8) ineffective assistance of counsel at the guilt phase; (9) Phillips's absence during critical trial proceedings in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; and (10) improper use of Phillips's prior felony convictions.

In April 1994, a new jury, by a vote of seven to five, again recommended a sentence of death. The trial court followed the jury's recommendation and found the following four aggravators: (1) the defendant was under a sentence of imprisonment at the time of the murder; (2) the defendant had prior convictions for violent felonies; (3) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the murder was committed in a cold, calculated, and premeditated fashion. The trial court did not find any statutory mitigators, but it found that the following nonstatutory mitigators applied: (1) Phillips's low intelligence (given little weight); (2) Phillips's poor family background (given little weight); and (3) his abusive childhood, including lack of proper guidance by his father (given little weight). Phillips again appealed his sentence, raising six issues.[3] We affirmed the sentence. *See Phillips v. State,* 705 So.2d 1320 (Fla.1997).

[3] The six issues on direct appeal of his resentencing were: (1) Phillips's resentencing proceeding did not comport with the requirements set forth in *Spencer v. State,* 615 So.2d 688 (Fla.1993); (2) the trial court mishandled the jury and improperly influenced the jury to return a death verdict; (3) the "disrupt or hinder a governmental function" aggravator was improperly and over-broadly submitted to the jury and found by the court; (4) the State improperly made Phillips's prior bad acts, including uncharged matters, a focus of the resentencing, and introduced unnecessary and unreliable evidence and hearsay regarding Phillips's guilt; (5) the trial court improperly allowed the State to strike an African-American from the jury panel; and (6) the CCP aggravator cannot be constitutionally narrowed and was improperly employed.

On September 13, 1999, Phillips filed a motion for postconviction relief. He subsequently filed an amended motion for postconviction relief raising twenty-four claims on December 2, 1999.[4] The trial ***34** court held a hearing pursuant to *Huff v. State,* 622 So.2d 982 (Fla.1993), and thereafter summarily denied Phillips's amended motion.

[4] The twenty-four claims in Phillips's amended motion for postconviction relief were: (1) denial of the right to effective representation by the lack of funding available to fully investigate and prepare postconviction pleadings, understaffing, and the unprecedented workload on present counsel and staff; (2) denial of due process and equal protection rights because access to the files and records pertaining to Phillips's case in the possession of certain state agencies had been withheld in violation of chapter 119 of the Florida Statutes and Rule 3.852 of the Florida Rules of Criminal Procedure; (3) deprivation of due process rights because the State withheld evidence that was material and exculpatory in nature, which rendered defense counsel's representation ineffective and prevented a full adversarial testing of the evidence at resentencing; (4) ineffective assistance of counsel during voir dire in resentencing; (5) ineffective assistance of counsel when critical information regarding Phillips's mental state was not provided by specialized experts; (6) denial of rights under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), at the resentencing; (7) deprivation of a fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments due to a combination of procedural and substantive errors during resentencing; (8) innocence of the death penalty; (9) Phillips's absence from critical stages of the trial; (10) ineffective assistance of counsel for defense counsel's failure to object to the sentence of death where the jury instructions were incorrect under Florida law and shifted the burden to Phillips to prove that death was inappropriate; (11) ineffective assistance of counsel where trial counsel failed to object to the State's introduction of nonstatutory aggravating factors and the State's arguments regarding nonstatutory aggravating factors; (12) ineffective assistance of counsel where trial counsel failed to object to comments, questions, and instructions which diluted the jury's sense of responsibility; (13) ineffective assistance of counsel where trial counsel was prohibited from interviewing jurors to determine if constitutional error was present; (14) ineffective assistance of counsel where defense counsel failed to object when the prosecutor commented upon the aggravating circumstances; (15) execution by electrocution is cruel and unusual punishment or both pursuant to the federal and state constitutions; (16) Florida's capital sentencing statute is unconstitutional on its face and as applied in this case; (17) ineffective assistance of counsel where trial counsel failed to object and argue that there was a violation of the Eighth Amendment by the sentencing court's refusal to find and consider mitigating circumstances set out clearly in the record; (18) lack of an independent weighing or reasoned judgment in the trial court's sentencing order; (19) denial of a proper direct appeal of appellant's conviction and death sentence due to omissions in the record; (20) the jury's and judge's reliance upon misinformation in sentencing Phillips to death in violation of *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); (21) execution is prohibited due to insanity; (22) refusal of the trial court to instruct the jury that mercy towards Phillips was a proper consideration in resentencing; (23) denial of right to a fair proceeding before an impartial judge during resentencing; and (24) denial of right to a fair proceeding before an impartial judge during the postconviction proceedings.

Phillips now appeals the trial court's denial of his postconviction motion and petitions for a writ of habeas corpus, raising four claims of ineffective assistance of appellate counsel. For the reasons explained below, we affirm the denial of postconviction relief and deny the petition for habeas corpus. In light of the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), however, and our recent adoption of a rule implementing that decision, *see Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure,* 875 So.2d 563 (Fla.2004), we deny relief without prejudice to Phillips seeking relief under that rule. We express no opinion about the merits of such a motion.

II. 3.850 APPEAL

Phillips raises eleven claims: (1) the trial court improperly denied his postconviction claims without an evidentiary hearing;[5] (2) resentencing counsel was ineffective for failing to argue that section 921.137, Florida Statutes (2001), prohibiting the imposition of the death sentence on mentally retarded defendants, applied to him; (3) his right to due process was violated when the trial judge denied his claim regarding public records disclosure and his motion to disqualify the trial judge; (4) the following sub-claims concerning the jury were improperly denied as procedurally barred and meritless: (a) failure of resentencing counsel to use all of his peremptory challenges; (b) the trial court's jury instructions diminished the jury's sense of responsibility; (c) the prosecutor's remarks during opening and closing arguments in voir dire; (d) trial court's jury instructions ***35** regarding voting procedures; (e) the trial court's jury instructions concerning premeditation and the CCP aggravator; (f) jury instructions regarding feelings of prejudice, bias, and sympathy; and (g) not having the opportunity to interview the jurors; (5) the trial court and the prosecutor improperly shifted the burden of proof to the defendant to establish that mitigating circumstances outweighed the aggravating circumstances; (6) the following prosecutorial comments concerning nonstatutory aggravating circumstances were improper: (a) comparing Phillips to his siblings; (b) Phillips's future dangerousness; and (c) the State's use of a door-sized prop that charted Phillips's behavior during parole; (7) the trial court erred in summarily denying his claim that he is innocent of the death penalty; (8) Phillips cannot be put to death due to insanity; (9) the trial court improperly relied upon Phillips's two prior felony convictions during his resentencing in violation of *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); (10) Phillips's absence from unrecorded bench conferences violated his right to be present at trial; and (11) cumulative error.

5 Phillips asserts two sub-issues within his first claim: (1) ineffective assistance of counsel where resentencing trial counsel did not present definitive evidence regarding Phillips's possible mental retardation and organic brain damage from specialized experts in neurology and mental retardation; and (2) denial of rights under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), at resentencing.

The bulk of Phillips's claims on appeal are procedurally barred or without merit.[6] We address only certain claims that are not procedurally barred.

6 Claims 4(b), 4(c), 4(d), 4(f), 4(g), 5, 6(a), 6(b), 7, and 10 are all procedurally barred because they should have been raised on direct appeal. *See Arbelaez v. State,* 775 So.2d 909, 919 (Fla.2000); *Maharaj v. State,* 684 So.2d 726 (Fla.1996). Claims 4(e) and 6(c) are also procedurally barred because they were raised and rejected on direct appeal. *See Phillips v. State,* 705 So.2d 1320 (Fla.1997). Claim 3 is facially and legally insufficient and is therefore denied. *See Maharaj,* 684 So.2d at 728; *Holland v. State,* 503 So.2d 1250, 1251 (Fla.1987).

A.

In claim 4(a), Phillips contends that his resentencing counsel rendered ineffective assistance when he failed to exercise his two remaining peremptory challenges. This Court has repeatedly held that in order to establish a claim of ineffective assistance of counsel a defendant must prove two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla.2001) (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In *Valle,* this Court explained further:

> In evaluating whether an attorney's conduct is deficient, "there 'is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered ***36** and rejected.

> Moreover, "[t]o establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' "

Id. at 965-66 (citations omitted) (quoting *Brown v. State,* 755 So.2d 616, 628 (Fla.2000), and *Williams v. Taylor,* 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Phillips's claim that resentencing counsel rendered ineffective assistance when he failed to exercise his two remaining peremptory challenges is meritless. No statute, rule, or case law requires a defense attorney to exercise all peremptory strikes. Moreover, peremptory challenges are not constitutional rights or of "constitutional dimension." *Ross v. Oklahoma,* 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). "[Peremptory challenges] are a means to achieve the end of an impartial jury." *Id.* The ultimate result of voir dire is achieving an impartial jury, and Phillips fails to demonstrate that his resentencing counsel's performance was deficient during voir dire and that such deficiency created a jury that was not impartial.

B.

Phillips's eighth claim asserts that he cannot be executed due to insanity. However, this claim cannot be raised until an execution is imminent. *See* Fla. R.Crim. P. 3.811(c) (providing that "[n]o motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes"). Phillips's execution is not imminent; no warrant has been issued and no date has been set. Thus, this claim is untimely, and the trial court properly denied it without an evidentiary hearing. *See Hall v. Moore,* 792 So.2d 447, 450 (Fla.2001).

C.

Phillips's ninth claim asserts that the trial court improperly relied on two of his prior felony convictions during resentencing, in violation of *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). The court found that the State presented evidence of two prior felony convictions: (1) armed robbery, Eleventh Judicial Circuit Case No. 73-2480B; and (2) assault with intent to commit first-degree murder, Eleventh Judicial Circuit Case No. 62-6140C. In order to state a claim under *Johnson,* a defendant must show that the conviction on which the prior violent felony aggravator is based has been reversed. Phillips failed to demonstrate and the record did not indicate that either of these convictions has been set aside, vacated, or reversed. Thus, *Johnson* does not apply. *See Henderson v. Singletary,* 617 So.2d 313, 316 (Fla.1993). Therefore, this claim is meritless, and the trial court properly denied it without an evidentiary hearing.

D.

Phillips next contends that the trial court erred in summarily denying other claims, including a claim under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and two ineffective assistance of counsel claims concerning resentencing counsel's failure: (1) to present definitive evidence of his organic brain damage and mental retardation; and (2) to argue the application of section 921.137, Florida Statutes (2001). A defendant is ***37** entitled to an evidentiary hearing on his motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is facially invalid. *See Cook v. State,* 792 So.2d 1197, 1201-1202 (Fla.2001); *Maharaj,* 684 So.2d at 728. In determining whether or not an evidentiary hearing on a claim is warranted, we must accept the defendant's factual allegations to the extent the record does not refute them. *See Atwater v. State,* 788 So.2d 223, 229 (Fla.2001); *Peede v. State,* 748 So.2d 253, 257 (Fla.1999). The defendant must establish a prima facie case based upon a legally valid claim, and mere conclusory allegations are insufficient to meet this burden. *See Freeman v. State,* 761 So.2d 1055 (Fla.2000); *Kennedy v. State,* 547 So.2d 912, 913 (Fla.1989).

1. Presenting Evidence of Mental Retardation

Phillips asserts that the trial court erred by failing to conduct an evidentiary hearing on his counsel's failure to investigate and present further testing as to his possible mental retardation and organic brain damage at the time of his resentencing. Specifically, he contends that resentencing counsel never had him examined by a competent mental

health expert for a definitive diagnosis of mental retardation and organic brain damage. Postconviction counsel argued at the *Huff* hearing and appellate counsel asserted at oral argument that a mental retardation specialist and a neurologist were prepared to testify at an evidentiary hearing about Phillips's mental retardation and organic brain damage.

We disagree that counsel's performance was deficient. The record in this case is replete with mitigation testimony from both of Phillips's mental health experts, each of whom comprehensively evaluated Phillips and provided significant testimony concerning Phillips's possible mental retardation and organic brain damage, such that the record conclusively establishes that counsel was not ineffective in investigating and presenting evidence on this issue.

Both Dr. Joyce Carbonell and Dr. Jethro Toomer testified at Phillips's initial evidentiary hearing in 1988, before we remanded for new sentencing proceedings. *See Phillips,* 608 So.2d at 778. Dr. Carbonell interviewed Phillips for 4 ½ hours and reviewed his prison records, personnel records, parole records, school records, jail records, his attorney's file, testimony and depositions, police reports, and affidavits from his family, friends and a school teacher. She even spoke personally to one of Phillips's teachers. Dr. Carbonell administered a battery of tests, including the Wechsler Adult Intelligence Scale Revised (WAIS-R), the Wide Range Achievement test, Level 2 Revised (WRAT-R-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt, and the Minnesota Multiphasic Personality Inventory (MMPI).

Although Dr. Carbonell did not testify personally at Phillips's resentencing-her testimony from the 1988 hearing was read into evidence-it was apparently not due to any lack of diligence on the part of defense counsel. Prior to resentencing, defense counsel asked the trial court to appoint Drs. Toomer and Carbonell as his experts. Defense counsel subsequently indicated that he was having trouble with Dr. Carbonell because she was ill, and was unable to schedule another evaluation by Dr. Carbonell until the middle of trial. The State objected to the lateness of this reevaluation, and the trial court refused to ***38** grant a continuance to have Dr. Carbonell reexamine Phillips. On the day resentencing commenced, defense counsel again moved for a continuance because Dr. Carbonell was unavailable. However, the parties agreed to have Dr. Carbonell testify at a time certain, alleviating the need for a continuance. The next day, defense counsel indicated that he would be either introducing Dr. Carbonell's testimony telephonically or having her prior testimony read because her testimony had not changed. Counsel later indicated that Phillips had agreed to use Dr. Carbonell's prior testimony instead of her telephonic testimony. The trial court asked Phillips about this agreement, and Phillips confirmed it.

Dr. Jethro Toomer did testify at the resentencing. He testified that he evaluated Phillips in 1988 and again in 1994. Dr. Toomer met with Defendant for 3 to 3 ½ hours in 1988 and for an hour in 1994. During his interview, Dr. Toomer gave Phillips the revised Beta IQ test, the Carlson Psychological Survey, the Rorschach test, the Bender Gestalt Design test and the verbal reasoning portion of the WAIS. In preparing to testify, Dr. Toomer also reviewed affidavits from Phillips's family, friends, teachers and coworkers, his school records, DOC records, personnel file, documents used during his interviews with Phillips, Phillips's trial attorney's file and the transcript of his prior testimony and of the original trial. Dr. Toomer reviewed the affidavits and records to corroborate the history Phillips had provided.

The comprehensive mental mitigation investigation performed in this case is a far cry from those cases where we have found error in a trial court's failure to hold an evidentiary hearing to determine whether counsel failed to properly investigate and present evidence in mitigation. *See Ragsdale v. State,* 720 So.2d 203, 208 (Fla.1998) (holding trial court erred in summarily denying defendant's ineffective assistance of counsel claim where "defense counsel never had him examined by a competent mental health expert for purposes of presenting mitigation" and defendant claimed that, among other things, he suffered from organic brain damage and was mentally retarded); *see also Arbelaez v. State,* 775 So.2d 909, 913 (Fla.2000) (finding that trial court erred in failing to hold evidentiary hearing regarding defendant's ineffective assistance of counsel claim where defendant alleged that "no expert was appointed to evaluate him for the purposes of presenting mitigation"); *O'Callaghan v. State,* 461 So.2d 1354, 1355 (Fla.1984) (holding that trial court erred in summarily denying defendant's ineffective assistance of counsel claim where defense counsel never conducted psychiatric examination of defendant and called no mitigation witnesses at the sentencing hearing despite mental health professional's affidavit asserting defendant exhibited evidence of brain damage and mental illness).

Moreover, we find no error in a trial court's failure to hold an evidentiary hearing on a defendant's claim that defense counsel was ineffective for failing to present evidence in mitigation where the record shows similar mitigation evidence was presented through other witnesses. *See Atwater,* 788 So.2d at 232-34; *see also Arbelaez,* 775 So.2d at 913 (finding no error in trial court's failure to hold an evidentiary hearing on defendant's claim that defense counsel was ineffective for failing to present adequate evidence or expert testimony as to defendant's epilepsy where the record showed that counsel presented evidence of defendant's epilepsy through defendant's own testimony and the testimony of two of his friends).

In this case, the record is clear that each expert not only testified extensively about the battery of tests administered to Phillips, ***39** they each also testified that Phillips was borderline mentally retarded and probably brain-damaged. Dr. Toomer testified that Phillips "is in the borderline range of mental functioning." He also testified that Phillips's results on the Bender Gestalt Design test "suggested some motor perception problems, and there [were] discrepancies that reflected or suggested that there was some organicity or brain damage." Later Toomer stated that the design Phillips drew "indicated or suggested" to him that Phillips had organicity or brain damage. On cross-examination, Toomer testified that he found some evidence of "mild organicity." Dr. Carbonell testified that Phillips had a verbal IQ of 75 and a performance IQ of 77, numerically putting him in the "borderline" range, and that Phillips "is functioning at the level of many retarded people." She also testified that the type of closed head injury that Phillips allegedly sustained do "not infrequently cause brain damage." She later testified that Phillips "possibly had a head injury that could have in fact further damaged his level of functioning." On cross-examination, Carbonell was asked whether Phillips had brain damage, and she responded, "It's a probability. It's certainly a possibility."

Finally, the mere fact that the defense experts' opinions were rejected does not demonstrate that counsel was ineffective. *See Teffeteller v. Dugger,* 734 So.2d 1009, 1020 (Fla.1999). Instead, the failure can be attributed to Drs. Haber and Miller's opinions that Phillips's intelligence was between average and borderline and that Phillips exhibited no evidence of brain damage. The fact that Phillips now has new experts does not indicate that his counsel was ineffective, where counsel did investigate and present evidence on these issues. *See Cherry v. State,* 781 So.2d 1040, 1052 (Fla.2000); *Rose v. State,* 617 So.2d 291, 295 (Fla.1993).

In sum, given the significant mental health investigation and testimony in the record, we hold that the trial court did not err in denying Phillips's claim without an evidentiary hearing. Given that the record reflects that two mental health experts were appointed in Phillips's defense, and each performed a comprehensive mental health evaluation of Phillips and testified thereto, we also affirm the trial court's summary denial of Phillips's *Ake* claim.

2. Applicability of Section 921.137(1), Florida Statutes (2001)

Phillips next asserts that his resentencing counsel rendered ineffective assistance for presenting insufficient evidence to show that his level of retardation met the criteria set forth in section 921.137(1), Florida Statutes (2001).[7] Resentencing counsel cannot be deemed ineffective, however, because section 921.137, the statute prohibiting the execution of mentally retarded defendants, did not even exist at the time of Phillips's resentencing ***40** or subsequent direct appeal.[8] Nevertheless, we do not preclude Phillips from raising the retroactive application of section 921.137 in a subsequent proceeding. Nor do we address the potential merits of a claim under *Atkins,* 536 U.S. at 304, 122 S.Ct. 2242, or Florida Rule of Criminal Procedure 3.203 (Defendant's/Prisoner's Mental Retardation as a Bar to Execution). Phillips is free to file a motion under rule 3.203. *See Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure,* 875 So.2d 563 (Fla.2004). We express no opinion regarding the merits of such a claim.

7 Section 921.137(1) provides:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The

> Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

8 Section 921.137, Florida Statutes (2001), was enacted on June 12, 2001.

Finally, regarding Phillips's cumulative error claim, Phillips's individual claims are either procedurally barred or meritless. No finding of cumulative error is appropriate under these circumstances. *See Vining v. State,* 827 So.2d 201, 209 (Fla.2002) (stating that where the alleged individual errors are without merit, the contention of cumulative error is also without merit).

III. HABEAS CORPUS

Phillips raises four claims in his petition for writ of habeas corpus: (1) whether appellate counsel rendered ineffective assistance in failing to raise on appeal the admissibility of Detective Smith's hearsay testimony; (2) whether appellate counsel rendered ineffective assistance when he failed to raise the issue that the execution of a mentally retarded defendant was a violation of the prohibition against cruel or unusual punishment; (3) whether appellate counsel rendered ineffective assistance when he failed to raise on appeal an issue relative to the admissibility of Dr. Miller's testimony at resentencing; and (4) whether appellate counsel rendered ineffective assistance when he failed to raise on appeal other trial court rulings which may have warranted a new resentencing. We find no merit to any of these claims.

In his first habeas claim, Phillips contends that appellate counsel was ineffective for failing to raise the admissibility of Detective Greg Smith's hearsay testimony from jailhouse witnesses. Resentencing counsel did not raise a specific objection regarding Smith's hearsay testimony about what jailhouse informants Malcolm Watson, Tony Smith, and Larry Hunter told him. Because there was no motion filed or objection below, appellate counsel cannot be deemed ineffective for not raising this issue on direct appeal. *See Rutherford v. Moore,* 774 So.2d 637, 648 (Fla.2000) ("[A]ppellate counsel cannot be considered ineffective for failing to raise issues which [were] procedurally barred ... because they were not properly raised at trial."); *Robinson v. Moore,* 773 So.2d 1, 5 (Fla.2000).

In his second habeas claim, Phillips argues that he received ineffective assistance of appellate counsel when counsel failed to raise the constitutionality of executing a mentally retarded defendant. In the record on appeal, resentencing counsel did not assert that sentencing Phillips to death was unconstitutional due to his alleged mental retardation. Thus, this issue was not preserved on this basis. Again, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *See Rutherford,* 774 So.2d at 648.

In his third habeas claim, Phillips asserts that appellate counsel was ineffective when he failed to raise the admissibility of Dr. Miller's testimony at resentencing in violation of the confidentiality requirement of rule 3.211(e), Florida Rules of Criminal Procedure.[9] We disagree.

9 Rule 3.211(e) of the Florida Rules of Criminal Procedure provides as follows:

> (1) The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.
> (2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

***41** Dr. Miller initially evaluated Phillips to determine competency in 1988. At resentencing in 1994, the trial court allowed Dr. Miller to testify for the purpose of rebutting the defense's mental mitigation. When Dr. Miller testified at resentencing about his 1988 interview with Phillips, Dr. Miller did not state that he had interviewed Phillips for the determination of competency. In the portion of Dr. Miller's testimony where Phillips objected, Dr. Miller stated that he conducted a mental status examination consisting of numerous current event questions. The purpose of the exam was to evaluate Phillips's general intelligence and degree of learning. Dr. Miller testified to the type of questions he asked, Phillips's responses, and the psychological interpretation of those responses. He did not discuss anything further concerning his 1988 interview with Phillips.

Furthermore, Dr. Miller was reappointed in 1994 because Phillips's defense counsel filed a notice of intent to rely on two statutory mitigators: (1) under the influence of extreme mental or emotional disturbance; and (2) diminished mental capacity. Dr. Miller's 1994 interview with Phillips occurred only after he had placed his emotional and mental capacity at issue and after notice to his counsel. Moreover, the trial court's order appointing Dr. Miller specifically stated that Dr. Miller was to determine whether Phillips suffered from diminished mental capacity at the time of the offense. In addition, Dr. Miller was only allowed to testify in rebuttal to direct mental health testimony presented by Phillips. *See Dillbeck v. State,* 643 So.2d 1027, 1030 (Fla.1994). Given these circumstances, we find that Dr. Miller's testimony at resentencing was proper, and appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. *See Long v. State,* 610 So.2d 1268, 1275 (Fla.1992).

In his last habeas claim, Phillips argues that he received ineffective assistance of appellate counsel on his first direct appeal when counsel failed to raise two issues: (1) whether the trial court abused its discretion when it admitted autopsy photos; and (2) whether the trial court erred in denying a motion for judgment of acquittal.

In the first sub-claim, Phillips moved for a standing objection to the introduction of autopsy photos immediately before opening statements on the ground that motive was no longer at issue. The trial court refused to grant a standing objection but agreed to revisit the issue at the time the photos were introduced. At the time the photographs were admitted, Phillips did not object. Thus, any issue regarding the admission of the autopsy photographs was not preserved. *See Castor v. State,* 365 So.2d 701, 703 (Fla.1978). Therefore, appellate counsel cannot be deemed ineffective for failing to raise this unpreserved issue on appeal. *See Rutherford,* 774 So.2d at 648.

***42** Phillips's second sub-claim is procedurally barred. Phillips filed a prior habeas petition regarding the conduct of his first appeal, and we denied it. *See Phillips v. Dugger,* 515 So.2d at 227. "Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed." *Johnson v. Singletary,* 647 So.2d 106, 109 (Fla.1994). Here, the fact that appellate counsel on Phillips's first direct appeal did not raise the denial of the motion for judgment of acquittal is an issue that he could and should have known at the time he filed his first habeas petition. Thus, this claim is procedurally barred.

Accordingly, we deny Phillips's petition for habeas corpus and affirm the trial court's summary denial of postconviction relief.

It is so ordered.

WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

WELLS, J., concurs with an opinion, in which BELL, J., concurs.

CANTERO, J., concurs with an opinion.

PARIENTE, C.J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.

WELLS, J., concurring.
I concur with the majority. I write to express my agreement with Justice Cantero that the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), applies to Phillips and to express the basis of my conclusion.

I read *Atkins* to set forth a substantive federal constitutional right not to be executed if it is established that a person is mentally retarded. In this regard I adhere to the Eleventh Circuit's statement in *In re Holladay,* 331 F.3d 1169, 1173 (11th Cir.2003):

> Although the Court ultimately rejected such a rule in [*Penry v. Lynaugh,* 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)], in *Atkins* the Court reversed course and announced that "the Constitution '*places a substantive restriction* on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321, 122 S.Ct. 2242 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

(Emphasis added.)

In *Witt v. State,* 387 So.2d 922, 929 (Fla.1980), this Court specifically stated that one category of constitutional rulings which would be cognizable in capital cases under Florida Rule of Criminal Procedure 3.850 was

> changes of law which place beyond the authority of the state the power to regulate certain conduct or *impose certain penalties.* This category is exemplified by *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for this crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment.

(Emphasis added.) *Atkins* has made the execution of a mentally retarded person beyond the power of the state to impose, which I believe in this context means to carry out. Therefore, in accord with this specific reasoning in *Witt,* I would hold that Phillips can proceed with an *Atkins* claim. Phillips will, of course, have to establish that he is mentally retarded as that condition has been defined by our law.

***43** However, I do not believe that this is an issue of retroactivity similar to court procedures such as in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), or other issues having to do with the admissibility of evidence or the confrontation of witnesses. The question here is whether mental retardation bars the State from executing an otherwise lawful penalty. This issue is similar to whether a person is insane to be executed. As to insane to be executed and mental retardation, the issue is whether the person is eligible for a prospective execution. I do not read *Atkins* as having a retroactive application in the sense that it makes the pronouncement of the death penalty illegal. Clearly, *Atkins* has no effect on guilt issues.

BELL, J., concurs.

CANTERO, J., concurring.

I concur in all aspects of the majority opinion. I write separately only to explain our decision to allow Phillips to file a motion under new Florida Rule of Criminal Procedure 3.203, which became effective October 1, 2004. I believe we should state explicitly what we necessarily have concluded implicitly-that the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), applies retroactively-and explain why.

Our recent amendments to the Florida Rules of Criminal Procedure implicitly concluded, or at least assumed, that *Atkins* applies retroactively. Rule 3.203(d)(4) creates a procedure for raising mental retardation as a bar to execution in pending cases, in future cases, and in cases that already are final. *See Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure,* 875 So.2d 563 (Fla.2004). However, the bench and bar would benefit from an opinion expressly addressing the issue and this case presents an opportunity to do so.

The Court did not state in *Atkins* whether its holding was retroactive. However, the retroactivity of its decision is apparent, at least under the standard articulated in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (which is different from ours), when read alongside *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), in which the Court stated:

> Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id. at 330, 109 S.Ct. 2934. Although the Court rejected such a rule in *Penry,* the Court ultimately announced in *Atkins* that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321, 122 S.Ct. 2242.

In the two years since *Atkins* was decided, many federal and state courts have considered whether *Atkins* applies retroactively, and all have held that it does. *See In re Holladay,* 331 F.3d 1169, 1173 (11th Cir.2003); *In re Morris,* 328 F.3d 739, 740 (5th Cir.2003); *Hill v. Anderson,* 300 F.3d 679, 681 (6th Cir.2002); *Clemons v. State,* No. CR-01-1355, --- So.2d ----, ----, 2003 WL 22047260, at *3 (Ala.Crim.App. Aug.29, 2003); *Head v. Hill,* 277 Ga. 255, 587 S.E.2d 613, 621 (2003); *Williams v. State,* 793 N.E.2d 1019, 1027 (Ind.2003); *State v. Dunn,* 831 So.2d 862, 882 n. 21 (La.2002); *Johnson v. State,* 102 S.W.3d 535, 539 n. 12 (Mo.2003); ***44** *State v. Lott,* 97 Ohio St.3d 303, 779 N.E.2d 1011, 1015 (2002); *Pickens v. State,* 74 P.3d 601, 603 (Okla.Crim.App.2003); *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604, 606 n. 6 (2003); *cf. Ex parte Briseno,* 135 S.W.3d 1, 5 (Tex.Crim.App.2004) (suggesting the retroactivity of *Atkins*).

The vast majority of these courts analyzed the retroactivity of *Atkins* using the standards articulated in *Teague,* which is not the standard we have historically used. I continue to believe that we should consider the retroactivity of United States Supreme Court decisions based on that Court's own standards. *See Windom v. State,* 886 So.2d 915, 935-52, (Fla. 2004) (Cantero, J., specially concurring). Nevertheless, a retroactivity analysis under our current law leads to the same conclusion. In *Witt v. State,* 387 So.2d 922 (Fla.1980),

this Court held that a change in the law does not apply retroactively unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. *Id.* at 931. Clearly, the holding of *Atkins* meets the first two prongs of *Witt*-that is, the United States Supreme Court issued a new rule that is constitutional in nature. *Id.*

The question of *Atkins's* retroactive application therefore rests on the third prong: whether the rule constitutes a development of fundamental significance. In *Witt,* we stated that most major constitutional changes fall within one of two categories: changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," *id.* at 929, and those which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).[10] 387 So.2d at 929. *Atkins* clearly falls within the first category-it prohibits the government from imposing the penalty of death on mentally retarded defendants, which is a substantive limit on the state's power to impose certain penalties. *Cf. Penry,* 492 U.S. at 330, 109 S.Ct. 2934 (applying a *Teague* analysis and stating that "a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all" and would be retroactive because it deprives the State of the power to impose a certain penalty).

10 The *Linkletter* three-fold test inquires into (a) the purpose to be served by the new rule, (b) the extent of reliance on the prior rule, and (c) the effect retroactive application of the new rule would have on the administration of justice. *See Witt,* 387 So.2d at 926.

For these reasons, *Atkins* applies retroactively. Phillips must receive the benefit of both *Atkins* and new rule 3.203.

PARIENTE, C.J., concurring in part and dissenting in part.
I concur in all aspects of the majority opinion except on the issue of ineffective assistance of trial counsel relating to Phillips' possible mental retardation and organic brain damage. I would reverse for an evidentiary hearing because there are sufficient allegations to call into question the performance of resentencing counsel on the failure to investigate and present further testing on this potentially powerful mitigation.

Despite the fact that resentencing counsel was aware that both experts who examined Phillips previously testified that more testing was needed to confirm the presence or extent of brain damage and mental retardation, resentencing counsel ***45** failed to pursue or present definitive evidence of Phillips' brain damage or mental retardation. In my view, these allegations in Phillips' motion for postconviction relief entitle him to an evidentiary hearing on this ineffective assistance of counsel claim. Further, the majority's decision to affirm the denial of this claim without prejudice to Phillips filing a motion under Florida Rule of Criminal Procedure 3.203 is insufficient to afford Phillips an adequate review, because any hearing conducted pursuant to rule 3.203 regarding mental retardation may be qualitatively different from one conducted on the ineffective assistance of counsel claim.[11]

11 I do, however, agree with Justice Cantero's conclusion in his separate concurring opinion that *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which bars execution of mentally retarded offenders, must be given retroactive application.

As the majority acknowledges, a defendant is entitled to an evidentiary hearing on a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is facially invalid. *See Cook v. State,* 792 So.2d 1197, 1201-02 (Fla.2001). In determining whether an evidentiary hearing on a claim is warranted, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Atwater v. State,* 788 So.2d 223, 229 (Fla.2001).

Phillips asserts that the trial court erred in denying an evidentiary hearing on his claim that defense counsel failed to investigate and conduct further testing as to Phillips' possible mental retardation and organic brain damage at the time of his resentencing. Specifically, he contends that resentencing counsel never had him examined by a competent mental health expert even though counsel was aware before resentencing that further testing was necessary for a definitive diagnosis of mental retardation and organic brain damage. I agree that Phillips was entitled to an evidentiary hearing on this issue.

Before this Court remanded for new resentencing proceedings, Dr. Joyce Carbonell and Dr. Jethro Toomer

testified at Phillips' initial evidentiary hearing in 1988. Both concluded that Phillips' intellectual functioning was in the borderline range of mental retardation and that he was intellectually and emotionally impaired. Further, although both Carbonell and Toomer testified that the tests they performed indicated that Phillips may suffer from organic brain damage, neither could confirm the presence or extent of the brain damage without further testing.

At resentencing, Toomer testified similarly regarding Phillips' possible brain damage, but he stated that a specialist in nerve scoping psychology would have to conduct a nerve psychological test to properly diagnose the existence and extent of any organic brain disturbance. Carbonell did not testify at the resentencing. Her testimony from the 1988 evidentiary hearing was read into evidence.

The majority's conclusion that Phillips is not entitled to an evidentiary hearing because "the record in this case is replete with mitigation testimony from both of Phillips's mental health experts," *see* majority op. at 37, ignores the uncontested fact that both experts admittedly lacked the ability to definitively diagnose Phillips as either mentally retarded or suffering from organic brain damage. Both experts stated that further testing was necessary and, although aware of this fact, resentencing counsel failed to investigate or secure that further testing. Moreover, postconviction ***46** counsel argued at the *Huff*[12] hearing and appellate counsel asserted at oral argument that a mental retardation specialist and a neurologist were prepared to testify at an evidentiary hearing on Phillips' mental retardation and organic brain damage. Because the record does not conclusively refute the claim that Phillips suffered from mental retardation and organic brain damage, the trial court erred in failing to grant Phillips an evidentiary hearing on whether defense counsel was ineffective in failing to pursue the matter.

12 *Huff v. State,* 622 So.2d 982 (Fla.1993).

The majority's affirmance of the decision to deny Phillips a hearing on the ineffective assistance claim without prejudice for him to file a motion pursuant to new rule 3.203 will not resolve the ineffective assistance of counsel claim. The current statutory burden for establishing mental retardation as a bar to execution is different from the burden of establishing that counsel's performance was ineffective. Section 921.137(4), Florida Statutes (2004), requires proof of mental retardation by clear and convincing evidence. The ineffective assistance claim requires Phillips to demonstrate that had definitive evidence of his mental retardation been presented at the resentencing, such evidence would undermine our confidence in the imposition of the death sentence, which was recommended by a bare majority of the jurors. Allowing Phillips a hearing pursuant to rule 3.203 while denying him a hearing on the ineffective assistance of counsel claim does not afford Phillips adequate review or protect his constitutional right to counsel. I would therefore grant Phillips an evidentiary hearing on the ineffective assistance of counsel claim so it can be pursued in tandem with a mental retardation claim pursuant to rule 3.203. Fairness as well as efficiency dictate this result, especially since both claims could be adjudicated in a single hearing with the same evidence.

ANSTEAD, J., concurs.

All Citations

894 So.2d 28, 29 Fla. L. Weekly S585, 30 Fla. L. Weekly S73

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705 So.2d 1320
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,

v.

STATE of Florida, Appellee.

No. 83731.
|
Sept. 25, 1997.
|
Rehearing Denied Feb. 23, 1998.

Synopsis

Murder conviction and death sentence were affirmed by the Supreme Court, 476 So.2d 194, and defendant moved for postconviction relief. Motion was denied, but the Supreme Court, 608 So2d 778,remanded for resentencing. The Circuit Court for Dade County, Arthur I. Snyder, J., sentenced defendant to death, and defendant appealed. The Supreme Court held that: (1) resentencing proceeding was properly conducted; (2) jury was not improperly influenced; and (3) aggravating circumstance was properly submitted to jury.

Affirmed.

Anstead, J., concurred specially with opinion.

Attorneys and Law Firms

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Robert A. Butterworth, Attorney General and Fariba N. Komeily, Assistant Attorney General, Miami, for Appellee.

Opinion

PER CURIAM.

We have on appeal the sentence of the trial court reimposing the death penalty upon Harry Franklin Phillips. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

In 1984, Phillips was convicted of the 1982 murder of Bjorn Svenson, a parole supervisor. The jury recommended the death penalty by a vote of seven to five, and the trial court sentenced Phillips to death. This Court affirmed the conviction and sentence. *Phillips v. State,* 476 So.2d 194 (Fla.1985). The trial court denied Phillips' motion for postconviction relief in 1988. On appeal, this Court vacated the death sentence and remanded for resentencing due to the ineffectiveness of Phillips' trial counsel in failing to present mitigating evidence to the jury during the penalty phase. *Phillips v. State,* 608 So.2d 778 (Fla.1992).

***1321** Resentencing occurred in 1994. Following the presentation of evidence, the jury returned a recommendation of death by a vote of seven to five. In the written sentencing order the trial court found that the following aggravators applied to Phillips: (1) at the time of the murder, Phillips was under a sentence of imprisonment (because he was on parole); (2) Phillips had prior convictions for violent felonies; (3) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification (CCP). The trial court also found that although no statutory mitigators were applicable, the following nonstatutory mitigators applied: (1) Phillips' low intelligence (given little weight); (2) Phillips' poor family background (given little weight); and (3) Phillips' abusive childhood, including lack of proper guidance by his father (given little weight). The trial court held that the aggravating circumstances outweighed the mitigating circumstances and sentenced Phillips to death.

Phillips raises the following six issues on appeal: (1) that Phillips' resentencing proceeding did not comport with the requirements set forth in *Spencer v. State,* 615 So.2d 688 (Fla.1993); (2) that the trial court mishandled the jury and improperly influenced the jury to return a death verdict; (3) that the "disrupt or hinder a governmental function" aggravator was improperly and overbroadly submitted to the jury and found by the court; (4) that the State improperly made Phillips' prior bad acts, including uncharged matters, a focus of the resentencing, and introduced unnecessary and unreliable evidence and hearsay regarding Phillips' guilt; (5) that the trial court improperly allowed the State to strike an African–American from the jury panel; and (6) that the CCP aggravator cannot be constitutionally narrowed and was improperly employed. We reject the arguments under claims (1), (4), and (5) as procedurally barred or without merit.

There are two aspects of claim (2) which require explanation. Prior to commencement of voir dire, defense counsel

requested the trial court to fashion a response to potential questions from the venire about the long time span between the original trial and the current proceeding. The trial court proposed to advise the jury "that this case was tried originally and the defendant was convicted of first-degree murder and due to legal problems over the years we have to retry the penalty phase." Both counsel agreed to such an explanation. The trial court then told the jury that Phillips "has already been found guilty of First Degree Murder by a different jury and for legal technicalities we have to retry the penalty phase." There were no objections to this explanation. Phillips now contends that the giving of this statement constituted fundamental error. We cannot agree. While some might quarrel over the term "legal technicalities," the general tenor of the statement was similar to the one to which counsel had agreed. The jury was never informed of Phillips' previous death sentence or even of a previous jury recommendation. We are convinced that Phillips was not prejudiced by the trial court's comment. *See Teffeteller v. State,* 495 So.2d 744 (Fla.1986) (mere mention of prior death sentence not prejudicial in subsequent resentencing).

Phillips also challenges the trial court's alleged failure to give the jury Florida Standard Jury Instruction 3.06 (traditionally referred to as an *Allen* charge)[1] when the jury informed the trial court during its deliberations that two of the jurors were declining to vote because they were unhappy with where the majority were leaning. Defense counsel suggested the jury be told, if they had a majority, to render a verdict based on the majority. The trial court instructed the jury to take a vote from the ten jurors willing to vote and to record the vote as it stood. The trial court noted that it would consider any refusal to vote as a vote for life imprisonment. However, when the vote was finally taken, all of the jurors voted and a majority of them recommended death. Phillips now asserts that the trial court should have instead suggested to the jury that it deliberate ***1322** further and if it could not reach a verdict then it would be discharged.

[1] *See Kelley v. State,* 486 So.2d 578 (Fla.1986).

This claim fails for three reasons. First, Phillips never objected to the actual instruction given or requested that an *Allen* charge be given below. *See Derrick v. State,* 641 So.2d 378, 379 (Fla.1994). Second, the trial court would have committed error if it had given the jury the instruction requested by Phillips because an *Allen* charge is only applicable in the guilt phase of a criminal proceeding. *Derrick,* 641 So.2d at 379; *Patten v. State,* 467 So.2d 975 (Fla.1985). Lastly, the fact that the trial judge indicated that he would count the votes of the jurors refusing to vote as votes in favor of a recommendation of life imprisonment was the most favorable treatment Phillips could have obtained. Even Phillips' own defense counsel said that it made sense for the trial judge to count the two jurors' refusals to vote as votes for life imprisonment. Phillips' remaining arguments under claim (2) are without merit and need not be discussed.

Phillips next asserts that the "disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws" aggravator (the disrupt/hinder aggravator) was improperly submitted to the jury and erroneously applied by the trial court because: (1) the aggravator had previously been found to be inapplicable at the original sentencing; (2) the aggravator only applies where the State has proven beyond a reasonable doubt that the dominant or sole motive of the murder was to disrupt or hinder a governmental function or enforcement of laws; and (3) there was insufficient evidence to establish that Phillips was going to have his parole revoked by Officer Svenson. Phillips' claims regarding the disrupt/hinder aggravator are without merit. The trial court explained in its sentencing order why it applied this aggravator upon resentencing:

> This Court previously found this factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits, that although revenge may have been one motive, it was part of the overall motive of killing a parole official, who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole revoked, for continuing to violate the terms of his parole and for shooting a gun which occurred a few days before the homicide. This would clearly hinder a governmental function. Mr. Svenson's only connection with the defendant was as a parole officer and parolee. Mr. Svenson's homicide was beyond a reasonable doubt committed to disrupt or hinder governmental function. See *Jones v. State,* 440 So.2d 570 (Fla.1983).

Phillips' resentencing proceeding was a "completely new proceeding," and the trial court was therefore under no obligation to make the same findings as those made in Phillips' prior sentencing proceeding. *King v. Dugger,* 555 So.2d 355, 358–59 (Fla.1990).

Regarding Phillips' argument that the trial court should have given the jury a narrowing instruction on the disrupt/hinder aggravator, Phillips failed to object below to the form of the instruction given to the jury or request that a narrowing

instruction be given. Instead, Phillips merely objected to the applicability of the disrupt/hinder aggravator. An objection to the applicability of a jury instruction does not preserve a claim that the instruction was vague or overbroad. *See Roberts v. Singletary,* 626 So.2d 168, 169 (Fla.1993)("We have repeatedly held that claims are procedurally barred where there was a failure at trial to object to the instruction on the grounds of vagueness or unconstitutionality."). Moreover, a narrowing instruction was not required. This Court has held that in order for the disrupt/hinder aggravator to be applicable, it is sufficient for the State to show that the victim was killed while performing a legitimate governmental function. *See Jones v. State,* 440 So.2d 570, 577–78 (Fla.1983).

Phillips' claim of insufficient evidence to support this aggravator is also without merit. Officer Svenson was the parole district supervisor who supervised Phillips' former parole officer, Nanette Brochin. In 1981, Svenson personally instructed Phillips to stay away from Brochin and then testified at Phillips' parole revocation proceeding ***1323** when Phillips violated those instructions. Phillips' parole was revoked and he was sent back to prison. In 1982, when Phillips was subsequently re-released on parole, he again violated Svenson's instructions. On the day of the murder, Phillips was again instructed by Officer Svenson to stay away from Brochin and was told that he would be imprisoned for violating the instructions. The evidence establishes that Svenson was directly involved in the revocation of Phillips' parole.

We now turn to Phillips' claim regarding the constitutionality of the CCP aggravator. Phillips does not challenge the sufficiency of the evidence presented in support of the CCP aggravator, nor does he challenge the language of the CCP instruction given to the jury. He instead argues that the CCP aggravator is inherently vague, subject to overbroad, unconstitutional application irrespective of any definitions of its terms, and should not be applied in capital cases. This Court has previously rejected the contention that the CCP aggravator is unconstitutionally vague. *Jackson v. State,* 648 So.2d 85 (Fla.1994). In *Jackson,* we ruled that the jury should receive more expansive instructions defining the terms "cold," "calculated," and "premeditated," but we rejected a challenge to the statutory CCP aggravator itself. In this case, even though Phillips' resentencing occurred prior to this Court's decision in *Jackson,* the jury was given a proper narrowing instruction consistent with that decision.

Accordingly, we affirm the trial court's sentence of death.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs specially with an opinion.

ANSTEAD, Justice, specially concurring.

I agree with the majority's conclusion that appellant's *Spencer* claim is procedurally barred under our case law because it was not preserved for review by a proper objection at trial. Nevertheless, I write separately to express my concern with the trial court's failure to follow the sentencing procedure explicitly set out in *Spencer v. State,* 615 So.2d 688 (Fla.1993), and to emphasize that the *Spencer* rule is a *mandatory* one which *must* be followed in a death penalty sentencing. The sentencing in this case illustrates the need for our recent decision mandating special education for judges in capital cases.

In order to ensure that all judges hearing capital cases have the concern and competence necessary to handle the unique demands of capital criminal proceedings, this Court recently enacted rule 2.050(b)(10) of the Florida Rules of Judicial Administration, requiring in part that a judge must have recently completed the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies before presiding over a capital case—and for good reason. It is especially worth noting here that the judge-authors of the teaching manual for the course specifically admonish trial judges: "After this [*Spencer*] hearing, the judge should adjourn to consider the appropriate sentence. Final sentencing should be set on a separate date. *Failure to do this after Spencer could and probably will result in a reversal.*" Susan F. Schaeffer, *Conducting the Penalty Phase of a Capital Case* 53 *in Handling Capital Cases* (Fla. College of Advanced Judicial Studies 1997) (emphasis added). The manual further cautions: "Do not have either side prepare your *Order.*" *Id.*

In *Spencer,* this Court plainly stated the specific steps a trial court must follow in capital sentencing, and explained our rationale:

> In *Grossman* [*v. State*, 525 So.2d 833 (Fla.1988)], we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be

used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant ***1324** an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. *Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. ...*

It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role.

615 So.2d at 690–91 (emphasis added).[2] The trial judge in this case clearly failed to follow the sentencing procedure mandated in *Spencer* by making his sentencing decision *before* hearing the parties as to the proper sentence. Contrary to our explicit directions, the trial court did not first listen to the parties and then "recess the proceedings to consider the appropriate sentence." *Spencer.* Instead, the trial judge apparently came to the sentencing hearing with a sentencing order imposing death already prepared and then heard arguments from the State and the defendant. Immediately thereafter the court sentenced the defendant to death and filed the sentencing order, with no indication that the just-argued contentions of both sides had been considered before the sentence was decided. The trial judge's error in prematurely preparing Phillips' sentencing order was compounded by the fact that the judge adopted almost verbatim the State's earlier-filed sentencing memorandum as his sentencing order.[3]

2 In *Gibson v. State,* 661 So.2d 288 (Fla.1995), albeit in the context of stating why written orders must be prepared before oral pronouncement of sentence and filed contemporaneously, we explained the rationale which also underlies the *Spencer* sentencing procedure:

> In *Grossman,* we mandated that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." *The purpose of this requirement is to reinforce the court's obligation to think through its sentencing decision and to ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death.*

Id. at 293 (emphasis added).

3 The State's sentencing memorandum and the court's virtually identical order are supported by evidence in the record. Further, the trial judge stated that he had "independently reviewed and weighed the evidence."

While the trial court may not have actually abdicated its sentencing responsibility to the State in this case,[4] its failure to follow the procedure set out in *Spencer,* coupled with its adoption of the State's sentencing memorandum, create both an appearance of partiality and a failure to carefully consider the contentions of both sides and to take seriously the independent judicial "obligation to think through [the] sentencing decision." *Gibson v. State,* 661 So.2d 288, 293 (Fla.1995).

4 Unlike *Spencer* and *Patterson v. State,* 513 So.2d 1257 (Fla.1987), there is no claim here that the trial court had ex parte communications with the State concerning the appropriate sentence for the defendant or that the court directed the State to prepare the sentencing order.

All Citations

705 So.2d 1320, 22 Fla. L. Weekly S607

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Called into Doubt by Stephens v. State, Fla., November 24, 1999

608 So.2d 778
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,
v.
STATE of Florida, Appellee.

No. 75598.
|
Sept. 24, 1992.
|
Rehearing Denied Dec. 24, 1992.

Synopsis
Following affirmance, 476 So.2d 194, of murder conviction and sentence of death, defendant petitioned to have his sentence vacated, set aside or corrected. The Circuit Court in and for Dade County, Arthur I. Snyder, J., denied the petition. Defendant appealed. The Supreme Court held: (1) state's disclosure of benefits offered to inmates in exchange for their testimony was adequate; (2) state did not fail to correct false testimony; (3) state did not use jailhouse informants to elicit testimony from defendant after he asserted his right to counsel; (4) defense counsel was not ineffective at the guilt phase; but (5) counsel was ineffective at the sentencing phase.

Affirmed in part and reversed in part; sentence vacated and remanded for resentencing.

Shaw, J., concurred in result.

McDonald, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

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Robert A. Butterworth, Atty. Gen. and Ralph Barreira, Asst. Atty. Gen., Miami, for appellee.

Opinion

PER CURIAM.

Harry Franklin Phillips, a prisoner under sentence of death, appeals from the circuit court's denial of his petition under Florida Rule of Criminal Procedure 3.850. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

Phillips was convicted of the 1982 murder of Bjorn Svenson, a parole supervisor. The jury recommended a death sentence by a vote of seven to five, and the judge followed this recommendation. This Court affirmed the conviction and sentence on appeal. *Phillips v. State,* 476 So.2d 194 (Fla.1985). After his first death warrant was signed, Phillips filed a petition for habeas corpus, alleging a violation of his rights under *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The petition was denied by this Court as procedurally barred. *Phillips v. Dugger,* 515 So.2d 227 (Fla.1987). Phillips ***780** then filed this 3.850 motion. An evidentiary hearing was held, and the circuit court denied relief on all claims.

We first address the claims Phillips raises alleging error in the guilt phase of his trial. Much of the State's evidence at trial consisted of the testimony of inmates who had been in a cell with Phillips. These inmates testified that Phillips admitted his guilt to them, and each supplied details of the crime as Phillips portrayed it to them—details which presumably only the killer would know.

Phillips contends that the State failed to disclose the nature or extent of the benefits offered to these inmates in exchange for their testimony, violating his rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, before trial, Phillips was allowed to depose the prosecutor in this case, David Waksman. He also took the depositions of the inmates themselves and of the lead detective, Greg Smith. Through these depositions, Phillips learned that the inmates had been told that Waksman would write a letter informing the relevant authority—the parole board for those inmates who were serving prison sentences and the sentencing judge for those inmates who had not yet gone to trial—of their cooperation in the case. In addition, one inmate, Malcolm Watson, was promised that he would be given a polygraph test regarding his crime, and if he passed it his sentencing judge would be so informed. These promises were brought out on cross-examination of the inmates at trial.

Phillips now contends that the inmates were promised much more than was actually disclosed. In support of this claim, he introduced at the postconviction hearing documents showing that Waksman and Smith were involved in various activities in aid of the inmates after trial. For example, Waksman became involved in plea negotiations which ultimately resulted in a lenient sentence of five years' probation for Larry Hunter.

In rebutting this allegation, the State presented Waksman as a witness, who explained that he did in fact do more than simply write letters for some of the inmates. Because they had been such a help to the case and had gone through such pains to testify, including spending more time in jail while their own trials were postponed and being subjected to beatings and threats from other prisoners, Waksman decided to aid these inmates in whatever ways he could. However, he did not inform the inmates that he was going to do anything other than write letters, and in fact he himself had no idea to what extent he would end up helping them.[1]

[1] Phillips also cites several examples of good fortune which befell the inmates after they testified against him. For example, Malcolm Watson's life sentence was vacated, William Farley received early parole, and assault charges against William Scott were dropped. However, Phillips submitted no proof that these events were causally connected to the inmates' testimony at trial or that they took place in fulfillment of promises by the State.

Phillips also introduced check stubs showing that the inmates were in fact given reward money after trial. However, Smith and Waksman explained that this money was provided by the Florida Police Benevolent Association, a private organization, that they themselves were unaware of the reward until shortly before trial, and that they never told the inmates about the money until after they testified. Accordingly, although the inmates were ultimately given reward money by an outside organization, they were not aware of the possibility of a reward until after trial, and it therefore could not have provided any incentive for them to testify.

Finally, Phillips presented the testimony of William Farley, who stated that he lied on the stand at trial, that Phillips had never in fact confessed to him, that all the information about the crime was provided to him by the police, and that he perjured himself on the stand after being promised freedom and reward money. A similar claim was made as to the testimony of Larry Hunter. While Hunter himself refused to testify on grounds of self-incrimination, the parties stipulated to the consideration of his affidavit. Waksman and Smith denied these allegations. The circuit ***781** court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding. Accordingly, we reject Phillips' *Brady* claim.

Phillips next claims that various witnesses lied on the stand at trial and the State failed to correct the false testimony, in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In order to prevail on this claim, Phillips must demonstrate: (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Routly v. State,* 590 So.2d 397, 400 (Fla.1991).

Phillips first alleges that William Scott was a police informant at the time Phillips confessed to him, yet he stated on the witness stand that he was not a police agent. The fact that Scott had been a paid informant for the federal government and had aided one of the detectives in the Metro–Dade police department was well known to the defense through pretrial depositions of Scott and Detective Smith and was brought out on cross-examination at trial. Scott's statement that he was not a police agent is attributable to the ambiguity of the term "agent." Scott was on the federal government payroll at the time of trial and was assigned an informant number for the federal authorities; he did not, at that time, have an informant number for the Metro–Dade police, and therefore evidently did not believe that he was an agent for that department. Even at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro–Dade. Ambiguous testimony does not constitute false testimony for the purposes of *Giglio. Routly,* 590 So.2d at 400.

Phillips also alleges that William Farley lied when he stated that the tape was started immediately when he gave his tape-recorded statement to the police; actually, a pre-interview was conducted which lasted approximately one and one-half hours. We find this misstatement to be immaterial. Further, the statement could have been corrected by the defense, had it been important, since the defense was aware of the pre-interview from Detective Smith's pretrial deposition.

Finally, Phillips contends that both Farley and Watson lied about their criminal records. While we agree that statements made by these witnesses regarding their records were incorrect, we find that there is no reasonable probability that

the false testimony affected the judgment of the jury. The jury was made aware that these witnesses were convicted felons; the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility.

In a related claim, Phillips argues that the State used the jailhouse informants to elicit testimony from Phillips after he asserted his right to counsel, violating his rights under *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). This claim is without merit, as Phillips has made no showing that the informants were state agents when they talked with him,[2] that they in any way attempted to elicit information about the crimes, or that the State had anything to do with placing these persons in a cell with Phillips in order to obtain information.

2 Although William Scott was a state agent when he attempted to elicit information from Phillips' family, this action in no way implicated Phillips' rights. The circumstances of this incident were not hidden by the State, as Scott discussed the incident in his pretrial deposition.

Phillips next argues that his trial counsel was ineffective at the guilt phase. In order to prevail on this claim, Phillips must demonstrate that counsel's performance was deficient and that there is a reasonable probability that the result of the proceeding would have been different absent the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Phillips bases his claim on several alleged actions which counsel failed to take. First, Phillips contends that counsel should have obtained a competency evaluation before trial. In support of this allegation, ***782** Phillips presented the testimony of two forensic psychology experts, who stated that Phillips was not competent at the time of his trial. In rebutting this claim, the State presented the testimony of two experts who opined that Phillips was competent at trial, and the testimony of Phillips' counsel, who stated that there was absolutely no reason to doubt Phillips' competence at the time of trial.[3] The State also presented notes and letters written by Phillips at the time of trial which indicated overall intellectual functioning and an understanding of the case against him. The circuit court found that Phillips was competent at trial and that counsel was not ineffective for failing to have his competency evaluated. We find competent, substantial evidence to support the circuit court's finding on this issue.

3 Phillips places much emphasis on counsel's statements that Phillips was an "idiot." Counsel explained that this statement did not reflect his feelings about Phillips' mental capacity, but rather about his tendency to take actions which sabotaged his own case, such as bragging about the crime to other inmates.

Phillips next claims that counsel was ineffective for failing to investigate the jailhouse informants, for failing to file a motion to suppress, for failing to move for a change of venue, for failing to conduct an appropriate voir dire, for failing to obtain or consult with experts, for failing to object to Phillips' absence from certain proceedings, for failing to adequately cross-examine witnesses, and for failing to object to hearsay, lay opinions, and improper comments during the prosecutor's closing argument. We find these claims to be conclusory and summarily reject them. Many of these claims are exactly the type of hindsight second-guessing that *Strickland* condemns, and even those matters asserted as significant "omissions" would have been mere exercises in futility, with no legal basis. Accordingly, having found that Phillips has demonstrated neither deficient performance nor prejudice, we reject his claim that trial counsel was ineffective at the guilt phase.

We turn now to Phillips' claims regarding the sentencing phase of his trial. Phillips first argues that his trial counsel was ineffective at sentencing. Counsel testified at the postconviction hearing that he did virtually no preparation for the penalty phase. The only testimony presented in mitigation was that of Phillips' mother, who testified that Phillips was a good son who tried to help her when he was not in prison. The State has conceded that counsel's performance was deficient at the penalty phase, but contends that the deficient performance did not prejudice Phillips, as he would have been sentenced to death anyway. The circuit court agreed with the State.

At the postconviction proceeding, Phillips introduced a large amount of mitigating evidence through the testimony of relatives and friends of the family, who described Phillips' poor childhood, and through the testimony of expert witnesses, who described Phillips' mental and emotional deficiencies.

Phillips' mother, brother, and sister testified that Phillips grew up in poverty. His parents were migrant workers who often left the children unsupervised. Phillips' father physically abused him, and physically abused Phillips' mother in front of the children. Phillips was a withdrawn, quiet child with no

friends. When he was thirteen or fourteen, Phillips was shot in the head and taken to the hospital.

The State argues that this childhood evidence is entitled to little weight, since Phillips was thirty-six years old at the time he committed this crime and had numerous chances to rehabilitate himself by then. Although it is true that this evidence is far less compelling as mitigation in light of Phillips' age, this does not change the fact that it was relevant, admissible evidence that should have been presented to the jury. It cannot be seriously argued that the admission of this evidence could have in any way affirmatively damaged Phillips' case.

More compelling evidence was presented by Phillips' experts. These experts testified that Phillips is emotionally, intellectually, ***783** and socially deficient, that he has lifelong deficits in his adaptive functioning, that he is withdrawn and socially isolated, that he has a schizoid personality, and that he is passive-aggressive. Phillips' IQ was found to be between seventy-three and seventy-five, in the borderline intelligence range. Both experts concluded that Phillips falls under the statutory mitigating circumstances of extreme emotional disturbance and an inability to conform his conduct to the requirements of the law.[4] They also opined that Phillips did not have the capacity to form the requisite intent to fall under the aggravating factors of cold, calculated, and premeditated or heinous, atrocious, or cruel.[5]

4 § 921.141(6)(b), (f), Fla.Stat. (1981).

5 § 921.141(5)(i), (h), Fla.Stat. (1981).

Again, the State contends that this mitigation is not sufficiently compelling to demonstrate prejudice. However, this testimony provides strong mental mitigation and was essentially unrebutted. The testimony of the State experts related solely to the issue of competency. While these experts testified that they did not believe Phillips had significant mental or emotional disorders, they offered no opinion as to the applicability of the statutory mental mitigators, and even these experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded. Accordingly, even giving full credit to the testimony of the State's experts there was significant, unrebutted mental mitigation which should have been considered by the jury.[6]

6 While the circuit judge ruled against Phillips on the competency claim, he never found as a factual matter that no mental mitigation was established.

The jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigating evidence. Having demonstrated both deficient performance and prejudice, Phillips is entitled to relief on his claim of ineffective assistance of counsel at the sentencing phase of his trial. Given our resolution of this issue, it is unnecessary for us to address the remainder of Phillips' claims of error in his sentencing.[7]

7 Phillips argues: 1) comments by the court and prosecutor diminished the jury's sense of responsibility for the sentencing decision; 2) trial counsel was ineffective for failing to object to a jury instruction which shifted the burden of proof at sentencing to Phillips; and 3) trial counsel was ineffective for failing to object to inconsistent jury instructions regarding the vote necessary for a life recommendation.

For the foregoing reasons, the circuit court's order is affirmed in part and reversed in part, the sentence of death is vacated, and the case is remanded for a new sentencing proceeding before a jury.

It is so ordered.

BARKETT, C.J., and OVERTON, GRIMES, KOGAN and HARDING, JJ., concur.

SHAW, J., concurs in result only.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part, dissenting in part.
I concur in the denial of relief to Phillips on the guilt phase of his trial, but would also deny relief on the sentence. I agree with the trial judge when he determined:

Based on the facts surrounding the murder, this Court finds that there is no reasonable probability that the evidence of a troubled childhood and limited mental capacity would have altered the jury's decision and certainly not this Court's decision. Since Phillips has not established prejudice, he is not entitled to relief on this claim.

All Citations

608 So.2d 778, 17 Fla. L. Weekly S595

476 So.2d 194
Supreme Court of Florida.

Harry PHILLIPS, Appellant,

v.

STATE of Florida, Appellee.

No. 64883.
|
Aug. 30, 1985.
|
Rehearing Denied Oct. 28, 1985.

Synopsis

Defendant was convicted before the Circuit Court, Dade County, Arthur I. Snyder, J., of first-degree murder and sentenced to death. On his appeal, the Supreme Court, Adkins J., held that: (1) there was no error in allowing State to elicit testimony concerning prior shooting incident at home of probation officers; (2) testimony of prosecution witness, a fellow inmate, was relevant to discredit defendant's alibi and to explain context of an incriminating admission, and thus its admission at trial was not error; (3) evidence was sufficient to support finding that murder was especially heinous, atrocious or cruel; and (4) evidence was sufficient to support finding that murder was committed in a cold, calculated and premeditated manner.

Affirmed.

Attorneys and Law Firms

***195** Eric Wm. Hendon, Miami, for appellant.

Jim Smith, Atty. Gen., and Michael J. Neiman, Asst. Atty. Gen., Miami, for appellee.

Opinion

ADKINS, Justice.

This case is before the Court on appeal from a judgment of conviction of first-degree murder for which a sentence of death was imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction and sentence.

In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.

***196** As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.

On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.

Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.

Appellant's first point on appeal claims error in allowing the state to elicit testimony concerning a collateral crime, i.e., the August 24th shooting incident at the home of the probation officers. The trial court denied appellant's motion in limine as it related to that shooting. However, appellant failed to object when the collateral crimes testimony was admitted and thus did not preserve the issue for appellate review. *German v. State,* 379 So.2d 1013 (Fla. 4th DCA), *cert. denied,* 388 So.2d 1113 (1980). Even assuming proper objection had been made, evidence of the prior shooting was relevant to prove motivation and intent. § 90.404(2)(a), Fla.Stat. (1983). *See also Herzog v. State,* 439 So.2d 1372 (Fla.1983).

Appellant next claims that certain testimony of a prosecution witness, a fellow inmate, deprived him of a fair trial by provoking the jurors' hostility toward appellant. This testimony included certain racial slurs, attributed to appellant, regarding the victim as well as reference to the victim's

grieving relatives. Appellant failed to object to this testimony at trial, however, and therefore may not raise the issue on appeal. *Herzog v. State.* Even if preserved for review, this testimony was relevant to discredit appellant's alibi and to explain the context of an incriminating admission; consequently, its admission at trial was not error.

Appellant next contends that the trial court erred in refusing to charge the jury with his requested instruction on alibi. Appellant requested Florida Standard Jury Instruction (Criminal) 2.10(a) (1981), purportedly to avoid confusing the jury as to the standard of proof necessary to establish an alibi. The court refused, instructing the jury instead with the appropriate instruction from the current Florida Standard Jury Instructions. We uphold the trial court's action, for appellant has not shown a palpable abuse of that court's discretion in refusing to give the old jury instruction. *See Williams v. State,* 437 So.2d 133 (Fla.1983), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984).

The trial court found four statutory aggravating circumstances applicable in sentencing appellant to death: the murder was committed while appellant was under a sentence of imprisonment, appellant was previously convicted of another felony involving the use of violence, the murder was especially heinous, atrocious or cruel, and was committed in a cold, calculated and premeditated manner. Appellant challenges the court's finding of the latter two circumstances. We find that contention without merit.

The record in this case amply supports the finding that the victim's murder was especially heinous, atrocious or cruel. The victim was stalked by appellant, shot twice in the chest and fled a short distance before being killed by repeated shots in the head and back. The mindset or mental anguish of the victim is an important factor in determining whether this aggravating ***197** circumstance applies. *Jennings v. State* 453 So.2d 1109 (Fla.1984), *vacated on other grounds,* 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985). Based upon the evidence presented, the trial court correctly surmised that between the two vollies of gunfire the victim must have agonized over his ultimate fate and properly considered this circumstance in the sentencing process. *See Francois v. State,* 407 So.2d 885 (Fla.1981), *cert. denied,* 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). Appellant correctly contends that lack of remorse is not a relevant consideration in the finding of an aggravating circumstance. *Pope v. State,* 441 So.2d 1073 (Fla.1984). Disregarding any possible language to that effect in the sentencing order, however, the evidence was sufficient to prove this factor beyond a reasonable doubt.

The record likewise amply supports the trial court's finding that this murder was committed in a cold, calculated and premeditated manner. Appellant waited for the victim to leave work, confronted him in the parking lot and shot him twice. The victim managed to flee approximately one hundred feet before he was cut down by gunfire to his head and back. In order for all of the shots to be fired appellant had to reload his revolver, affording him time to contemplate his actions and choose to kill his victim. These facts are sufficient to show the heightened premeditation for imposition of this aggravating factor. *Herring v. State,* 446 So.2d 1049 (Fla.), *cert. denied,* 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); *Mills v. State,* 462 So.2d 1075 (Fla.), *cert. denied,* 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); *Troedel v. State,* 462 So.2d 392 (Fla.1984).

The judgment of conviction of murder in the first degree and sentence of death are affirmed.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

All Citations

476 So.2d 194, 10 Fla. L. Weekly 501

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