DOCKET NO. ______

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

HARRY FRANKLIN PHILLIPS

Petitioner,

vs.

RICKY D. DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

Marie-Louise Samuels Parmer
Special Assistant CCRC-South
Fla. Bar No. 0005584
Counsel of Record

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL-SOUTHERN REGION
110 S.E. 6th Street Suite 701
Fort Lauderdale, FL 33301
TEL: (954) 713-1284
FAX: (954) 713-1299

COUNSEL FOR PETITIONER

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-11606-P

HARRY FRANKLIN PHILLIPS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Harry Franklin Phillips is a Florida death row prisoner who seeks a certificate of appealability ("COA") to appeal the district court's denial of his motion for leave to amend his 28 U.S.C. § 2254 habeas corpus petition. Appellee's motion to accept its response as timely filed is GRANTED. The motion for a COA is DENIED because Phillips has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 07, 2022

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 22-11606-P
Case Style: Harry Franklin Phillips v. Secretary, Florida Department of Corrections
District Court Docket No: 1:08-cv-23420-DMM

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15714-P

HARRY FRANKLIN PHILLIPS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Harry Franklin Phillips is a Florida death row prisoner who seeks to expand the existing certificate of appealability ("COA") to include the district court's denial of Ground V of his 28 U.S.C. § 2254 habeas corpus petition. His motion to expand the COA is DENIED because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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David J. Smith
Clerk of Court

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October 07, 2022

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 15-15714-P
Case Style: Harry Phillips v. Secretary, FL DOC
District Court Docket No: 1:08-cv-23420-AJ

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Appellant's brief is due 40 days from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-23420-CV-MIDDLEBROOKS

HARRY FRANKLIN PHILLIPS,
Petitioner,

v.

MARK S. INCH, Secretary Florida
Department of Corrections,
Respondent.
______________________________________/

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE comes before the Court upon Petitioner's Motion for Rehearing or Reconsideration, filed on February 23, 2022. (DE 58). Respondent has responded and Petitioner's deadline to reply has elapsed. (DE 60). For the reasons explained below, Petitioner's Motion is denied.

On January 27, 2022, I denied Petitioner's Motion for Leave to Amend Habeas, or, Alternatively, Rule 60(b)(6) Motion for Relief, concluding that Petitioner's Motion was, in effect, an unauthorized successive petition, and that, even if it weren't, amendment would be futile. (DE 56 at 13). I also concluded that Petitioner was not entitled to Rule 60(b) relief because there was no defect that threatened the integrity of his federal habeas proceedings. (*Id.* at 17). Plaintiff now moves for reconsideration of that Order under Federal Rule of Civil Procedure 59(e), arguing that I "erred in several respects." (DE 58 at ¶ 5).

Under Rule 59(e), reconsideration is proper when there is: (1) newly discovered evidence, (2) an intervening change in controlling law, or (3) a need to correct a clear error of law or fact or prevent manifest injustice. *See Bd. of Trs. of Bay Med. Ctr. v. Humana Military Healthcare Servs., Inc*., 447 F.3d 1370, 1377 (11th Cir. 2006) (citations omitted). To prevail on a motion to

reconsider, the moving party must demonstrate why the court should reverse its prior decision by setting forth facts or law of a strongly convincing nature. A motion to reconsider should not be used as a vehicle "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.,* 408 F.3d 757, 763 (11th Cir. 2005).

Petitioner's Motion is merely an attempt to relitigate the same arguments I previously rejected, and this is not a proper basis for seeking reconsideration. He first argues that, instead of relying on binding Eleventh Circuit precedent, I should have adopted the Fifth Circuit's approach and determined that Petitioner's Motion was not a successive petition. (DE 58 at ¶¶ 7–8). Petitioner has already argued that his Motion should not be considered a successive petition, and I rejected that argument. (*See* DE 35 at ¶ 2). Moreover, I am bound by the law of the Eleventh Circuit, not the law of the Fifth Circuit, which Petitioner concedes. (DE 58 at ¶ 24). Petitioner's second argument—that *In re Henry* was wrongly decided and that *Hall* should be retroactive—fails for the same reasons. Petitioner thoroughly briefed this issue in his Motion to Amend and I rejected it after careful consideration. (*See* 35 at ¶¶ 44–51). Additionally, unless and until the Eleventh Circuit overturns *In re Henry*, I am obliged to follow it.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Motion for Reconsideration (DE 58) is **DENIED**.

SIGNED in Chambers in West Palm Beach, Florida on this 11th day of April, 2022.

Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-23420-CV-MIDDLEBROOKS

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

MARK S. INCH, Secretary Florida
Department of Corrections,

Respondent.
_______________________________________/

ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court *sua sponte*. On January 27, 2022, I entered an Order Denying Petitioner's Motion to Amend or Reopen. (DE 56). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. The Eleventh Circuit has held that the denial of a Rule 60 motion is a "final order" in a habeas corpus proceeding and requires a Certificate of Appealability before an appeal may proceed. *See* 28 U.S.C. § 2253(c)(1); *Perez v. Sec'y, Fla. Dep't of Corr.,* 711 F.3d 1263, 1264 (11th Cir. 2013)(citations omitted); *see also Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1263–64 (11th Cir.2004) (en banc) (concluding that the denial of a Fed.R.Civ.P. 60(b) motion constitutes a "final order" under section 2253(c)(1) and, thus, requires a COA).

A court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); *Harbison v. Bell,* 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson,* 544 U.S. 74, 78-83 (2005)). To make a substantial showing, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable

or wrong," *Tennard v. Dretke,* 542 U.S. 274, 282 (2004) (quoting *Slack*, 529 U.S. at 484), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Upon consideration of the record as a whole, I decline to grant Petitioner a certificate of appealability with respect to my denial of his Motion to Amend or Reopen. (DE 56). Petitioner cannot show that my procedural ruling was debatable, and he has not made a substantial showing of the denial of a constitutional right. Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

(1) No certificate of appealability shall issue with respect to the denial of Petitioner's Motion to Amend or Reopen. (DE 56).

(2) Petitioner may seek a certificate from the Court of Appeals under Federal Rule of Appellate Procedure 22.

SIGNED in Chambers, at West Palm Beach, Florida, this 31st day of January, 2022.

Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-23420-CV-MIDDLEBROOKS

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

MARK S. INCH, Secretary Florida
Department of Corrections,

Respondent.
_____________________________________/

ORDER DENYING PETITIONER'S MOTION TO AMEND OR REOPEN

THIS CAUSE is before the Court on Petitioner Harry Franklin Phillip's Motion for Leave to Amend Habeas, or Alternatively, Petitioner's 60(b)(6) Motion for Relief (the "Motion"), filed on July 1, 2021. (DE 35). Although Petitioner's Motion is, in legal effect, a successive Petition, the Eleventh Circuit has expressly directed me to consider it, and I therefore reach the merits despite the AEDPA's jurisdictional bar. The Motion is fully briefed. (DE 53; DE 54). For the following reasons, Petitioner's Motion is denied.

I. Facts and Procedural History

Petitioner asserts that his death sentence violates the Eighth Amendment of the United States Constitution because he suffers from an intellectual disability. He raised this claim in federal habeas proceedings that he initiated in 2008. Then-United States District Court Judge Adalberto Jordan denied that petition in 2015, and Petitioner's appeal of that order was pending in the Eleventh Circuit until the filing of the instant Motion, through which Petitioner now seeks leave to amend Ground V of his federal habeas petition, his intellectual disability claim. Petitioner alternatively moves, pursuant to Federal Rule of Civil Procedure 60(b)(6), for relief from Judge

Jordan's Order. (DE 29). Petitioner ultimately seeks to present the district court with certain favorable factual findings made by the state court in a successive state habeas petition which Petitioner brought in 2018. (DE 35 at ¶ 11). Petitioner argues that, with these additional factual findings, he has established that he has an intellectual disability and therefore he should be permitted to reopen this case.

In 1983, a jury convicted Petitioner of first-degree murder for the 1982 shooting of a parole supervisor, Bjorn Svenson, in Florida state court. (DE 29 at 2; DE 35 ¶ 1). The trial court sentenced Petitioner to death in accordance with the jury's recommendation. (DE 29 at 2). Petitioner appealed, and in 1985, the Florida Supreme Court affirmed the conviction and sentence. (*Id.*); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). Petitioner sought post-conviction relief in state court, which was denied but later reversed in part by the Florida Supreme Court in 1992.[1] *Phillips v. State*, 608 So. 2d 778 (Fla. 1992). Upon remand for a new sentencing hearing before a jury, in 1994, the jury again recommended that Petitioner be sentenced to death, and the re-sentencing court so sentenced Petitioner.[2] *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997) (per curiam).

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[1] Petitioner raised several claims, one of which is relevant here. Plaintiff brought an ineffective assistance of counsel claim premised on the sentencing phase of trial. *Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992). Petitioner argued that his trial counsel was ineffective in that counsel testified at the post-conviction hearing "that he did virtually no preparation for the penalty phase," and the only testimony presented as to mitigation was Petitioner's mother. *Id.* The Florida Supreme Court found that a "large amount of mitigating evidence" was presented at the postconviction hearing regarding Petitioner's mental and emotional deficiencies, including expert evidence as to Petitioner's low IQ and defects in adaptive functioning throughout life. *Id.* at 782–83. The Florida Supreme Court therefore found that Petitioner was entitled to relief on this claim, vacated the sentence of death, and remanded for re-sentencing before a jury. *Id.* at 783.

[2] None of the claims raised on appeal are relevant here. *See Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997).

In 1997, the Florida Supreme Court affirmed. *Id.* at 1323. The United States Supreme Court denied a petition for writ of certiorari. *See Phillips v. Florida*, 525 U.S. 880 (1998). Next, in 1999, Petitioner filed a motion for post-conviction relief in state court pursuant to Rule 3.850, raising twenty-four claims. *Phillips v. State*, 894 So. 2d 28, 34 (Fla. 2004) (per curiam). The state court denied the motion and the Florida Supreme Court affirmed. *Id.* at 23–24. Petitioner raised eleven claims before the Florida Supreme Court, one of which was that resentencing counsel was ineffective for failing to offer evidence that Petitioner was intellectually disabled and therefore could not be executed under Fla. Stat. § 921.137(1). The Florida Supreme Court noted that § 921.137(1) was not in existence at the time of Petitioner's resentencing or direct appeal. *Id.* at 40. It noted, however, that Petitioner could file a motion pursuant to Florida Rule of Criminal Procedure 3.203.

In 2005, Petitioner filed in state court a second successive Rule 3.851 motion for an intellectual disability determination pursuant to Rule 3.203. (DE 35 ¶ 1). Under Fla. Stat. § 921.137, to establish intellectual disability, Petitioner had to show: "(1) significant 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." (*See* DE 29 at 43). As will be explained in further detail later, this three-pronged definition of intellectual disability remains the framework by which courts assess claims of intellectual disability. *See Hall v. Florida*, 572 U.S. 701, 710 (2014). At the time Petitioner filed his 2005 motion, the Florida Supreme Court interpreted Fla. Stat. § 921.137 as requiring a strict cutoff of an IQ score of 70 or below to meet the first prong of the intellectual disability definition. *See Cherry v. State*, 959 So. 2d 702, 711–14 (Fla. 2007), *abrogated by Hall v. Florida*, 572 U.S. 701 (2014). After an evidentiary hearing in 2006, the state court determined that Petitioner had not proved any of the three prongs by clear

and convincing evidence. *See Phillips v. State*, 984 So. 2d 503, 506, 509 (Fla. 2008) (per curiam). Relevant here, as to prong one, defense experts opined that Petitioner's IQ scores of 75, 74 and 70 demonstrated Petitioner's functioning at a substantially subaverage intellectual level. *Id.* The state's expert, however, opined that the low scores were a result of malingering, not intellectual disability, based on the results of the "validity tests" the state's expert conducted. *Id.* Because the defense experts did not test for malingering, the state court accepted the state's expert's opinion over those of the defense experts. *Id.* at 508–10. The state court additionally found that Petitioner's IQ scores did not indicate intellectual disability under § 921.137. *Id.* at 511. In 2008, the Florida Supreme Court affirmed. *See id.* at 513. As to prong one, Petitioner argued that the lower court erred because the strict cutoff of an IQ score of 70 failed to take into account the test's error of measurement, which is approximately plus or minus 5 points, meaning, it is possible that individuals with IQ scores up to 75 to be diagnosed as intellectually disabled. *Id.* at 510. The Florida Supreme Court rejected Petitioner's argument, deferring to the state court's credibility determination, i.e., that it found the state's expert opinion on Petitioner's IQ scores credible, and noting that alternatively, "[e]ven were we to disregard the circuit court's credibility finding," Petitioner's IQ scores fell below the then-applicable threshold. *Id.*

On December 10, 2008, Petitioner filed in this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DE 1). Petitioner raised several grounds for relief, including that the Florida Supreme Court's affirmance of the lower court's finding that Petitioner is not intellectually disabled conflicts with clearly established federal law as set forth in *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of the intellectually disabled constitute cruel and unusual punishment and are prohibited by the Eighth Amendment). (DE 1 at 62–71).

During the pendency of Petitioner's federal habeas petition, on May 27, 2014, the United States Supreme Court decided *Hall v. Florida*, 572 U.S. 701 (2014). There, the United States Supreme Court held that Florida's strict cutoff of an IQ score of 70 to meet the first prong of the intellectual disability standard was unconstitutional, and it required that a defendant with an IQ score within the test's margin of error, which is plus or minus five points, be allowed to present evidence of intellectual disability, including adaptive deficits. 572 U.S. at 721, 723. The United States Supreme Court advised that a state's assessment of a defendant's intellectual disability should focus on both "significantly subaverage intellectual functioning" and "deficits in adaptive functioning." *Id.* at 711. These factors are "interrelated" and no "single factor [is] dispositive." *Id.* at 723.

After *Hall* but prior to a decision by Judge Jordan on Petitioner's federal habeas petition, the Eleventh Circuit issued two opinions in which it found that *Hall* is not retroactive on collateral review. *In re Henry*, 757 F.3d 1151, 1157–58 (11th Cir. 2014) (issued June 17, 2014); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1312–1315 (11th Cir. 2015) (issued November 16, 2015). On November 20, 2015, Judge Jordan denied Petitioner's habeas petition. (DE 29). As to the IQ score component of the intellectual disability claim, Judge Jordan did not specifically address the issue of the retroactivity of *Hall*, but stated that:

> [*Hall*] does not entitle Mr. Phillips to relief, for the Florida Supreme Court did not use the 70 IQ cut-off to reject Mr. Phillips argument as to significantly subaverage intellectual functioning. Instead, the Florida Supreme Court reviewed all the evidence in the record, including Mr. Phillips' IQ scores 70 or above, and found (1) that the trial court had not erred in concluding that Mr. Phillips' low scores were the result of malingering, and (2) that in any event most of Mr. Phillips' IQ scores were above 70, thereby showing that he was not mentally retarded.

(DE 29 at 46).

On December 20, 2015, Petitioner filed in this Court an application for certificate of appealability ("COA"). (DE 30). Judge Jordan granted in part, and issued the certificate as to Petitioner's *Brady* and *Giglio* claims only. (DE 34). On February 10, 2016, Petitioner then filed in the Eleventh Circuit an application to expand the COA to include his intellectual disability claim, which remains pending. (DE 35 ¶ 7); *Harry Phillips v. Sec'y, Fla. DOC*, Dkt. No. 15-15714. On February 22, 2016, Petitioner also filed in the Eleventh Circuit a motion to stay the appeal pending the resolution of additional state court proceedings,[3] which was granted on March 2, 2016. (DE 35 ¶ 8); *Harry Phillips v. Sec'y, Fla. DOC*, Dkt. No. 15-15714.

In a 2016 opinion, the Florida Supreme Court found that *Hall* is retroactive. *Walls v. State*, 213 So. 3d 340 (Fla. 2016). The legal landscape now having been altered, Petitioner invoked *Walls* in the filing of another successive 3.851 motion in state court on February 28, 2018. (*See* DE 35 ¶ 9). The 2018 state post-conviction court conduct a *de novo* review of the entire record from the 2006 evidentiary hearing which resulted in the finding that Petitioner was not intellectually disabled. *Phillips v. State*, 299 So. 3d 1013, 1017 (Fla. 2020). Ultimately, the 2018 state court entered an order denying an evidentiary hearing and denying Petitioner's motion. *Id.*; (DE 35-1). However, it found that Petitioner "clearly" proved the first prong by clear and convincing evidence, given his IQ scores and *Hall*'s directive that courts must take into account the standard error of measurement. *Phillips*, 299 So. 3d at 1017. But Petitioner failed to establish the second prong, adaptive behavior, and therefore the 2018 state court declined to find that Petitioner is intellectually disabled. *Id.* Petitioner appealed and the Florida Supreme Court affirmed. *Id.* at 1024. In so doing,

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[3] Petitioner indicated in this motion that he intended to pursue a claim in state court pursuant to *Hurst v. Florida*, which involved a constitutional challenge to Florida's death penalty scheme with respect to jury findings regarding the elements necessary to impose a sentence of death. *See* Dkt. No. 15-15714.

the Florida Supreme Court receded from *Walls*, finding that *Hall* is not retroactive on collateral review, considering, among other factors, the federal habeas decisions finding *Hall* to be non-retroactive. *Phillips v. State*, 299 So. 3d 1013, 1019–22 (Fla. 2020). Petitioner sought and was denied rehearing from the Florida Supreme Court (DE 35-3; DE 35-4), and Petitioner also filed in the United States Supreme Court a petition for writ of certiorari, which was denied. (DE 35 ¶ 16–17).

On June 15, 2021, Petitioner filed in the Eleventh Circuit a motion for leave to file a motion to relinquish jurisdiction to the district court so Petitioner can move to amend the federal habeas petition. (*Id.* ¶ 18). The Eleventh Circuit granted the motion for leave to file a motion to relinquish jurisdiction, and on July 1, 2021, Petitioner filed in the Eleventh Circuit a motion to remand to the district court for indicative ruling, or in the alternative, to relinquish jurisdiction, which was granted. (*See id.* ¶ 19–20). Separately on July 1, 2021, Petitioner filed in this Court the instant Motion. (DE 35). Although a district court lacks jurisdiction to consider a successive habeas petition, because the Eleventh Circuit has relinquished jurisdiction and directed me "to address [Petitioner's] motion to amend" I address the merits of his proposed amendments.

II. Discussion

Petitioner seeks to either amend his habeas Petition or, alternatively, to reopen it. Based on the current record, Petitioner is not entitled to either form of relief.

As a preliminary matter, and as explained in greater detail later, Petitioner's Motion is, in effect, a successive § 2254 petition, and the Eleventh Circuit has not authorized Petitioner to file it. This provides one basis for me to deny Petitioner the relief he seeks. However, because the Eleventh Circuit has relinquished jurisdiction for me to consider Petitioner's Motion, I will also assess the substantive merit of Petitioner's proposed amendments. In that analysis, I ultimately conclude that even if Petitioner's Motion were properly before me, I would not grant leave to

amend because amendment would be futile for at least two reasons: first, the Florida Supreme Court's decision was not based solely on its conclusion that Petitioner failed to satisfy the first (or third) prong of the intellectual disability test; and second, the Eleventh Circuit has held that *Hall* is not retroactive. Rule 60(b) similarly fails to offer Petitioner a viable path to habeas relief: Petitioner's federal habeas proceedings were not corrupted without the 2018 state court's factual findings because those findings would not have changed the basis for Judge Jordan's denial of Petitioner's habeas petition. For these reasons, Petitioner's Motion is denied.

1. **Petitioner's Motion to Amend is a successive petition that has not been authorized by the Eleventh Circuit, and, even if it were not, his proposed amendments would be futile.**

   a. **Petitioner's Motion to Amend is a successive petition.**

Petitioner first argues that he should be permitted to amend his petition under the liberal amendment standard of Federal Rule of Civil Procedure 15(a)(2) because his appeal of the district court's denial of his petition is still pending in the Eleventh Circuit, and, therefore, his petition is not yet final. The Government argues that this Motion is a successive petition because Judge Jordan entered a final order denying habeas relief years ago and, practically, Petitioner is improperly seeking to file a successive petition without authorization from the Eleventh Circuit. (DE 53 at 6).

A "second or successive" habeas petition must be authorized by the appropriate United States court of appeals, and unauthorized successive petitions must be dismissed for lack of jurisdiction when filed in the district court. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007) ("[Petitioner] neither sought nor received authorization from the Court of Appeals before filing his 2002 petition, a 'second or successive' petition challenging his custody, and so the District Court was without jurisdiction to entertain it."). Under the controlling statute, 28 U.S.C. § 2244(b)(2), a state prisoner may raise a new claim in a second or successive habeas petition in federal district

court only if a three-judge panel of a United States Court of Appeals first determines that the application makes a prima facie showing that: (A) the petitioner's claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (B) it relies on facts that (i) could not have been discovered previously through the exercise of due diligence, and that (ii), if proven, would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)–(B) (2006). A "prima facie showing" of these requirements is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Bennett v. United States,* 119 F.3d 468, 469 (7th Cir.1997) (cited in *In re Holladay,* 331 F.3d 1169, 1173–74 (11th Cir.2003)); *Reyes–Requena v. United States,* 243 F.3d 893, 899 (5th Cir.2001).

However, "the phrase 'second or successive' is not self-defining," *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). In *Panetti*, the Supreme Court of the United States concluded that a second-in-time habeas petition under 28 U.S.C.§ 2254 did not fit the definition of "second or successive" as that gatekeeping mechanism is understood. *See Scott v. United States*, 890 F. 3d 1239, 1248 (11th Cir. 2018) (discussing *Panetti*, 551 U.S. at 947). For instance, "second or successive status only attaches to a judgment on the merits." *Boyd v. United States*, 754 F.3d 1298, 1302 (11th Cir. 2014) (citing, *inter alia*, *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000)).

Petitioner argues that his attempt to amend should not be considered a second or successive petition because his original habeas petition remains pending on appeal. (DE 35 at ¶ 22). As Petitioner sees it, a "district court's denial of a petitioner's habeas petition is not in effect a final adjudication that triggers AEDPA's gatekeeping requirement"—much like the Supreme Court held in *Panetti*—because, when there is an appeal, "adjudication of such a petition is still 'ongoing

during the period of appellate review.'" (*Id.* at ¶¶ 24–25 (citing *Ching v. United States*, 298 F.3d at 174, 177–178 (2d Cir. 2005)). This view finds support in the approach adopted by the Second and Third Circuits. *See Ching*, 298 F.3d 174; *United States v. Santarelli*, 929 F.3d 95, 104 (3d Cir. 2019).

The Government argues that in seeking either to amend or to reopen his habeas petition, Petitioner is, in effect, requesting a second full federal habeas review of his intellectual disability claim. (DE 53 at 5). It contends that this Motion is successive because the district court entered a final order denying habeas relief in 2015. (*See* DE 28; DE 29). As Petitioner concedes, the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits agree with the Government and have determined that a habeas petition is final once an order has been entered by a district court, notwithstanding the pendency of an appeal. *See Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006); *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020), *cert. denied*, 2021 WL 2405164 (June 14, 2021); *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (per curiam). Those courts have reasoned that such an approach avoids piecemeal litigation and prevents parties from using amendment to circumvent the successive petition restrictions in AEDPA. *See, e.g., Phillips*, 668 F.3d 433, 435 (7th Cir. 2012) ("Treating motions filed during appeal as part of the original application, however, would drain most force from the time-and-number limits in § 2244 and § 2255."). The Eleventh Circuit has not yet ruled on the issue. *See Amodeo v. United States*, 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam) (stating that the Eleventh Circuit "has no published opinion established when the adjudication of a § 2255 motion becomes final such that the 'second or successive' limitation applies to all future motions,'" which also applies to successive petitions under § 2244).

At least on the facts of this case, I find the reasoning adopted by the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits persuasive. As a practical matter, the district court's decision on Ground V is a final decision because a certificate of appealability has only been issued as to Petitioner's *Brady* and *Giglio* claims. Unless and until Petitioner's Motion to Expand his Certification of Appealability is granted by the Eleventh Circuit, his intellectual disability claim has been finally decided. To permit Petitioner to circumvent the successive petition restriction on any claim, including claims not currently pending before the court of appeals, "as long as [he] keeps his initial request alive through motions, appeals, and petitions" would "suggest[] that the time-and-number limits [of § 2244] are irrelevant," and I am unable to square such an interpretation with my reading of the statute. *Phillips*, 668 F.3d at 435; *see also Moreland*, 813 F.3d at 322 ("Rule 60(b) motions and motions to amend may not be used as vehicles to circumvent the limitations that Congress has placed upon the presentation of claims in a second or successive application for habeas relief."). This concern is particularly salient in this case, as Petitioner's habeas petition has been pending for over a decade.

However, because the Eleventh Circuit has relinquished jurisdiction[4] and remanded this case to me to consider Petitioner's Motion, I will address his proposed amendments despite my

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[4] I do not consider the Eleventh Circuit's relinquishment of jurisdiction to be an implicit authorization for the filing of a second or successive petition, nor am I persuaded that, were Petitioner to seek authorization to file a second or successive petition, such a motion would be successful. Under 28 U.S.C. § 2244, a successive habeas petition shall be dismissed unless:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but

conclusion that this is a successive petition. Federal Rule of Civil Procedure 62.1 authorizes district courts to issue indicative rulings on pending motions even though they implicate issues under consideration on appeal. *See* Fed. R. Civ. P. 62.1(a)(3) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."). Rule 62.1 applies when rules "deprive the district court of authority to grant relief without appellate permission." Fed. R. Civ. P. 62.1, 2009 Advisory Committee Notes. Here, 28 U.S.C. § 2244 prevents me from considering Petitioner's successive petition without express authorization from the Eleventh Circuit. 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). I view the Eleventh Circuit's remand order as express authorization for me to consider the substantive merit of Petitioner's motion to amend, which I have construed as a successive petition, and which I would otherwise have no jurisdiction to entertain. And so, based on the unique procedural posture of this case, I will explain how I would rule if Petitioner had been granted authorization from the Eleventh Circuit to file a successive petition and this matter were properly before me.

> for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). Petitioner has not satisfied prong (A) because the Supreme Court has not made *Hall* retroactive to cases on collateral review. And prong (B) is not applicable here because Petitioner is not relying on new evidence, nor is he arguing actual innocence. Thus, it does not appear to me that Petitioner can satisfy the standard to file a successive petition.

b. Even if Petitioner's Motion to Amend were not a successive petition, amendment would be futile.

Notwithstanding that Petitioner's Motion is a successive petition that has not been authorized by the Eleventh Circuit, I would deny his Motion under Rule 15(a) because amendment would be futile.[5] Rule 15(a) instructs that district courts "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, despite this liberal standard, "a district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004).

Here, Petitioner states that, if granted leave to amend, he will "set out additional facts and arguments in Ground V of his petition that the State Courts' determination of Mr. Phillips [sic] intellectual disability claim was an unreasonable application of clearly established federal law and an unreasonable determination of facts" and that the Florida Supreme Court's "determination that *Hall* announced a new non-watershed rule was likewise an unreasonable application of clearly established law." (DE 35 at 13). The Florida Supreme Court found that *Hall* is not retroactive, and therefore, because Petitioner "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 could establish that he meets the second prong, adaptive deficits.[6] *Phillips*, 299 So. 3d. at 1024.

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[5] Rule 15(a) supplies the relevant standard for amending a habeas Petition under 28 U.S.C. § 2242, which provides that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

[6] Petitioner additionally argues that "the determination that Phillips failed to establish that he has concurrent adaptive defects based on perceived strengths is an unreasonable application of clearly established federal law," specifically *Moore v. Texas*, (DE 35 ¶ 32). Since the Florida Supreme Court found that Petitioner was not entitled to a re-determination of the second prong in light of his failure to establish the first prong, based upon Florida Supreme Court precedents, I do not perceive a need to assess Petitioner's arguments under *Moore*.

Ultimately Petitioner would like to amend his Petition in light of the state court's determinations in 2018 that he "has clearly proven the first prong [of the intellectual disability definition] by clear and convincing evidence" and that he has also satisfied the third prong, and that the state courts unreasonably applied federal law in assessing his adaptive defects. (DE 35 at ¶ 31–33). To do so, however, requires that *Hall* be retroactive.

Amendment would be futile because the Eleventh Circuit has found that *Hall* is not retroactive. *Kilgore v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314–15 (11th Cir. 2015) (holding, in the context of an initial habeas appeal, that under *Teague v. Lane*, *Hall* is not retroactive); *In re Henry*, 757 F.3d 1151, 1159 (11th Cir. 2014) (holding, in the context of a second or successive petition, that *Hall* announced a new rule of constitutional law that the Supreme Court has not made retroactive to cases on collateral review); *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015) (per curiam) (same); *In re Bowles*, 935 F.3d 1210, 1219–20 (11th Cir. 2019) (same).[7] And Petitioner's arguments to the contrary are foreclosed by precedent. Petitioner argues that, under *Teague*, *Hall* did not announce a new rule of constitutional law. (DE 35 ¶¶ 44–51). According to

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[7] In dicta, the Eleventh Circuit has recognized that the Supreme Court's reasoning in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) undermines the reasoning of *Kilgore* and *In re Henry*. *See Smith . Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1339 n.5 (11th Cir. 2009); *In re Bowles*, 935 F.3d at 1219 n.3. *In re Henry*, and *Kilgore*, found that *Hall* is not retroactive in part because *Hall* "guarantee[d] only the chance to present evidence, not ultimately relief," which "is necessarily a non-retroactive procedural rule under *Teague*." *In re Bowles*, 935 F.3d at 1219 n.3 (first quoting *In re Henry*, 757 F.3d at 1161). In *Montgomery*, the Supreme Court found a rule to be substantive even when the rule only guaranteed "[a] hearing where youth and its attendant characteristics are considered as sentencing factors, not a shorter sentence or parole." *Id.* (quoting *Smith*, 924 F.3d at 1339) (internal quotation marks omitted) (alteration in original). Ultimately, however, that does not change the analysis here. The Eleventh Circuit has emphasized that "*In re Henry* and *Kilgore* remain binding precedents in this Circuit," because *Montgomery* was not "clearly on point" as to the retroactivity of *Hall* and thus did not overrule the panel decisions, and, in any event, the reasoning in *In re Henry* and *Kilgore* is distinguishable. *Id* (citation omitted).

Petitioner, the "pivotal point for the Court in *Hall*" was that Florida's strict IQ score cutoff failed to account for the standard error of measurement, the importance of which garnered a "unanimous professional consensus." (DE 35 ¶ 49). Thus, because the views of the medical community are a relevant consideration under *Atkins*, *Hall* merely condemned a practice out of sync with the established professional norms and thus represents an application of *Atkins*. (*Id.* ¶¶ 47, 49–51). The problem with Petitioner's argument is that the Eleventh Circuit has found that *Hall* indeed announced a new rule, reasoning that *Hall* imposed a new obligation on the states that was not dictated by *Atkins*. *Kilgore*, 805 F.3d at 1313; *In re Henry*, 757 F.3d at 1158–59.

In reply, Petitioner argues in the alternative that *Hall* announced a substantive rule, not a procedural rule, and is thus retroactive under *Teague*, relying on the reasoning in *Montgomery v. Louisiana*. (DE 54 at 15 (citing 577 U.S. at 210–11)). But the Eleventh Circuit has found that the rule announced in *Hall* is a procedural rule. *Kilgore*, 805 F.3d 1301 (holding that *Hall* is not a substantive rule in analyzing retroactivity under *Teague*, because *Hall* "merely provides new *procedures* for ensuring that states follow the rule enunciated in *Atkins*. As we held in *In re Henry*, *Hall* did not expand the class of individuals protected by *Atkins's* prohibition"). That remains true post-*Montgomery*. *See In re Bowles*, 935 F.3d at 1219 n.3 (noting that despite that *Montgomery* undermined the reasoning in *In re Henry* and *Kilgore*, those holdings "remain binding precedent in this Circuit").

At bottom, Petitioner simply disagrees with the Eleventh Circuit's retroactivity analysis as to *Hall*. Petitioner concedes in reply that the Eleventh Circuit has found *Hall* to be non-retroactive, but he "respectfully disagrees." (DE 54 at 12). Irrespective of the merits of the arguments for and against *Hall* being deemed a non-retroactive rule, the foregoing precedents are clear and I am bound to apply them here.

Accordingly, because *Hall* is not retroactive under federal law, Petitioner's claim that the Florida Supreme Court determined that *Hall* is not retroactive based on an unreasonable application of clearly established federal law would be meritless, and any effort to amend his petition to assert such arguments would be futile. Moreover, as *Hall* is not retroactive, any amendment to set forth facts demonstrating that the state courts unreasonably applied federal law in assessing his intellectual disability claim would also be futile.

Moreover, even if *Hall* were retroactive, it would not help Petitioner. As Judge Jordan noted in the Order on Petitioner's habeas petition, the 2008 Florida Supreme Court found that the 2006 state court did not exclusively rely on the strict 70 IQ cutoff made unconstitutional by *Hall*. Rather,

> [t]he Florida Supreme Court reviewed all the evidence in the record, including Mr. Phillips' IQ scores of 70 or above, and found (1) that the trial court had not erred in concluding that Mr. Phillips' low scores were the result of malingering, and (2) that in any event most of Mr. Phillips' IQ scores were above 70, thereby showing that he was not mentally retarded.

(DE 29 at 46). Thus, the 2008 Florida Supreme Court's decision would still stand based on its finding that Petitioner's IQ scores were the result of malingering, and Plaintiff would not be entitled to a redetermination of the first prong based on *Hall*. The reasoning in Judge Jordan's Order thus remains applicable even to Plaintiff's proposed amended claim.

2. Petitioner is also not entitled to Rule 60(b) relief because there was no defect that threatened the integrity of his federal habeas proceeding.

Petitioner next argues that he should be permitted to reopen his habeas Petition under Federal Rule of Civil Procedure 60(b). Rule 60(b) provides that, upon a showing of "extraordinary circumstances," a district court may relieve a party from an order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b). One such reason is a "defect in [the] integrity of federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). Petitioner argues that his original

habeas proceedings before Judge Jordan were corrupted because "the state court's new factual findings regarding intellectual disability"—that is, the findings from the 2018 state court decision —are missing from this Court's analysis. (DE 54 at 10). Petitioner also argues that his case presents extraordinary circumstances because of "[t]he combination of changes in United States Supreme Court law, changes in Florida Supreme Court law, and changes in the state postconviction court's factual findings." (*Id.* at 11).

For many of the same reasons discussed in Section (1)(b) above, Petitioner has not identified a defect in the integrity of his federal habeas proceedings that warrants Rule 60(b) relief. Even if the district court had been presented with the "state court's new factual findings regarding intellectual disability"—the lack of which forms the basis of Petitioner's Rule 60(b) claim—the result of his habeas petition would have been the same: because the Eleventh Circuit has held that *Hall* is not retroactive, Petitioner is not entitled to relief. *See, e.g.*, *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014) (*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."). Thus, as the Florida Supreme Court concluded, "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," *Phillips*, 299 So.3d at 1024. And because Petitioner is not entitled to reconsideration of whether he has satisfied the three-prong intellectual disability standard, amendments to his habeas petition to include the 2018 state court factual findings regarding the three-prong test would not change the result of Petitioner's federal habeas proceedings.

III. Conclusion

In sum, Petitioner's Motion to Amend is a successive petition filed without the express authorization of the Eleventh Circuit, and that provides one basis for me to deny it. However, the Eleventh Circuit has relinquished jurisdiction for me to consider the Motion, so I have also assessed its merits. Even under the liberal Rule 15(a) pleading standard, I would not grant Petitioner leave to amend, as amendment would be futile in light of the Eleventh Circuit's holding that *Hall* is not retroactive. Whatever the merits of that holding, I am bound to follow it. For the same reason, there was no defect in Petitioner's original habeas proceedings and his request to reopen his habeas petition under Rule 60(b) also fails. Accordingly, it is **ORDERED AND ADJUDGED** that Petitioner's Motion to Amend or Reopen (DE 35) is **DENIED**.

SIGNED in Chambers, at West Palm Beach, Florida, this 27th day of January, 2022.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

APPENDIX F

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.

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Clerk, Supreme Court

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

APPENDIX G

A036

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:

[1] 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;

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

[3] 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.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (9)

[1] **Sentencing and Punishment** Persons with intellectual disabilities

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. Fla. Stat. Ann. § 921.137(1).

3 Cases that cite this headnote

[2] **Courts** In general; retroactive or prospective operation

A change in the law only applies retroactively if the change (1) emanates from the Florida Supreme Court or the United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.

2 Cases that cite this headnote

[3] **Courts** In general; retroactive or prospective operation

A decision is of "fundamental significance," as a factor in deciding whether a change in the law applies retroactively, 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*, and *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601.

[4] **Courts** In general; retroactive or prospective operation

Holding of United States Supreme Court in *Hall v. Florida*, 572 U.S. 701, that Florida's definition of intellectual disability in context

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of death-penalty cases was unconstitutional because it required an IQ score of 70 or below to demonstrate subaverage intellectual functioning, did not constitute a development of fundamental significance, as required to apply retroactively, receding from *Walls v. State*, 213 So. 3d 340; *Hall* placed no categorical limitation on the authority of the State to impose a sentence of death, but rather, was an evolutionary refinement that more precisely defined the procedure that was to be followed in certain cases to determine whether a person facing the death penalty was intellectually disabled. Fla. Stat. Ann. § 921.137(1).

3 Cases that cite this headnote

[5] **Courts** In general; retroactive or prospective operation

In order to determine whether a new rule of law is of "sufficient magnitude" to merit retroactive application, the Supreme Court considers the following three factors: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule.

1 Case that cites this headnote

[6] **Courts** In general; retroactive or prospective operation

Federal law did not operate to require retroactive application of the holding of the United States Supreme Court in *Hall v. Florida*, 572 U.S. 701, that Florida's definition of intellectual disability in context of death-penalty cases was unconstitutional because it required an IQ score of 70 or below to demonstrate subaverage intellectual functioning; *Hall* announced a new procedural rule, which did not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulated only the manner of determining the defendant's culpability. Fla. Stat. Ann. § 921.137(1).

3 Cases that cite this headnote

[7] **Courts** In general; retroactive or prospective operation

For purposes of the rule that state courts must give retroactive effect to new substantive rules of federal constitutional law, "substantive rules" set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose, while 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.

1 Case that cites this headnote

[8] **Courts** In general; retroactive or prospective operation

The court in *Walls v. State*, 213 So.3d 340, clearly erred in concluding that the holding of United States Supreme Court in *Hall v. Florida*, 572 U.S. 701, that Florida's definition of intellectual disability in context of death-penalty cases was unconstitutional because it required an IQ score of 70 or below to demonstrate subaverage intellectual functioning, constituted a development of fundamental significance, and therefore applied retroactively; *Hall* did not satisfy the analysis in *Witt v. State*, 387 So. 2d 922 for retroactivity and was not a new substantive rule of federal constitutional law that required retroactive application to cases on collateral review, and prisoner, as the expectant potential beneficiary of the erroneous decision in *Walls*, had no concrete reliance interest. Fla. Stat. Ann. § 921.137(1).

3 Cases that cite this headnote

[9] **Courts** Decisions of Same Court or Co-Ordinate Court

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> Once the Supreme Court has chosen to reassess a precedent and has 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.

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

Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, William M. Hennis III, Litigation Director, and Marta Jaszczolt, Staff Attorney, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Lisa-Marie Lerner, Assistant Attorney General, West Palm Beach, Florida, for Appellee

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.

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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.

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

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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.

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)).

[1] 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

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able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

[2] **[3]** 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*

[4] 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

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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]

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.

[5] 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*

[6] **[7]** 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

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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.

*1023 E. Receding from *Walls*

[8] 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, 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.

[9] "[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,

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> 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 1021. *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

Footnotes

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.

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."

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.").

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.

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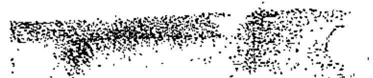
APPENDIX H



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 #4

STATE OF FLORIDA,
Plaintiff,

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

v.

HARRY FRANKLIN PHILLIPS,
Defendant.
_______________________________/

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

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 08-23420-CIV-JORDAN

HARRY FRANKLIN PHILLIPS)
)
Petitioner)
)
vs.)
)
JULIE L. JONES)
)
Respondent)
)

ORDER ON APPLICATION FOR CERTIFICATE OF APPEALABILITY

On December 10, 2008, Harry Franklin Phillips filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. I entered an order denying the petition. [DE 25]. Mr. Phillips has filed an application for a certificate of appealability.

Pursuant to 28 U.S.C. §2253(c), Federal Rule of Appellate Procedure 22(b), and the standard articulated by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), Mr. Phillips' application [DE 31] is granted in part and denied in part. Mr. Phillips is permitted to appeal the claim as asserted in Ground I: whether the state courts' determination that Mr. Phillips' *Brady v. Maryland* and *Giglio v. United States* claim was without merit resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts. *See* 28 U.S.C. §2254(d)(1)-(2). Should Mr. Phillips wish to appeal on any other ground, he must first obtain a certificate of appealability from the Eleventh Circuit.

DONE and **ORDERED** in chambers at Miami, Florida, this 22nd day of January, 2016.

Adalberto J. Jordan
United States District Judge

Copies to counsel of record

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 08-23420-CIV-JORDAN

HARRY FRANKLIN PHILLIPS)
)
Petitioner)
)
vs.)
)
JULIE L. JONES[1])
)
Respondent)
)

CORRECTED ORDER DENYING HABEAS CORPUS PETITION & CLOSING CASE

In this habeas corpus proceeding, brought pursuant to 28 U.S.C. §2254, Harry Franklin Phillips seeks to overturn the death sentence imposed on him for his role in the murder of Bjorn Thomas Svenson over 30 years ago. Mr. Phillips contends that he was denied due process when the State used false and misleading testimony during the guilt phase of his trial and withheld material exculpatory evidence; that the State's use of jailhouse informants violated his rights under the Sixth and Fourteenth Amendments; that he was denied a competency hearing prior to trial; that his counsel was ineffective due to lack of preparation and ignorance; that the state court's determination that he is not mentally retarded was an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002); that the state court applied the wrong standard of proof in determining mental retardation; that the summary denial of his Rule 3.850 claims deprived him of due process and a full and fair evidentiary hearing; that judicial bias motivated a denial of a public records request; that the jury instructions were misleading and diminished the jury's sense of responsibility for the advisory sentence; that the State urged the jury to apply aggravating

[1]Kenneth S. Tucker is no longer the Secretary of the Florida Department of Corrections. The new Secretary, Julie L. Jones, is now the proper respondent in this proceeding, and should "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the respondent.

circumstances in a manner inconsistent with the law; that the re-sentencing court erred in denying a motion to disallow a large door-sized chart in front of the jury; that he is both innocent of first degree murder and the death penalty; and that appellate counsel was ineffective for failing to raise a claim that the State was allowed to present unrebutted hearsay testimony at his re-sentencing. Following oral argument, and a review of the extensive record in this case, Mr. Phillips' habeas corpus petition is **DENIED**.

I. The Underlying Facts and Procedural History

In 1983, a Florida jury convicted Mr. Phillips of the first-degree murder of Mr. Svenson. The Florida Supreme Court, in Mr. Phillips' direct appeal, summarized the basic facts 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). After a separate sentencing hearing, the jury, by a 7-5 vote, recommended that Mr. Phillips be sentenced to death. The trial court sentenced Mr. Phillips to death in accordance with this recommendation. Mr. Phillips appealed, but the Florida Supreme Court affirmed the conviction and sentence. *See id.*

Mr. Phillips sought post-conviction relief in the Florida courts under Rule 3.850 of the Florida Rules of Criminal Procedure. The post-conviction court denied relief but the Florida Supreme Court affirmed in part and reversed in part. *See Phillips v. State*, 608 So.2d 778 (Fla. 1992). The Florida Supreme Court reversed Mr. Phillips' death sentence, finding that his counsel was ineffective at the sentencing phase of the trial. *See id.* at 783. Mr. Phillip's case was therefore remanded for a new sentencing proceeding before a jury. *See id.*

In 1994, Mr. Phillips' re-sentencing hearing was held in state court. The jury again recommended, by a vote of 7-5, that Mr. Phillips be sentenced to death. *See Phillips v. State*, 705 So.2d 1320, 1321 (Fla. 1997). In its written order, the re-sentencing court found that the following aggravators applied to Mr. Phillips: (1) at the time of the murder, Mr. Phillips was under a sentence of imprisonment (because he was on parole); (2) Mr. 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 (the CCP aggravator). The re-sentencing court also found that, although no statutory mitigators were applicable, the following nonstatutory mitigators applied: (1) Mr. Phillips' low intelligence (given little weight); (2) Mr. Phillips' poor family background (given little weight); and (3) Mr. Phillips' abusive childhood, including lack of proper guidance by his father (given little weight). The re-sentencing court held that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Phillips to death. Mr. Phillips appealed to the Florida Supreme Court, which affirmed his death sentence. *See id.* at 1323.

Mr. Phillips filed a petition for writ of certiorari with the United States Supreme Court. That petition was denied on October 5, 1998. *See Phillips v. Florida*, 525 U.S. 880 (1998).

Mr. Phillips subsequently filed a motion for post-conviction relief in state court pursuant to Rule 3.850. *See Phillips v. State*, 894 So.2d 28 (Fla. 2005). Mr. Phillips raised 24 claims. The post-conviction court held a *Huff*[2] hearing and thereafter summarily denied Mr. Phillips'

[2]*See Huff v. State*, 622 So.2d 982, 983 (Fla. 1993) (requiring a hearing in post-conviction cases "for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion").

motion. *See id.* at 34. Mr. Phillips appealed to the Florida Supreme Court, which affirmed and also simultaneously denied Mr. Phillips' petition for writ of habeas corpus. *See id.*

Mr. Phillips later filed a motion for a mental retardation determination pursuant to Rule 3.203 of the Florida Rules of Criminal Procedure. The state court determined that Mr. Phillips was not mentally retarded. Mr. Phillips appealed to the Florida Supreme Court, which affirmed. *See Phillips v. State*, 984 So.2d 503 (Fla. 2008). Mr. Phillips also filed a successive Rule 3.851(d) motion challenging the validity of his death sentence, alleging newly discovered evidence. The state court denied the motion and the Florida Supreme Court affirmed. *See Phillips v. State*, 996 So.2d 859 (Fla. 2008).

In December of 2008, Mr. Phillips filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The State filed its answer and memorandum of law in April of 2009, and Mr. Phillips filed a reply memorandum in August of 2009. The parties presented oral argument in October of 2009.

II. Mr. Phillips' Claims and Applicable Standards

Mr. Phillips' habeas corpus petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), which significantly changed the standards of review that federal courts apply in habeas corpus proceedings.[3] Under AEDPA, if a claim was

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[3]Mr. Phillips argues that "because this is a capital case involving his fundamental constitutional right to life, as of March 21, 2005, he is no longer subject to any provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), nor are any of his claims subject to any assertion of procedural default, and none of his claims are subject to the AEDPA given Congress' passage of S.686 on March 21, 2005." D.E. 3 at 2. S. 686 is also known as A Bill to Provide for the Relief of the Parents of Theresa Marie Schiavo.

Section 1 of the Schiavo Act provides the following:

> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Section 2 of the Schiavo Act provides, in pertinent part, that "[a]ny parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act." Pub.L. 109-3 (S.686) (March 21, 2005).
This Act was passed to permit certain specific complainants, i.e., the parents of Theresa Marie Schiavo, to bring suit to assert a violation of the rights of Theresa Marie Schiavo in the Middle District of Florida.

adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard." *Maharaj v. Secretary, Dept. of Corrections,* 432 F.3d 1292, 1308 (11th Cir. 2005). *See also Harrington v. Richter*, 131 S. Ct. 770, 783 (2011).

Pursuant to § 2254(d)(1), a state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor,* 529 U.S. 362, 405 (2000) (opinion of O'Connor, J., for a majority of the Court). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. *See also Wiggins v. Smith,* 539 U.S. 510, 520-21 (2003). Significantly, an "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti,* 537 U.S. 19, 25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's

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See Pub.L. 109-3 (emphasis added). Mr. Phillips has provided no support for his argument that this extremely limited and narrow law (1) applies to him, (2) invalidates or supersedes the provisions of AEDPA or (3) eliminates state procedural bars or defaults. A plain reading of this Act shows that its sole purpose was to address alleged violations of Theresa Marie Schiavo's rights under the United States Constitution. Nowhere in its text does the Act remotely implicate the rights of a federal habeas corpus petitioner. Accordingly, Mr. Phillips' current federal habeas petition is governed by AEDPA and all of its attendant applications. *See Alley v. Bell*, 178 Fed. Appx. 538, 542-43 (6th Cir. 2006).

determination of the facts, however, is entitled to substantial deference" under § 2254(e)(1). *Maharaj,* 432 F.3d at 1309. This means that a federal habeas court must presume that findings of fact by a state court are correct, and, a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Secretary, Dept. of Corrections,* 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a *de novo* review standard, relief must also be denied under the much narrower AEDPA review standards." *Jefferson v. Fountain,* 382 F.3d 1286, 1295 n.5 (11th Cir. 2004).

III. Timeliness of Mr. Phillips' Petition

The State argues that the majority of Mr. Phillips' claims are barred by the applicable statute of limitations. I choose not to address this argument because Mr. Phillips' claims fail on the merits.

AEDPA imposes a one-year limitations period for the filing of an application for relief under § 2254. The relevant provision, 28 U.S.C. § 2244(d), provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including this one, the limitations period begins to run pursuant to § 2244(d)(1)(A). The Eleventh Circuit has ruled that a judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: "(1) if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773 (11th Cir. 2002).

Mr. Phillips' sentence became final on October 5, 1998, when the United States Supreme Court denied his petition for writ of certiorari. *See Phillips v. Florida*, 525 U.S. 880 (1998). At that time, the one-year limitations period began to run. Because this federal petition for writ of habeas corpus challenging the instant convictions was not filed until December 10, 2008, well-beyond one year after the date on which the conviction and sentence became final, the petition would be time-barred pursuant to § 2244(d)(1)(A) unless the limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. *See* 28 U.S.C. § 2244(d)(2).

On September 13, 1999, within the one-year period, Mr. Phillips filed his first motion for post-conviction relief. *See* D.E. 13, App. R at 1. This motion tolled the time to file a petition for writ of habeas corpus. At that time, Mr. Phillips had only 22 days remaining in the one-year period prescribed by § 2244(d).[4]

Ultimately, the state post-conviction court denied the motion and Mr. Phillips appealed to the Florida Supreme Court. The Florida Supreme Court affirmed and denied a motion for rehearing on January 27, 2005. *See Phillips*, 894 So.2d at 31. During the pendency of this post-conviction motion, Mr. Phillips also filed a petition for writ of habeas corpus in the Florida Supreme Court. *See* D.E. 13, App. W. This habeas petition was denied at the same time as the affirmance of the denial of his motion for post-conviction relief. *See id.* The mandate issued on February 14, 2005. *See* D.E. 13, App. Z at *vi*.

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[4] On January 5, 2000, Mr. Phillips also filed a petition for extraordinary relief, a writ of prohibition, and a writ of mandamus. *See* D.E. 13, App. O. That petition was denied on January 27, 2000. *See Phillips v. State*, 751 So.2d 1253 (Fla. 2000).

On September 23, 2004, while the appeal from the denial of his post-conviction motion and the habeas petition were still pending before the Florida Supreme Court, Mr. Phillips filed a successive post-conviction motion based on newly discovered evidence. *See* D.E. 13, App. Z at *v*. That motion was dismissed because Mr. Phillips already had an appeal pending with the Florida Supreme Court, and the trial court lacked jurisdiction to entertain the second motion. Mr. Phillips later re-filed. The re-filed motion was ultimately denied and Mr. Phillips appealed. On September 23, 2008, the Florida Supreme Court affirmed. *See Phillips v. State*, 996 So.2d 859 (Fla. 2008) (table decision). A motion for rehearing was denied on November 20, 2008.

On March 28, 2005, Mr. Phillips filed a Rule 3.203 motion arguing that he was (and is) mentally retarded and therefore ineligible for the death penalty. The motion was denied after an evidentiary hearing and Mr. Phillips appealed. On March 20, 2008, the Florida Supreme Court affirmed. *See Phillips v. State*, 984 So.2d 503 (Fla. 2008). The mandate issued on June 30, 2008.

Assuming that all these motions were considered "properly filed" for federal habeas tolling purposes, Mr. Phillips would have had until December 12, 2008, to file the instant federal petition because his final pending post-conviction motion for rehearing was denied on November 20, 2008, and at that time he had 22 days left to file his federal habeas petition. Mr. Phillips' petition was filed on December 10, 2008. Mr. Phillips had two days to spare.

The State argues, however, that some of Mr. Phillips' post-conviction motions were not properly filed and, as such, the instant petition is time barred. Indeed, the State devotes over 22 pages of its response to the complex procedural history of Mr. Phillips' state post-conviction proceedings. In sum, the State argues that Mr. Phillips' petition is time-barred because (1) his September 23, 2004, motion, which was dismissed for lack of jurisdiction, was not properly filed for tolling purposes; (2) even though Mr. Phillips was permitted to re-file that motion at a later time it should not be considered as "relating back" sufficiently to toll the time; (3) even if the motion was considered to be "relating back" it still should not toll the time because it was determined that the motion was not based on newly discovered evidence such that it qualified for an exception to Florida's one-year time limit; (4) his March 28, 2005, motion could not have tolled the time because his time had already expired on March 8, 2005; (5) an unsigned, unverified version of a proposed motion filed on November 30, 2004, also did not toll the time

because it too was not properly filed; (6) his post-conviction counsel's failure to file does not constitute grounds for application of § 2244(d)(1)(B); (7) his eighth claim for relief argues that it was based on newly discovered evidence but the state courts determined it was not and a federal court is bound by that determination; (8) certain of his claims do not present claims for federal habeas relief; and (9) Mr. Phillips is not entitled to equitable tolling. The State concedes that two of Mr. Phillips' claims—regarding mental retardation—were timely filed, but it argues that although Mr. Phillips does have some claims that are timely, this does not make his entire petition timely.

At the time of the filing of its response, the State invited me to overrule the Eleventh Circuit's decision in *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003). In the interim time period, however, the Eleventh Circuit has squarely resolved this issue. *See Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir. 2013) (en banc) ("Accordingly, we hold that the statute of limitations in AEDPA applies on a claim-by-claim basis in a multiple trigger date case."). So, any timeliness analysis would have to be done on a claim by claim basis.

Nonetheless, given the complexities of the multiple issues regarding the statute of limitations, I find that judicial economy dictates reaching the merits of Mr. Phillips' claims rather than continuing to exert effort on the more complicated procedural issues. *See Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (citing *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997), and concluding that "[a]lthough the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner"). After careful review of the petition and regardless of whether some of Mr. Phillips' claims are time-barred, I choose to exercise my discretion and conclude that "the interests of justice would be better served by addressing the merits" than addressing the limitations issues. *See Day v. McDonough*, 547 U.S. 198, 210 (2006) (citing *Granberry v. Greer*, 481 U.S. 129, 136 (1987)).

IV. ANALYSIS

Mr. Phillips asserts 12 claims for federal habeas relief. Each is addressed below.

A. MR. PHILLIPS' *BRADY* AND *GIGLIO* CLAIMS

At trial, the State presented no physical evidence connecting Mr. Phillips to the murder, no eyewitnesses, and no murder weapon. The State's case was circumstantial in nature and the

evidence implicating Mr. Phillips came, in part, from jailhouse informants who testified that Mr. Phillips made certain admissions regarding his culpability for the crime. At trial, counsel for Mr. Phillips cross-examined each witness about his motivation for testifying and what, if any, benefits he received or was to receive from the State. Mr. Phillips now argues that the State provided those witnesses with undisclosed benefits and "stood idly by" while they perjured themselves. Mr. Phillips asserts that this violated both *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Further, Mr. Phillips argues that the State affirmatively altered documents before disclosing them to defense counsel by redacting certain information out of police reports and then photocopying them such that the copy does not reflect the redaction. Mr. Phillips also asserts that the State concealed the prior crimes and mental health histories of the informants. *See* D.E. 1 at 7.

At trial, four witnesses testified that Mr. Phillips had made inculpatory statements about his involvement in the murder of Mr. Svenson. All four witnesses—William Smith, William Farley, Larry Hunter, and Malcolm Watson—had been incarcerated in the same correctional facility as Mr. Phillips. After trial, three of these four witnesses have, in some form, recanted their testimony. I have reviewed the testimony given at trial, at depositions, and at the post-conviction evidentiary hearings. Below I set forth in greater detail the pertinent testimony, divided into two categories: (1) the jailhouse informants, and (2) the State's other witnesses.

1. *The Jailhouse Informants*

• *William Smith a/k/a William Scott*

At trial, Mr. Smith testified that he had known Mr. Phillips since 1971. *See* D.E. 13, Vol. 5, Appx. HH at 578. In September of 1982, Mr. Smith saw Mr. Phillips at the Dade County Jail. At that time, Mr. Smith was in the Dade County Jail on an assault charge and a violation of parole. When Mr. Smith asked of Mr. Phillips why he was in jail, Mr. Phillips responded "I just downed one of them motherfuckers." *Id.* at 580. Mr. Phillips told Mr. Smith that he was not worried about the murder weapon because "some woman got it." *Id.* at 581. Mr. Smith further testified that no one told him to go into the cell and talk to Mr. Phillips about the case, but that he decided to call Detective Lloyd Hough to "check it out." *Id.* at 582. Detective Hough then put him in touch with Detective Greg Smith. Mr. Smith testified that he was not given anything by either the police or the prosecution in order to testify. Although the assault charge was dropped,

Mr. Smith testified that he "had [his] wife do it for [him]." *Id.* at 583. After the charge was dropped, Mr. Smith was released on his own recognizance. Although the violation of parole charge was still pending at the time, Mr. Smith testified that it was "being taken care of." *Id.* at 584.

On cross-examination, Mr. Smith continued to maintain that he received no benefit for giving the police information regarding Mr. Phillips' involvement in the crime. *Id.* at 591. Mr. Smith did not receive any monetary stipend paid to government informants.

At the initial post-conviction evidentiary hearing, Mr. Smith did not testify because his whereabouts were unknown.[5] However, after a ten month recess, Mr. Smith was located and the evidentiary hearing was re-opened. Mr. Smith testified that he had been a confidential informant for the Metro-Dade (now Miami-Dade) Police Department before 1984. *See* D.E. 13, Vol. 59, App II at 37. Mr. Smith testified that he had been a police informant for law enforcement (either state or federal) from 1982 to the then-present time. Mr. Smith received meals and lodging from a detective during Mr. Phillips' case and may have gotten "around fifty dollars" from a detective during the timeframe preceding Mr. Phillips' trial. Mr. Smith also received three hundred dollars after he testified at Mr. Phillips' trial. Mr. Smith knew about the reward money "a couple weeks before trial." *Id.* at 111. Mr. Smith also testified that he had taken a polygraph test about the veracity of his testimony at Mr. Phillips' trial and that he had passed. *Id.* at 127.

In its final order denying the motion to vacate judgment and sentence, the post-conviction court found that any contention Mr. Phillips made about the State withholding information as to Mr. Smith's status as a police informant was "refuted by the pretrial deposition of [Mr. Smith] whereat [Mr. Smith] admitted that he was a paid confidential informant for the police." DE 13, Vol. 49, App II. The court also found that "there is no evidence that [Mr. Smith] received financial support during the pendency of [Mr.] Phillips' trial or that the police were instrumental in having assault charges against [Mr. Smith] dismissed." *Id.*

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[5]Janice Scott, Mr. Smith's estranged wife, did testify at the evidentiary hearing regarding the dismissal of an aggravated battery case against Mr. Smith in advance of his testimony in Mr. Phillips' trial. She essentially testified that the charge was dismissed without her knowledge. The trial court found her testimony unbelievable and referred her name to the State Attorney's Office for a potential perjury prosecution. D.E. 13, Vol. 58, Appx. II at 1241.

• *William Farley*

At the time of trial, Mr. Farley had a presumptive release date of November 9, 1984. *See* D.E. 13, Vol. 7, Appx. HH at 805. Mr. Farley testified that neither the prosecution nor the police had anything to do with the Parole Board's decision to release him.

Mr. Farley first met Mr. Phillips at the Reviewing Medical Center at Lake Butler. *Id.* at 806. Mr. Farley testified that, while he was incarcerated at Lake Butler, two detectives from Miami came up and asked if he had spoken with Mr. Phillips about a murder. Mr. Farley responded in the negative. He then was sent back to his cell; Mr. Phillips was his cellmate. Thereafter, Mr. Phillips produced a copy of a newspaper article about a family departing a funeral and certain excerpts from the text had been highlighted. According to Mr. Farley, Mr. Phillips told him directly that "he actually murdered the man." *Id.* at 810. Mr. Farley clarified that Mr. Phillips had actually said he "murdered the cracker." Mr. Phillips told Mr. Farley that he "laid across the street" and "shot him a whole heap of times." Mr. Phillips said he wanted to kill the parole officer because he had "unjustly violated his parole and sent him back to prison." *Id.* at 812. After Mr. Phillips made these statements, Mr. Farley contacted the Dade County authorities and told them he would like to speak with them about the murder. Mr. Farley then gave a tape-recorded statement to Detective Smith. Mr. Farley testified that Detective Smith made no promises that he would do anything for him, and that his parole date had been set before he ever spoke to Mr. Phillips. Mr. Farley came to court to testify against Mr. Phillips because Mr. Phillips seemed like "he had no respect for human life" and because he felt bad for "the grieving little boy I seen in the news article." *Id.* at 817.

On cross-examination, Mr. Farley stated that he had known Mr. Phillips for a period of three days before Mr. Phillips confessed to the murder. *Id.* at 818. Mr. Farley also testified that he had previously signed an affidavit indicating that statements he made about Mr. Phillips' involvement in the murder were false. But he also testified that he was forced to sign the affidavit by a group of other inmates. *Id.* at 829. Although a prosecutor and Detective Smith promised to write letters on his behalf to the Parole Board, Mr. Farley stated that ultimately his decision to testify was because "[f]or once in my life I wanted to do something to try to serve society and help humanity." *Id.* at 851.

At the evidentiary hearing held on January 21, 1988, Mr. Farley's testimony changed. At that time, Mr. Farley testified that when he was in a cell with Mr. Phillips at Lake Butler, Mr. Phillips "made it explicit at that time that he didn't, you know, he wasn't guilty of the crime that he was accused of committing." D.E. 13, Vol. 56, Appx. II at 934. Mr. Farley did not know why he was placed in a cell with Mr. Phillips, but a few days after he was there, Detective Smith came to see him and inquired of whether Mr. Phillips had made any statements to him. *Id.* at 938. During that meeting, Detective Smith told Mr. Farley that he "looked like [he] was tired of being incarcerated or whatever." *Id.* at 945. Mr. Farley inferred that he could get out of jail if he provided some information about Mr. Phillips to the Metro-Dade police. Mr. Farley testified that Detective Smith told him that the victim had been shot "numerous times" and that there was a reward involved. *Id.* at 961. Mr. Farley testified that Detective Smith spoke with him for about 15-20 minutes before he turned on the recording device used to take Mr. Farley's statement. During those 15-20 minutes, according to Mr. Farley, Detective Smith promised to assist Mr. Farley in getting parole. Mr. Farley also alleged that Detective Smith "instructed me specifically to state certain things" on the tape-recorded statement. *Id.* at 971. There were also similar promises made by the prosecution.

At the evidentiary hearing, Mr. Farley read into the record excerpts of two letters that he had later penned to the prosecution. In both letters, he expressed concern about the prosecutor's ability to get him out of jail as promised. *Id.* at 998-99. He also verified that he received a one hundred seventy-five dollar check after he testified. Mr. Farley claimed that he was "promised money before the trial." *Id.* at 1006.[6] After he wrote the first letter to the prosecution, Detective Smith came to visit him in jail. According to Mr. Farley, Detective Smith was upset because Mr. Farley had threatened to tell the truth (that he had lied at Mr. Phillips' trial). Mr. Farley said that the same day he met with Detective Smith he was transferred to a section of the jail that was "harsher." *Id.* at 1012. In sum, Mr. Farley's testimony was essentially coached by the detective and the prosecution. The details about the murder that Mr. Farley gave during his trial testimony were not told to him by Mr. Phillips in jail but were disclosed to him by Detective Smith and the prosecution in advance of trial. Mr. Farley also acknowledged that he lied about his criminal

[6]Mr. Farley testified that although he had been promised one thousand dollars, he was only given one hundred seventy-five dollars. *Id.* at 1008.

record at trial when he told the jury that he only had one conviction and one parole violation. *Id.* at 1017.

On cross-examination, Mr. Farley admitted to having been re-arrested on more than one occasion after he was paroled following Mr. Phillips' trial. On those occasions, Mr. Farley had called the State Attorney's Office to ask if David Waksman, the Assistant State Attorney who prosecuted Mr. Phillips, would speak to the prosecutor on his new case to see if anything could be done regarding the pending charges. Mr. Farley denied that he came forward now because he was facing a life sentence and did not want to be known as a snitch in state prison. *Id.* at 1028-37.

In its order on Mr. Phillips' motion to vacate judgment and sentence, the post-conviction court found Mr. Farley's "testimony to be totally incredulous and unbelievable and therefore reject[ed] the same." D.E. 13, Vol. 49, Appx. II.

• *Larry Hunter*

At trial, Mr. Hunter testified that he had been arrested and housed in the Dade County Jail on January 19, 1983. During his incarceration, he met Mr. Phillips at the law library. *See* D.E. 13, Vol. 13, Appx. HH at 648. Mr. Hunter testified that Mr. Phillips approached him about crafting an alibi for the murder of Mr. Svenson. In doing so, Mr. Phillips told him that "he had come up from the east end of the parole building, from behind a clinic with some bushes, and he see [sic] one car in the back parking lot, and that he killed a man by the entrance of the gate to the parking lot, left the same way, and went home." *Id.* at 650. Thereafter, Mr. Hunter went back to his cell and told his cellmate what had occurred. His cellmate called Detective Smith, who came to the Dade County Jail to meet with Mr. Hunter. Mr. Hunter testified that he gave four alibi letters penned by Mr. Phillips to the detective. The only promise made to Mr. Hunter by the police and the prosecution was that they would come to court and inform the judge assigned to Mr. Hunter's case that he had been a witness for the State at Mr. Phillips' trial. *Id.* at 653. Later, Mr. Phillips approached Mr. Hunter and requested that he sign an affidavit which said that Mr. Hunter did not know anything about the case. Mr. Hunter testified that he felt threatened by Mr. Phillips to sign the document. As a result, the prosecution had him transferred from the Dade County Jail. One of the additional benefits conveyed to Mr. Hunter was that Detective Smith would let him smoke his cigarettes.

On cross-examination, Mr. Hunter explained that although both Detective Smith and the Assistant State Attorney advised him that they would speak in court on his behalf, he told them that he did not need their help because he was innocent of the charges that had been brought against him. Mr. Hunter testified that he did not think the State's assistance would be helpful to him because he did not need any help with his pending charges.

At the evidentiary hearing in 1988, Mr. Hunter asserted his Fifth Amendment right against self-incrimination and refused to testify. D.E. 13, Vol 57, Appx. II at 1056. The post-conviction court admitted his affidavit from November of 1997 into evidence. D.E. 13, Vol. 4, Appx. II at 652-56. In the affidavit, Mr. Hunter swore that Mr. Phillips had "never made a confession to me. He never spoke about the murder. The only knowledge that I have about the events I testified to was provided to me by Detective Smith and Mr. Waksman." *Id.* at 652. Mr. Hunter also swore that all the information he had about the details of the murder were given to him by Detective Smith. He also stated that Mr. Waksman told him to testify that no deal had been made even though, in truth, he was promised probation instead of the potential life sentence he was facing. Mr. Hunter also verified in his affidavit that he received two hundred dollars from Detective Smith after trial.

The post-conviction court found Mr. Hunter's affidavit "totally at odds with the facts." D.E. 13, Vol. 49, Appx. II.

• *Malcolm Watson*

At trial, Mr. Watson testified that, prior to his period of incarceration, he owned a dry cleaning store in Carol City, Florida. Mr. Watson related that, in 1980, Mr. Phillips came into his store, asked for $50.00 and wanted Mr. Watson to hold a gun as collateral. D.E. 13, Vol. 13, Appx. HH at 688. Mr. Watson also testified that Mr. Phillips stated that he was going to "get even" with a parole officer. *Id.* at 690. Mr. Watson saw Mr. Phillips again in 1982, this time at the Dade County Jail. At that time, Mr. Phillips admitted to killing his parole officer and said, "But they got to prove it." *Id.* at 692. Mr. Watson overheard Mr. Phillips talking in the law library about firing a shot at his parole officer's house. Mr. Watson testified that the police did not tell him to go into Mr. Phillips' cell and speak with him; rather Mr. Phillips "volunteered the information." *Id.* at 694. Mr. Watson concluded by testifying that Mr. Phillips had told him that there were no eyewitnesses and that the gun used in the murder was thrown away. Mr. Watson

did initiate contact with the police, but not for any rewards. Mr. Watson advised that he would receive no benefit from the police for his testimony because he had already pled guilty and had been sentenced. Rather, he testified that he came forward because his brother was "an officer, too" who was shot and was paralyzed from the waist down. Mr. Watson was moved from one area in the Dade County Jail to another for his safety. Further, for his safety, Mr. Watson made statements to other inmates that he knew nothing about Mr. Phillips' case but, at trial, he testified that he only said that because he was afraid for his own safety once the other inmates learned that he was a witness for the state. *Id.* at 698.

On cross-examination, Mr. Watson testified that he did request that a detective administer a polygraph test in relation to his underlying criminal case. If he passed, the detective would "speak up" for him since he was going to be a witness for the State. However, Mr. Watson insisted that the police would have administered a polygraph to him regardless because they believed in his innocence. On re-direct, Mr. Watson testified that Detective Smith once bought him dinner. *Id.* at 713.

Mr. Watson did not testify at the evidentiary hearing. Although Mr. Watson did not testify at the evidentiary hearing, the post-conviction court denied Mr. Phillips' claim as to Mr. Watson because "[a]fter [Mr.] Phillips' trial, [Mr.] Watson passed a polygraph and in accordance with the agreement his conviction was reduced to simple robbery." D.E. 13, Vol. 49, Appx. II. The court found that an agreement by the State and Mr. Watson was disclosed to Mr. Phillips by the State during pretrial proceedings, and "[s]ince the promise was disclosed and subsequently enforced, [the] claim is meritless and is denied."[7] *Id.*

The Other Witnesses

• *Detective Gregory Smith*

At the evidentiary hearing in 1988, the State called Detective Smith. Detective Smith was the lead investigator on the Svenson murder case. D.E. 13, Vol. 75, Appx. II at 1257.

[7]The post-conviction court characterized Mr. Phillips' claim in his Rule 3.850 motion as one where "he complains not that the scope of the promise was not revealed, but that the State did not properly enforce the deal." *Id.* I do not interpret Mr. Phillips' claim to be about enforcement of a deal; rather, Mr. Phillips complains that "[a] promise was made and consummated, yet, as with the other witnesses, the defense was repeatedly told that no such deal existed." D.E. 1 at 51. Mr. Phillips does not mention any failure of the State to enforce a deal with Mr. Watson.

During the course of his investigation, Detective Smith had the opportunity to come in contact with all of the informants who testified against Mr. Phillips.

Detective Smith first met Mr. Farley when he went to the correctional facility at Lake Butler. Detective Smith testified that he had nothing to do with Mr. Farley being Mr. Phillips' cellmate and he did not suggest that Mr. Farley seek to elicit information from Mr. Phillips. However, Detective Smith did ask Mr. Farley to listen to Mr. Phillips and, if Mr. Phillips made any incriminating statements, to contact him. *Id.* at 1258. Detective Smith denied ever advising Mr. Farley that he could be released from prison if he testified against Mr. Phillips. Detective Smith did not indicate that there was possible reward money available nor did he have anything to do with Mr. Farley being transferred to another correctional facility. After Mr. Farley was transferred to Poe Correctional Facility, Detective Smith went to see him again. At that time, Mr. Farley gave a tape-recorded oral statement. Detective Smith did not provide Mr. Farley with any information concerning the murder. The only promise that Detective Smith made to Mr. Farley was that he would "notify his attorney as to his involvement and testify before his judge if necessary." *Id.* at 1268. Detective Smith did state that he knew about the reward before trial but that he did not tell Mr. Farley about it until afterwards.

On cross-examination, Detective Smith testified that Mr. Farley was mistaken when he testified at trial that the two men had not had a conversation prior to the tape recorder being turned on at the Poe Correctional Facility. When Detective Smith was asked if he asked Mr. Waksman to correct that mistaken testimony at trial, he could not recall.

Detective Smith first met Mr. Hunter at the Dade County Jail after Mr. Waksman was notified that Mr. Hunter had some information to relay regarding the Svenson murder. *Id.* at 1271. Detective Smith did not have Mr. Hunter solicit information from Mr. Phillips, did not offer him any money as a reward for his testimony, and only promised to "notify [Mr. Hunter's] attorney as to his cooperation and to testify before the judge if necessary." *Id.* at 1273.

Detective Smith also testified that he spoke to parole officers and advised them that Mr. Smith was providing helpful information and the authorities would like him to continue to do so. *Id.* at 1291. Detective Smith had given Mr. Smith twenty dollars and asked him to go over to Mr. Phillips' family home in an effort to find out where the gun was that was used in the murder. Detective Smith acknowledged that, at that time, Mr. Smith was acting as an agent of the Metro-

Dade Police Department. *Id.* at 1295. Although this was in conflict with Mr. Smith's testimony at trial, Detective Smith stated that it may have been that Mr. Smith has a different definition of "agent" than he did.

• *Assistant State Attorney David Waksman*

At the evidentiary hearing in 1988, the defense called David Waksman, Assistant State Attorney, to testify. Mr. Waksman was the prosecutor assigned to Mr. Phillips' trial. Mr. Waksman met with the informants along with Detective Smith.[8]

As to Mr. Watson, Mr. Waksman testified that the State entered into a joint stipulation with Mr. Watson's counsel to have his conviction for robbery with a firearm vacated and a judgment for simple robbery entered by the court. The stipulation further requested that the court vacate the life sentence that had been imposed and instead impose a sentence of 15 years imprisonment, which would be suspended. Mr. Watson was also to be placed on probation for a period of five years. D.E. 13, Vol. 57, Appx. II at 1082. This stipulation was entered into despite a prior determination on October 26, 1981, by the State Attorney's Office that Mr. Watson was "without question a career criminal" and "his case should not be pled to anything less than 25 years in state prison." *Id.* at 1083.

As to Mr. Smith, Mr. Waksman testified that his knowledge regarding Mr. Smith's capacity as an informant for the Metro-Dade Police Department was that Mr. Smith "knew Detective Lloyd Hough over the years and periodically when he heard something—and Hough was assigned to homicide for many years—he would call Detective Hough and give him information." *Id.* at 1100. As to Mr. Farley, Mr. Waksman wrote a letter to the Florida Parole Commission in which he and Detective Smith recommended Mr. Farley for "early parole." *Id.* at 1130. As to Mr. Hunter, Mr. Waksman testified that he felt obligated to tell his judge at the time of sentencing that he rendered assistance in a major case for the State. *Id.* at 1131. This was the only promise made to Mr. Hunter before he testified at Mr. Philip's trial. Ultimately, Mr. Hunter's case was continued until after he testified at Mr. Phillips' trial and then he entered into a plea agreement which allowed him to be released from jail after Mr. Phillips' trial.

[8] On December 8, 1993, defense counsel took the deposition of Mr. Waksman. D.E. 13, Vol. 10, Appx HH at 30-31.

Mr. Waksman conceded that more was done for the informants than had been initially promised but he explained that this was because "some of them had been beaten up in the county jail awaiting trial" or had spent months in "safety cells" for their own protection. *Id.* at 1158. Nonetheless, to the extent Mr. Waksman did more than he had originally promised, it was done without the knowledge of the informants. While Mr. Waksman became aware of some reward money from the Police Benevolent Association towards the end of the trial, he never told that to any of the witnesses until the case was over. Mr. Waksman denied that he told Mr. Farley before trial that the State had a witness who saw Mr. Svenson carrying something because the State did not have any such witnesses. Mr. Waksman also directly disputed that he had told Mr. Hunter that (1) there was going to be a reward, (2) the date of the murder, or (3) that he would get probation on Mr. Hunter's pending criminal case. Mr. Waksman said that his only promise to Mr. Hunter was that he would speak to the judge who would be accepting Mr. Hunter's guilty plea and advise him of Mr. Hunter's cooperation. After Mr. Farley had been released, he contacted Mr. Waksman additional times requesting further "help" from him in regards to subsequent arrests. When Mr. Waksman seemed less likely to assist, Mr. Farley threatened to "sabotage that Phillips case" by telling the papers that he lied at trial. *Id.* at 1207. Likewise, Mr. Hunter also contacted Mr. Waksman when he violated his probation and he was sent back to prison. When Mr. Waksman was unable to provide him with the resolution he sought, Mr. Hunter sent a letter to State Attorney Janet Reno saying that Mr. Waksman "was going back on his promise." *Id.* at 1208-09.

The more troubling testimony given by Mr. Waksman concerned the documents provided to defense counsel in discovery. Mr. Waksman admitted to employing a routine practice of "cut and paste," through which he would get a Xerox copy of the entire police report and then determine what was discoverable and what was not. Mr. Waksman would then cut out what was, in his opinion, not discoverable, scotch-tape the documents together, and photocopy the document again such that defense counsel was unaware that any information had been redacted and believed he was receiving a full copy of the documents without alterations. Mr. Waksman employed this practice rather than use a marker or white-out to remove or redact the undiscoverable material from a document.

For example, Mr. Waksman redacted the portion of Detective Smith's report pertaining to a telephone message from Mr. Hunter on May 17, 1983, which indicated that Mr. Hunter had contacted Mr. Waksman directly and offered that "he had information regarding the murder of the parole officer and Harry Phillips." *Id.* at 1094.[9] As a result, defense counsel was unaware that Mr. Hunter had contacted the State Attorney's Office to "offer" information regarding Mr. Phillips. When asked what rules allow an Assistant State Attorney to take a police report, cut a section out, and then tape it back together such that it appears the information was never there in the first place, Mr. Waksman responded that the rules "tell me what I am supposed to disclose. I disclose what I think I have to, and I do not disclose the balance." *Id.* at 1176.

In denying relief, the post-conviction court, albeit not expressly, appeared to generally find the testimony of both Detective Smith and Mr. Waksman credible. The post-conviction court noted that "[b]oth the prosecutor and Detective Smith, at the hearing, denied these allegations." D.E. 13, Vol. 49, Appx. II. Thereafter, the court did not credit the informants' testimony as supporting any *Brady* violations and found that Mr. Phillips failed to substantiate his claims. *Id.* The post-conviction court did not address the alteration of documents. Nor did it analyze Mr. Phillips' assertions pursuant to *Giglio*.

2. Brady and Giglio

In his claim for habeas relief, Mr. Phillips asserts three constitutional violations. Mr. Phillips claims that there were several *Brady* or *Giglio* violations: (1) the suppression of the substantial benefits given to the informants by the State; (2) the suppression of the manner in which contact was established with the informants and the manner that interviews were conducted; and (3) the prior criminal and mental health histories of the informants. Mr. Phillips fails to delineate which conduct violated *Brady* and which conduct violated *Giglio*, but asserts that the State violated both. Because the standards for establishing *Brady* and *Giglio* violations are different. I have reviewed the claim as presented and have determined which arguments apply to which legal theory.

The Florida Supreme Court found this claim to be without merit because any additional benefits conveyed to the informants were unknown to them at the time that they testified.

[9] In his petition, Mr. Phillips alleges two other instances wherein this practice was employed with a police report about Mr. Smith and Mr. Farley. At the evidentiary hearing, however, counsel for Mr. Phillips only inquired about the specific report involving Mr. Hunter.

Indeed, according to the Florida Supreme Court, even Mr. Waksman was unaware of what, if any, additional assistance he could offer them at the time. *See Phillips*, 608 So.2d at 780. As to the reward money given to the informants, the Florida Supreme Court found the informants "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." *Id.* at 781. Finally, as to the recantation of the trial testimony, it stated, "[t]he circuit court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding." *Id.* at 780-81. As the Florida Supreme Court addressed the merits, I can only grant habeas relief if I find that its decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). The question under AEDPA is not whether a federal court believes that the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold. *See Williams,* 529 U.S. at 411-12. AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." § 2254(e)(1). Mr. Phillips has not met this burden.

•*Brady v. Maryland*

Mr. Phillips' claim regarding the suppression of the substantial benefits given to the informants and their prior criminal and mental health histories is governed by *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, "[t]he defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material." *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[10]

[10] Mr. Phillips provides little, if anything, to support this allegation. Mr. Phillips does not argue why this information was favorable to him or was material for *Brady* purposes. Further, it is not enough that the State had knowledge of the information but rather Mr. Phillips must show that the State suppressed it. Mr. Phillips cannot prevail on a *Brady* claim if he had equal access to it. "[T]here is no suppression if the defendant knew of the information or had equal access to obtaining it." *Parker v.*

The State does not dispute that this is the standard governing Mr. Phillips' claim; rather, the State argues here, as it did to the Florida Supreme Court, that the prosecution could not have suppressed evidence because it either did not know at the time or did not disclose the benefits before trial.

A careful review of the record shows that, although the testimony at the evidentiary hearing was contradictory, the Florida Supreme Court's determination was not unreasonable based on the testimony provided. Mr. Waksman testified that he did not know the extent of his assistance regarding any possible sentence reduction or granting of parole at the time the informants testified. Moreover, he testified that he did not advise any of the informants about the reward money and expressly disavowed the allegations that he encouraged or coached the witnesses to give false testimony. Detective Smith testified likewise. The post-conviction court rejected the informants' testimony and credited the testimony of the detective and prosecutor. Without showing that the State suppressed evidence, Mr. Phillips cannot prevail. And because the testimony was conflicting, these claims rest on the credibility of the witnesses.

> Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review. Federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 851, 74 L.Ed.2d 646 (1983). We consider questions about the credibility and demeanor of a witness to be questions of fact. *See Freund v. Butterworth*, 165 F.3d 839, 862 (11th Cir. 1999) (en banc). And the AEDPA affords a presumption of correctness to a factual determination made by a state court; the habeas petitioner has the burden of overcoming the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

Consalvo v. Sec'y, Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011). Mr. Phillips has failed to overcome the presumption of correctness owed to the factual findings of the Florida Supreme Court. These claims are therefore denied.

•*Giglio v. United States*

Mr. Phillips' remaining arguments concern alleged violations of *Giglio*. *Giglio* claims are a "species of *Brady* error" and exist "when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have

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Allen, 565 F.3d 1258, 1277 (11th Cir. 2009). Mr. Phillips has not shown that he did not have equal access to the information he says was suppressed by the State. This claim is therefore denied.

known, of the perjury." *Ventura v. Att'y Gen.*, 419 F.3d 1269, 1276-77 (11th Cir. 2005) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Mr. Phillips' *Giglio* claims consist of some claims which were adjudicated on the merits by the Florida Supreme Court and some claims which were asserted by Mr. Phillips but no expressly addressed by the Florida Supreme Court in its opinion. They are as follows.

A prosecutor has a duty to disclose evidence of any promise made by the state to a prosecution witness in exchange for his testimony. *See Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This is especially true when the testimony of the witness is essential to the state's case. *See Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985). To make out a valid *Giglio* claim, Mr. Phillips "must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material—i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006) (per curiam) (quotation marks, alterations, and citation omitted).

Mr. Phillips' remaining claims are that the State failed to correct false and misleading testimony that it knew to be false. Specifically, Mr. Phillips asserts that the State sat silently by while its witnesses made misrepresentations to the jury and during depositions as to the nature of their relationships with the State and other critical matters. *See* D.E. 3 at 4. The Florida Supreme Court rejected this claim. As to William Smith (a/k/a William Scott), the court found that, to the extent Mr. Smith gave false testimony regarding his status as an "agent," it was attributable to the ambiguity of the term "agent" and ambiguous testimony does not constitute false testimony for purposes of *Giglio*. *See Phillips*, 608 So.2d at 781.

As this claim was reviewed on the merits by the Florida Supreme Court, AEDPA deference applies. Having reviewed the testimony, I conclude that the Florida Supreme Court's determination—that Mr. Smith's testimony was not false because the term "agent" was ambiguous—was not an unreasonable determination given the record. The question and answer were as follows:

> MR. GURALNICK: Are you member of any police agency that you wanted this [Mr. Phillips' statement about the murder] checked out?
>
> WITNESS: No, no, no, I'm not a police agent.

D.E. 13, Vol. 5, Appx. HH at 591. Given the way that the question was phrased, it was reasonable for the Florida Supreme Court to have found that Mr. Smith did not interpret the term "agent" in the same way as counsel and that, therefore, the term was ambiguous and the testimony was not false for *Giglio* purposes. Habeas relief as to this claim is denied.

As to the remaining claims adjudicated by the Florida Supreme Court, Mr. Farley testified at trial that the tape recording of his statement to police started as soon as he entered the interrogation room. In fact, Mr. Farley's recorded statement took place after a pre-interview with Detective Smith. Similarly, some of the informants falsely testified regarding the extent of their prior criminal history, although each informant testified that they were convicted felons. Although this testimony may have affected the informants' credibility and caused jurors to question the veracity of their statements, this is not the *Giglio* standard for materiality. *Giglio* materiality may carry a different, less difficult burden than *Brady*, but it nonetheless requires a reasonable likelihood that this false testimony could have affected the judgment of the jury.

> The *Giglio* materiality standard is "different and more defense-friendly" than the *Brady* materiality standard, as we have explained:
>
> > Where there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the nondisclosed evidence is material: "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added); *accord Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959).
>
> *United States v. Alzate*, 47 F.3d 1103, 1109–10 (11th Cir. 1995). Thus, for *Brady* violations, the defendant must show a reasonable probability the result would have been different, but for *Giglio* violations, the defendant has the lighter burden of showing that there is any reasonable likelihood that the false testimony could

> have affected the jury's judgment. *Alzate*, 47 F.3d at 1109–10. The *Brady* materiality standard "is substantially more difficult for a defendant to meet than the 'could have affected' standard" under *Giglio*.FN22 *Id.* at 1110 n. 7.

Trepal v. Sec'y, Dep't. of Corr., 684 F.3d 1088, 1108 (11th Cir. 2012) (footnote omitted).

Therefore, it is not enough for the statement to simply be false. Mr. Phillips also must show that there is a reasonable likelihood that the false statement could have affected the jury's judgment. More importantly, he must show that the Florida Supreme Court's determination of this claim was contrary to or based on an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Here, the relevant Supreme Court precedent is *Giglio*, for "no Supreme Court case since *Giglio* itself has squarely addressed a *Giglio* claim." *Ventura v. Att'y. Gen. of Florida*, 419 F.3d 1269, 1279 (11th Cir. 2005).

I do not find, given the record, that the Florida Supreme Court's determination was unreasonable. The false testimony was that there was no pre-interview before Mr. Farley's tape-recorded statement and that the informants had more arrests than they acknowledged on the stand. It was not unreasonable for the Florida Supreme Court to find a reasonable probability that these false statements did not affect the judgment of the jury. The two events may have been relevant to the issue of credibility, but the jurors were aware that the witnesses were convicted felons and that the veracity of their statements could be deemed suspect. Similarly, the omission of the pre-interview was unlikely to have affected the jury's judgment, as Mr. Farley's credibility and motives were challenged on cross-examination. Habeas relief is therefore denied.

• *The Redaction Claim*

The Florida Supreme Court did not address any claimed *Giglio* violations due to the prosecution's redaction of police reports involving Larry Hunter, William Scott, or William Farley. *See id.* Likewise, the State offers little comment on the practice of redacting portions of police reports and cutting and pasting them other than to suggest that "it is entirely possible that the cell[mate] called Mr. Waksman and gave him Hunter's name and that Mr. Waksman then directed Det. Smith to speak to Hunter or that the discrepancy is based on a lapse of memory or oversight." D.E. 12 at 138. This argument overlooks the issue before me, which is that the State

suppressed information favorable to the defense which resulted in the presentation of false testimony. Indeed, it ignores the allegation of suppression of evidence altogether.

To recap, those claims are based on the fact that Assistant State Attorney David Waksman had an "usual practice" of removing undiscoverable portions of police reports, then cutting and pasting them back together, such that the defense had no idea that the document had been altered, and this allowed the State to use knowingly false testimony at trial. This claim was made in Mr. Phillips' Rule 3.850 motion and on appeal of the denial of the motion. D.E. 13, Vol. 2, Appx. F.[11][12]

Again, the Florida Supreme Court's opinion is silent as to this claim, but that does not change the level of deference that I give to the decision. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 131 S.Ct. 770, 784-85 (2011) (citation omitted). *Harrington* is not limited solely to summary denials. Indeed, the Eleventh Circuit has determined that "[i]t makes no sense to say that a state court decision is entitled to AEDPA deference if the opinion fails to contain discussion at all of a claim but is entitled to no deference if it contains some but less than complete discussion." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013). Therefore, AEDPA deference applies to the denial of this claim despite an absence of analysis by the Florida Supreme Court.

In his petition for writ of habeas corpus, Mr. Phillips asserts that "the State admitted to altering police reports prior to disclosing them to [his] counsel." D.E. 1 at 7. This assertion is true. Unlike the majority of Mr. Phillips' claims, which required a credibility judgment between State and defense witnesses, Mr. Waksman admitted to reviewing police reports, determining what was discoverable, purposefully removing the undiscoverable portions, taping the document back together such that it appeared to be one unaltered document, photocopying it, and providing it to defense counsel without disclosing that editing had occurred. Mr. Waksman engaged in this procedure routinely and, somewhat incredibly, testified unapologetically to having done so.

[11]In fact, Mr. Phillips' claim on appeal to the Florida Supreme Court provides far more detail of the three specific instances of misconduct alleged here. D.E. 13, Vol. 2, Appx. F at 27-93.

Mr. Phillips argues that the State "doctored" the police report of Detective Greg Smith dated October 2, 1982, concerning William Smith; the police report of Detective Greg Smith dated November 24, 1982, regarding William Farley; and the police report of Detective Greg Smith dated June 16, 1983, regarding Larry Hunter. D.E. 13, Vol. 2, Appx. F at 27-93. According to Mr. Phillips, the prosecution removed portions of these police reports that would have provided the defense with vital details affecting the witnesses' credibility and also demonstrated bias. The redactions included Detective Smith's narratives on the police's involvement in assisting Mr. Smith at his parole hearings, the pre-interview in advance of the tape-recorded statement given by Mr. Farley, and the actual circumstances under which Mr. Hunter came to contact Mr. Waksman and volunteer information, in direct contravention to Mr. Hunter's trial testimony.

The premise of *Giglio* is that the deliberate deception of the court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. Mr. Waksman had information which he purposefully withheld from the defense, and witnesses testified falsely concerning certain facts that had been withheld. The State, through its prosecutor and lead detective, stood silent while this false testimony was given, with the full knowledge that the defense was unaware that such contradictions existed.

Consider the specifics of Mr. Hunter's testimony. At a pre-trial deposition, Mr. Waksman testified that he did not recall how Mr. Hunter "volunteered" his services but that he thought that the police found him. He also said that Mr. Hunter had called the police and told the police what was going on, and the police then told Mr. Waksman. D.E. 13, Vol. 57, Appx. II at 1096. Mr. Waksman also testified that the police saw everybody first and they brought him the names of witnesses. *Id.*

At trial, Mr. Hunter testified on direct examination that after Mr. Phillips confessed to him that he had killed Mr. Svenson, he went back to his cell and discussed it with his cellmate and his "cellmate contacted Homicide without my knowledge. And, after he did that, they came to see me and asked me did I have anything pertaining to the case. And I don't want to get no perjury charge or anything. So, the guy called him again and he came back and I gave him some papers." D.E. 13, Vol. 13, Appx. HH at 650-51. This testimony, it seems to me, was false, and was known to be false when it was given. This is because the relevant portion of Detective

Smith's report – a report which was redacted by Mr. Waksman using his "cut and paste" method before being given to the defense – stated that on May 17, 1983, Mr. Waksman advised the detective that "he received a phone call from an individual named Larry Hunter, who is an inmate at the Dade County Jail. Mr. Hunter related to Mr. Waksman that he had information regarding the murder of the parole office and Harry Phillips." D.E. 13, Vol. 57, Appx. II at 1094. Yet, neither Mr. Waksman nor Detective Smith moved to correct Mr. Hunter's contradictory testimony. In fact, during closing argument, Mr. Waksman attested to Mr. Hunter's veracity because he "g[ot] all of these letters, when he comes up says: Hey, man, I don't know nothing. Take me back to my cell. Put me back in solitary. Harry who? I don't know nobody." D.E. 13, Vol. 8, Appx. HH at 1183. As it stood at trial, Mr. Hunter was an unwilling witness who was unwittingly dragged into the case. This is in stark contrast to his taking affirmative steps to contact Mr. Waksman, the prosecutor. At best, Mr. Hunter's testimony was misleading and, at worst, it was a *Giglio* violation.

Nevertheless, because "the harmlessness standard [from *Brecht v. Abrahamson*, 507 U.S. 619 (1993)] is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard, federal courts confronted with colorable *Giglio* claims in § 2254 petitions in many cases may choose to examine the *Brecht* harmlessness issue first." *Trepal*, 684 F.3d at 1114. In order to show that the denial of this claim by the Florida Supreme Court was an unreasonable application of clearly established federal law, Mr. Phillips must show that a *Giglio* error resulted in "actual prejudice" to him under the standard set forth in *Brecht*. "On collateral review, a federal constitutional error is harmless unless there is 'actual prejudice,' meaning that the error had a 'substantial and injurious effect or influence' on the jury's verdict." *Mansfield v. Sec'y, Dep't of Corrections*, 679 F.3d 1301, 1307 (11th Cir. 2012). Assuming Mr. Phillips has shown that parts of the informants' testimony was false about some things, and that the false testimony (1) can be imputed to the State, and (2) was material under *Giglio*, he has not shown that he suffered the actual prejudice required under *Brecht*.

In conducting the *Brecht* analysis, I must consider any *Giglio* error "in relation to all else that happened" at trial. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Although there can be little doubt that the veracity of the witnesses' statements and their credibility was of the utmost importance due to the circumstantial nature of the case against him, Mr. Phillips has not

established that the constitutional error had a substantial and injurious effect on determining the jury's verdict. At trial, all the informants, in one form or another, had their credibility and veracity challenged. I cannot conclude that, had the jury known that (1) the Metro-Dade police were involved in assisting Mr. Smith during his parole hearings, (2) that the police met with Mr. Farley *before* the tape–recorded interview, and (3) that it was Mr. Hunter who came forward offering information to the prosecutor, there is a reasonable probability that these errors contributed to the conviction. *See Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010). Indeed, it is not clear that, had the defense known of this information and could have used it to challenge the informants' credibility, the jury would have completely disregarded the remainder of their testimony regarding Mr. Phillips' inculpatory statements.

Mr. Phillips' conviction was based on circumstantial evidence, but the informants' testimony was not the only circumstantial evidence before the jury. The State also presented multiple witnesses who were not convicted felons with questionable motivation, all of whom testified that, prior to the murder, Mr. Phillips had serious problems with Mr. Svenson. Mr. Svenson had previously sent Mr. Phillips back to state prison for a parole violation, and subsequently instructed Mr. Phillips on multiple occasions to stay away from Ms. Brochin or his parole would once again be violated. Further, the State presented testimony that Mr. Phillips had inquired as to how to remove gun powder residue and that Mr. Phillips had admitted to firing a gun in violation of his parole. In sum, I cannot find that the Florida Supreme Court's determination was unreasonable; it is not beyond any possibility for fairminded disagreement that the false testimony had more than a minimal effect upon the jury's verdict. Habeas relief is therefore denied.

B. Mr. Phillips' Sixth Amendment Claim Regarding Jailhouse Informants

Mr. Phillips asserts that his Sixth Amendment right to counsel was violated when the State "dispatched informant after informant" to question him in his jail cell without counsel being present. According to Mr. Phillips, the four jailhouse informants who testified against him at trial "were government informants, agents of the State, who were working for the State at the time that they elicited the statements." In support of his argument, Mr. Phillips relies on *United States v. Henry*, 447 U.S. 264 (1980).

On direct appeal, the Florida Supreme Court rejected this argument as without merit. It found that Mr. Phillips had "made no showing that the informants were state agents when they talked with him, 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." *Phillips*, 608 So.2d at 781 (footnote omitted).

In establishing that an informant was an agent of the government, it is not enough for Mr. Phillips to show that he "either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Rather, Mr. Phillips must demonstrate "that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks." *Id.*

Under applicable AEDPA standards, Mr. Phillips is not entitled to habeas relief. The Florida Supreme Court's ruling that Mr. Phillips failed to show that the witnesses who testified against him at trial were agents placed in his cell by the State and were attempting to elicit information is neither contrary to, nor an unreasonable application of, clearly established federal law, nor was the ruling based on an unreasonable determination of the facts. *See Maharaj*, 432 F.3d at 1309. A review of the testimony elicited both at trial and during the post-conviction evidentiary hearings fails to convince me that Mr. Phillips has rebutted the presumption given to the Florida Supreme Court's findings by clear and convincing evidence. *See Hunter v. Sec'y, Dept. of Corr.*, 395 F.3d 1196, 1200 (11th Cir. 2005).

At the post-conviction hearing, Mr. Farley testified that after he was placed in a cell with Mr. Phillips at the medical center at Lake Butler Correctional Institution, Detective Greg Smith came to meet with him. The detective asked Mr. Farley if Mr. Phillips had made any statements and urged Mr. Farley to "keep your ears open" for any statements made by Mr. Phillips about the murder of Mr. Svenson. Before departing, the detective commented that Mr. Farley "looked tired of being incarcerated." Mr. Farley testified that he "grasped" or "implied" or "subconsciously" thought that Detective Smith could "perhaps" assist him in getting out of prison if he testified regarding statements made by Mr. Phillips. Mr. Farley also testified, however, that at a second meeting with Detective Smith at Poe Correctional, the detective told him that he could assist him with his parole hearing by writing a letter and having the State Attorney contact parole and probation officials in Tallahassee, if he testified at Mr. Phillips' trial.

Mr. Farley further testified that the detective advised that there was a $1000 reward for whoever testified at trial. Mr. Farley, finally, testified that despite his contrary testimony at trial, Mr. Phillips never told him that he committed any crime.

At the post-conviction hearing, Mr. Hunter invoked his right against self-incrimination and refused to testify. The trial court found that Mr. Hunter was unavailable and admitted his affidavit into evidence. The affidavit stated that Mr. Phillips "never made a confession" and "never spoke to me about the murder." Mr. Hunter attested that he testified falsely because the State offered him a very favorable plea deal.

Mr. Smith testified at the evidentiary hearing that he had been working as an informant for both state and federal law enforcement for a period of years. Mr. Smith further testified that he was put in the holding cell with Mr. Phillips without knowing about him. He maintained that the police had not asked him to question Mr. Phillips; rather, Mr. Phillips simply offered incriminating information during a conversation about their respective parole violations and current incarcerations. Additionally, as part of his cooperation with the Metro-Dade police, Mr. Smith wore a recording device and went to visit Mr. Phillips' mother and sister in an effort to get information regarding the location of the gun alleged to have been used in the murder of Mr. Svenson. Unlike Mr. Farley and Mr. Hunter, Mr. Smith did not recant his trial testimony.

Mr. Watson did not testify at the evidentiary hearing. As such, his trial testimony that he had not been offered anything in exchange for his testimony went unrebutted. Furthermore, Mr. Watson testified that the police did not contact him; rather he contacted the police to tell them about Mr. Phillips' incriminating statements. This testimony too went unrebutted.

There was some evidence presented at the post-conviction hearing which suggests that some witnesses were purposefully placed in the cell with Mr. Phillips in the hopes that an incriminating statement would be made. Mr. Phillips, however, has failed to show that these witnesses were instructed to deliberately engage him using investigatory techniques which would have amounted to interrogation. Indeed, while a possible inference may be that these witnesses were placed in the cell with Mr. Phillips for that very purpose, it is not the only inference available. Absent clear and convincing evidence to the contrary, I must give deference to the factual determinations of the state courts. On this record, the factual determinations of the

Florida Supreme Court were not unreasonable, and Mr. Phillips did not rebut them with clear and convincing evidence.

C. Mr. Phillips' Competency Claim

Mr. Phillips' third claim for habeas relief is that counsel was ineffective for failing to recognize "obvious signs and symptoms of mental deficiencies and emotional disturbance" and not requesting a competency evaluation. Mr. Phillips argues that such a deficiency resulted in prejudice and violated his due process rights.[12]

In the context of a capital case like this one,

> [i]neffective assistance under *Strickland* [*v. Washington,* 466 U.S. 668 (1984)], is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.' . . . In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'

Rompilla v. Beard, 545 U.S. 374, 380-81 (2005) (citations omitted). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 390 (citations omitted). Mr. Phillips bears the burden of establishing both deficient performance and prejudice. *See, e.g., Dill v. Allen,* 488 F.3d 1344, 1354 (11th Cir. 2007). As explained below, Mr. Phillips has not done so.

Mr. Phillips asserts that because he possesses a "readily apparent intellectual deficiency," and low level of intellect, his counsel should not have proceeded to trial before receiving a proper competency evaluation and treatment. Mr. Phillips further contends that in addition to his

[12] Mr. Phillips appears to have argued a variation of this claim before the state post-conviction court, asserting that the trial court erred in not conducting a competency evaluation prior to trial. Mr. Phillips did not argue that trial court error claim to the Florida Supreme Court; rather, he chose to argue that his counsel was ineffective for not asking the trial court to have a competency evaluation performed before trial. These are clearly two different claims. As Mr. Phillips did not make a claim of trial court error to the Florida Supreme Court, any such claim is unexhausted and procedurally barred from federal habeas review. To properly exhaust state remedies, Mr. Phillips must fairly present every issue raised in his federal petition to the *state's highest court.* *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 556 U.S. 449, 465 (2009) (internal citations omitted).

low level of functioning, he was "hampered with head injuries with untold effects on cognitive and personality functioning."

A mental disease or defect does not render a defendant incompetent unless that defect interferes with his ability to understand the proceedings and assist counsel before and during trial. *See generally Dusky v. United States*, 362 U.S. 402, 402 (1960). At the evidentiary hearing, Mr. Phillips' former attorneys and mental health experts testified on Mr. Phillips' competency to stand trial. This hearing was held approximately four years after Mr. Phillips' conviction.

Dr. Jethro Toomer testified that he conducted a forensic competency evaluation of Mr. Phillips on January 15, 1988. During the course of the evaluation, Dr. Toomer administered the Revised Beta examination, Bender Gestalt designs, Wechsler Adult Intelligence Scale, Carlson Psychological Survey, and the Rorschach and Thematic Appreciation Test. Dr. Toomer also reviewed Mr. Phillips' records from the Department of Corrections and sworn statements from family members. Among other things, Dr. Toomer testified that Mr. Phillips exhibited a variety of serious intellectual deficits. Based on his review of the records and his independent administration of tests, Dr. Toomer opined that Mr. Phillips was not competent to stand trial in 1983. On cross-examination, however, Dr. Toomer acknowledged that low I.Q. in and of itself did not make Mr. Phillips incompetent to stand trial, and testified that his conclusion was based on the sum total of all the information he had.

Dr. Joyce Carbonell testified that she interviewed Mr. Phillips on November 7, 1987. As part of this interview, Dr. Carbonell administered the Wechsler Adult Intelligence Scale Revised, Wide Range Achievement Test - Level 2, the Peabody Individual Achievement Test, the Rorschach and Wechsler Memory Scale, and the Canter Background Interference procedure for the Bender Gestalt. Dr. Carbonell testified that Mr. Phillips had a full scale I.Q. of 75, relatively low reading comprehension, depression, social introversion, and intellectual impairment. Dr. Carbonell opined that, based on her evaluation, Mr. Phillips was not competent to stand trial in 1983. Dr. Carbonell testified that although Mr. Phillips understood the proceeding was a trial, and could have named the "players" (i.e: the judge, the attorneys), he did not have a "good grasp" of the judicial process beyond a superficial level. Dr. Carbonell further testified that Mr. Phillips told her that the jury would decide his guilt or innocence and that the judge "decides my

case."[13] Dr. Carbonell also testified that she though it unusual that Mr. Phillips told her that he didn't understand things that happened in court but did not ask his lawyer because he was satisfied to "let Mr. Guralnick do the talking." Dr. Carbonell concluded that because of his low intelligence and passive nature, Mr. Phillips was unable to assist his counsel in his own defense, thereby not meeting the legal criteria for competency.

Ronald Guralnick, trial counsel for Mr. Phillips, also testified at the evidentiary hearing. As to Mr. Phillips' competency, Mr. Guralnick testified that he did not "recall him [Mr. Phillips] acting in any way which would lead me to believe that he was incompetent." Mr. Guralnick stated that he was able to talk to Mr. Phillips and that he answered in a coherent manner. Mr. Guralnick testified that he thought Mr. Phillips was competent and if he had not thought so, he would have requested a competency hearing for him. Mr. Guralnick also testified that Mr. Phillips' former counsel, Joseph Kershaw, did not mention anything to him that would have indicated that Mr. Phillips did not possess the requisite competency to stand trial.[14]

Mr. Kershaw was Mr. Phillips' original trial attorney. Initially, he was retained by Mr. Phillips' family but then was subsequently appointed as a special public defender to Mr. Phillips by the court. Mr. Kershaw testified that Mr. Phillips did not exhibit any type of behavior which would have caused him to question his competency. Mr. Kershaw stated that Mr. Phillips was aware of the process, the charges against him, and the fact that he faced the death penalty. In fact, one of the reasons Mr. Phillips requested for him to be discharged was that he felt Mr. Kershaw was not moving the case forward because certain witness depositions had not been taken. On re-direct examination, however, Mr. Kershaw testified that he could not tell counsel the statutory competency criteria in Florida, the competency standard established by the United States Supreme Court, or the legal definition of competency taught to first year law students because he was not "a law man. I'm a fact man."

[13] The post-conviction court advised Dr. Carbonell that the sentencing process in Florida during a capital case is essentially as Mr. Phillips described.

[14] Mr. Phillips makes much of the fact that Mr. Guralnick once categorized him as an "idiot." Yet Mr. Guralnick clarified, multiple times, that he meant Mr. Phillips behaved like an "idiot" when he expressly ignored his advice to not make any statements to other inmates about the murder or make inflammatory remarks in court.

Finally, two court-appointed mental health experts ultimately concluded that Mr. Phillips was competent to stand trial in 1983. Dr. Leonard Haber examined Mr. Phillips for two and a half hours, and reviewed prior reports and Dr. Carbonell's expert opinion. Dr. Haber also analyzed the "Brother White" letter, which he found to indicate that Mr. Phillips knew the role of witnesses and understood the effects of their adverse testimony. Ultimately, Dr. Haber concluded that he found "no indication of a lack of competence, lack of responsiveness, a lack of understanding or a disability pertaining to any of the listed competency criteria." Similarly, Dr. Lloyd Miller testified that his assessment of Mr. Phillips was that he "was indeed mentally competent to strand [sic] trial at the time of his trial." Dr. Miller admitted that assessing past mental states is "educated guesswork," but supported his conclusion with the fact that Mr. Phillips was not mentally ill, denied substance abuse disorders, and was not "identifiable as a mentally retarded person." Dr. Miller testified that he utilized the McGarry checklist in evaluating Mr. Phillips for competency. On cross-examination, Dr. Miller testified that Mr. Phillips did tell him that he did not know that the death penalty was a possible punishment in his case. Dr. Miller, however, did not find this answer to be credible. Ultimately, Dr. Miller concurred with Dr. Haber and found that Mr. Phillips was competent to stand trial in 1983.

On this record, the state post-conviction court concluded that Mr. Phillips was competent to stand trial. The order was silent regarding counsel's alleged ineffectiveness for failing to have his competency evaluated.[15] The court determined that, based on its own observations during trial and the testimony at the evidentiary hearing, "Mr. Phillips has failed to meet his burden of dispositively demonstrating that he was incompetent to stand trial." D.E. 13, Appx. II, Vol. 49.

On appeal, the Florida Supreme Court affirmed the trial court's denial of relief. Although the post-conviction court failed to address Mr. Phillips' ineffective assistance claim directly – again, because no such claim was raised in trial court – the Florida Supreme Court cited *Strickland* as setting the standard for ineffective assistance of counsel claims, and then found

[15] Although the Florida Supreme Court noted that the "[post-conviction] court found that Phillips was competent at trial and that counsel was not ineffective for failing to have his competency evaluated," the record reflects that the post-conviction court made no such finding. Nowhere in its order did the post-conviction court state that Mr. Phillips' counsel was not ineffective; nor did the court cite the *Strickland* standard or analyze the claim for deficiency or prejudice. D.E. 13, Appx. II, Vol. 49. That, of course, is not surprising, as Mr. Phillips did not raise an ineffectiveness claim regarding competency at the trial court.

"competent, substantial evidence to support the circuit court's finding on the issue." *Phillips*, 608 So.2d at 782. Given that the Florida Supreme Court addressed the ineffectiveness claim, I do as well.

I conclude, under the governing AEDPA standard of review, that the Florida Supreme Court reasonably concluded that there was support for the post-conviction court's "findings on this issue." *Phillips*, 608 So.2d at 782. Despite the failure of the post-conviction court to analyze the claim as made, it is evident that if Mr. Phillips was indeed competent – and that finding is not unreasonable – then counsel's performance was not deficient and Mr. Phillips was not prejudiced.

Although there was testimony given by Drs. Toomer and Carbonell that Mr. Phillips was not competent to have proceeded to trial in 1983, the predominant evidence, including documents penned by Mr. Phillips himself, showed that he did not exhibit the outward signs of incompetency. I do not conclude, nor do I need to, that Mr. Phillips was competent at the time of his 1983 trial. The question before me was whether counsel's performance was deficient for failing to request a competency hearing. On this record, I find that it was not.

"Because the trial of a person who is incompetent would violate that individual's due process rights, *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-04, 43 L.Ed.2d 103 (1975), courts must conduct a hearing whenever there is a 'bona fide doubt' regarding that defendant's competence." *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir. 1987) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). *See also Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) (demanding "real, substantial, legitimate doubt as to [petitioner's] mental capacity"). The record before me, including the habeas petition, raises no serious doubts regarding Mr. Phillips competence in 1983. Mr. Phillips is not able to point to specific evidence which existed in 1983 that would have raised a red flag to counsel as to his competency. Mr. Phillips cites only to very general principles such as his low level of functioning, "a history of deprivation, beatings, serious head injury and subsequent personality change, and an inability to perform in school." While these attributes certainly can have an effect on a person's competency, they do not, in and of themselves, constitute incompetence. Absent some indication that Mr. Phillips was presently unable to understand the nature and consequences of the proceedings against him or properly assist in his defense, habeas relief is denied.

D. MR. PHILLIPS' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO THE GUILT PHASE

At trial, Mr. Phillips was represented by Mr. Guralnick. Mr. Phillips contends that Mr. Guralnick was ineffective in investigating and preparing for the guilt phase, which resulted in numerous specific errors and omissions that substantially prejudiced him. In particular, Mr. Phillips alleges that Mr. Guralnick (1) conducted an unreasonably inadequate investigation and preparation, (2) failed to litigate and preserve issues or object to substantial errors at trial and sentencing, (3) failed to move for a change of venue and conduct an appropriate voir dire despite the extensive pretrial publicity, (4) failed to object to Mr. Phillips' absence during critical stages of the proceedings, (5) failed to investigate impeachment evidence, (6) failed to obtain the assistance of or consult with experts and (7) failed to research and familiarize himself with general criminal law.

Mr. Phillips asserted all seven of these claims in less than two and a half pages of his habeas corpus petition. D.E. 1 at 62-4. Thus, as one might imagine, given the brevity of his arguments, Mr. Phillips' claims are insufficiently pled. The underlying arguments made here were virtually identical to those made to the Florida Supreme Court, but with less detail.

The Florida Supreme Court found these claims "to be conclusory and summarily reject[ed] them," *Phillips*, 608 So.2d at 782, but also added that "[m]any 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." *Id.* It ultimately concluded, without further explanation, that Mr. Phillips failed to demonstrate either deficient performance or prejudice.

As noted earlier, § 2254(d) "applies even where there has been a summary denial." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1402 (2011). In *Harrington,* for example, the Supreme Court found "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 131 S.Ct. at 784–85 (emphasis added) (citations omitted). Under these circumstances, Mr. Phillips can satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the Florida Supreme Court's decision. *Id.* at 784 ("[A] habeas court must determine what arguments or theories ... could have supported[ ] the state court's decision;

and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). After a thorough review of the state court record, I conclude that Mr. Phillips has failed to meet this high threshold.

> There is no dispute that the clearly established federal law here is *Strickland v. Washington*. In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.

Cullen, 131 S.Ct at 1403. As this is a *Strickland* performance claim analyzed under the deferential lens of §2254(d), my review of the Florida Supreme Court's decision as to performance is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Mr. Phillips has not shown that the Florida Supreme Court's determination that he failed to demonstrate deficient performance by guilt phase counsel necessarily involved an unreasonable application of federal law.

At the evidentiary hearing, D.E. 13, Appx. II, Vol. 70, Mr. Guralnick generally did not remember specific details of his pre-trial investigation and motions. However, he did testify that he did not move for a change of venue because he "didn't think it was applicable in this particular case." *Id.* at 532. With respect to the investigation, Mr. Guralnick testified that he "placed an investigator on the case" whom he "thought at that time [did] an excellent job getting statements, as I recall, from some or all of the cellmates that wound up testifying against Mr. Phillips." *Id.* at 543. Mr. Guralnick also asked the investigator to "check whatever records were necessary for [him] to be able to use to properly examine and to impeach" the testimony of the informants. *Id.* at 546.

Mr. Guralnick also deposed the prosecutor in advance of trial in the hopes of ascertaining any helpful impeachment evidence that could have been used against the informants. *Id.* Mr.

Guralnick testified that he studied the rules and applicable law before trial. *Id.* at 619.[16] Post-conviction counsel did not inquire into all the areas of deficiency alleged in Mr. Phillips' habeas petition when he had the opportunity to examine Mr. Guralnick, so some of the allegations in Mr. Phillips § 2254 petition are wholly unsupported by the record and lack inquiry sufficient to determine if trial counsel made a strategic decision. For that and for other reasons detailed below, the claim of ineffective assistance during the guilt phase is denied.

I have reviewed the trial transcript and the hearing transcripts in conjunction with the allegations made by Mr. Phillips. To begin, four of Mr. Phillips' seven claims were either refuted by the record or Mr. Guralnick testified that he made a strategic decision to not pursue the action that Mr. Phillips now argues was deficient.[17]

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' but those made after 'less than complete investigation' are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690–691. Further, as *Harrington* emphasized, because the deficiency inquiry is governed by AEDPA, the question is not just if counsel's decisions were reasonable, but whether fairminded jurists could disagree about whether the state court's denial of the ineffective assistance claim was inconsistent with Supreme Court precedent or was based on an unreasonable determination of the facts. *See Harrington*, 131 S.Ct. at 785–86. If fairminded jurists could reasonably disagree, then habeas relief should be denied.

As to the remaining claims, Mr. Phillips' allegations appear in only the vaguest of terms. For example, he alleges that "[c]ritical evidentiary matters, of which Petitioner had unique knowledge that might have informed the actions of his attorney, were discussed without Petitioner's input." D.E. 1 at 59. This allegation leaves unanswered crucial questions, such as the nature of the critical evidentiary matters and what knowledge Mr. Phillips had that would

[16] The investigator assigned to Mr. Phillips' case was subsequently prosecuted for suborning perjury. Mr. Waksman, the Assistant State Attorney who prosecuted Mr. Phillips, also prosecuted the investigator, who was convicted. D.E. 13, Vol. 70, Appx. II at 544.

[17] These are the allegations that Mr. Guralnick (1) conducted an unreasonably inadequate investigation and preparation, (3) failed to move for a change of venue and conduct an appropriate voir dire despite the extensive pretrial publicity, (5) failed to investigate impeachment evidence, and (7) failed to research and familiarize himself with general criminal law.

have aided counsel. Likewise, Mr. Phillips argues that his counsel was ineffective for failing to consult an expert in firearms because an expert could have testified that the "bullets in evidence could just as well have come from a nine shot revolver, and the State's elaborate and irrelevant display of the mechanics of gun-loading was therefore misleading." D.E. 1 at 60. Yet, Mr. Phillips failed to offer an expert who would have testified to those facts at trial and failed to argue that, had this testimony been presented, it would have affected the outcome of the trial. Finally, Mr. Phillips asserts that his counsel "failed to litigate and preserve issues or object to substantial errors at trial and sentencing." D.E. 1 at 58. Yet, Mr. Phillips does not indicate which issues should have been preserved or what errors should have been objected to. It is not for me to guess. Therefore, even if he could show deficient performance, Mr. Phillips has failed to satisfy *Strickland*'s prejudice prong. Indeed, Mr. Phillips has failed to articulate any specific prejudice which resulted from any of trial counsel's alleged deficiencies. This alone precludes habeas relief. *See Hall v. Head*, 310 F.3d 683, 699 (11th Cir. 2002) ("[A]lthough there is evidence in the record to support the district court's finding of deficient performance, we need not and do not 'reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.'").

E. Mr. Phillips' Mental Retardation Claim

Following an evidentiary hearing pursuant to Florida Rule of Criminal Procedure 3.203, the state trial court rejected Mr. Phillips' mental retardation claim. On appeal, the Florida Supreme Court affirmed. The evidence presented at the hearing is set forth below.

1. The Evidence at the Hearing

At the hearing, the defense offered the testimony of Dr. Glen Ross Caddy, Ph.D., A.B.P.P., and Dr. Denis Williams Keyes, Ph.D.

Dr. Caddy testified that he was retained to conduct a comprehensive intellectual assessment of Mr. Phillips in 2005. In doing so, he administered the Wechsler Adult Intelligence Scale III ("WAIS III") to Mr. Phillips. Mr. Phillips achieved a full scale IQ score of 70 (his verbal dimension score was 69, overall score was 69, and performance IQ score was 76). *Id.* at 60. Dr. Caddy testified that this placed Mr. Phillips in the mild mental retardation category. On cross examination, however, Dr. Caddy admitted that he did not conduct any testing which looked at adaptive functioning (the second prong of the definition of mental retardation). Rather,

he relied on the testing done by a different doctor. Ultimately, Dr. Caddy concluded that Mr. Phillips qualified as mentally retarded. *See id.* at 106. Dr. Caddy also testified that he conducted no validity testing. On cross examination, Dr. Caddy conceded that Mr. Phillips' overall IQ score was on the borderline between mild mental retardation and borderline intelligence. Dr. Caddy agreed that the correct measure of mental retardation is the combination of IQ, along with adaptive functioning and onset before the age of 18. However, he only conducted the intellectual assessment measure test. On redirect, Dr. Caddy maintained that, due to the range of error measurement, 70 is a score which is in the borderline area and could be diagnosed as mild mental retardation. Dr. Caddy explained to the court that he did not conduct validity testing because the identical test was given to Mr. Phillips in the years prior and the scores were very similar.

Dr. Keyes testified that, in 2000, he administered the Draw-A-Person test, the Development Test of Visual-Motor Integration test, the Bender-Gestalt test, the Woodcock-Johnson Psychoeducational Battery test, and the WAIS III test. Dr. Keyes concluded that Mr. Phillips had achieved a verbal score of 75, a performance score of 76 and a full scale score of 74. *See* D.E. 13, App. MM, Vol. 17 at 244. Dr. Keyes testified that he also administered tests to Mr. Phillips to measure his adaptive functioning. He administered the Scale of Independent Behavior test and the Vineland. In doing so, he had to interview family members and others. Dr. Keyes found that Mr. Phillips had adaptive difficulties, which had improved slightly during the structured environment of prison. Dr. Keyes determined that the onset of his subaverage intellectual functioning and adaptive deficits was below the age of 18. *Id.* at 264. Dr. Keyes concluded that Mr. Phillips is mentally retarded. *Id.* On cross examination, Dr. Keyes conceded that, on the Woodcock-Johnson Psychoeducational Battery test, Mr. Phillips tested above the scoring range for a person with mental retardation. Regarding Mr. Phillips' employment history, Dr. Keyes testified that Mr. Phillips had worked at an unusually high level for someone who has mental retardation. He still ultimately concluded, however, that Mr. Phillips is mildly mentally retarded.

The State called one expert witness, Dr. Enrique Suarez, Ph.D. Dr. Suarez testified that he had reviewed the results from the testing done by Drs. Caddy and Keyes and found certain inconsistencies which prompted him to conduct nonverbal intelligence and validity testing. Dr. Suarez gave the TONI-III test to Mr. Phillips. Mr. Phillips obtained an IQ score of 86. D.E. 13,

App. MM, Vol. 18 at 454. This score placed him in the "low average" range of intelligence according to the TONI-III manual. Dr. Suarez also administered the Wechsler Memory Scale, Third Edition test to Mr. Phillips. Mr. Phillips scored a 62 on the auditory immediate memory index and a 53 on the visual immediate with an overall immediate recall score of 49. On his delayed scoring he achieved a 67 on the auditory delayed index and a 72 on the visual delayed memory index. Dr. Suarez opined that this change in results occurred because Mr. Phillips either putting forth insufficient effort or suppressing. Further, Mr. Phillips scored an 83 on the working memory score index. These results were considered an anomaly by Dr. Suarez because Mr. Phillips scored higher on the more difficult tests and performed at a low level on the simpler tests. These results caused Dr. Suarez to conclude that Mr. Phillips was malingering. *Id.* at 466. Dr. Suarez also administered the Wide Range Achievement Test, Third Edition. Mr. Phillips obtained a reading score of 88, which placed his reading at a ninth grade level. He scored a 90 on the spelling portion of the test, which placed his spelling at an eighth grade level. Mr. Phillips scored a 67 on the arithmetic portion, which is the equivalent of a third grade level.

Dr. Suarez also administered three validity tests, the Memory 15-Item Test ("Memory 15"), the Test of Memory Malingering ("TOMM"), and the Validity Indicator Profile ("VIP"). On the Memory 15, Mr. Phillips scored a 9. The test manual tells the administrator that a score below 12 could indicate that the test taker is "not giving their full effort." *Id.* at 479. Further, Mr. Phillips scored only a 6 on the recognition portion of the test, which would indicate that he was not giving forth full effort or was otherwise malingering. In contrast, Dr. Suarez found that Mr. Phillips "did well" on the TOMM test. Finally, on the VIP test, both the nonverbal and verbal subtests, Mr. Phillips' score was "classified as invalid," meaning that he did not put forth any effort into the examination. *Id.* at 492. Dr. Suarez concluded that Mr. Phillips was malingering.

Dr. Suarez also administered the Adaptive Behavior Assessment System to assess Mr. Phillips' adaptive functioning. He conducted telephone interviews with six of the correctional officers assigned to death row. Dr. Suarez found that Mr. Phillips had no current deficits in adaptive behavior which would go to the level of impairment necessary to classify Mr. Phillips as mentally retarded. Dr. Suarez concluded that Mr. Phillips is not mentally retarded and he functions in the low-average range. On cross examination, Dr. Suarez admitted that he did not

administer the two tests identified in Florida as the standardized tests for determining a person's IQ, the WAIS III and the Stanford-Binet. *See* Fla. R. Crim. P. 3.203. Dr. Suarez testified, however, that he did not need to give the WAIS III because it had been previously administered to Mr. Phillips on three different occasions. Although Dr. Suarez did admit certain problems with the testing (i.e. the structured environment of prison may skew certain results and the lack of records available in general), this did not change his determination that Mr. Phillips was not mentally retarded.

2. The Florida Supreme Court's Decision

After summarizing the evidence introduced at the hearing, on appeal the Florida Supreme Court explained that, under Fla. Stat. § 921.137(*l*) (enacted in 2001), Mr. Phillips had to show "(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." *Phillips*, 984 So.2d at 509. It then concluded that Mr. Phillips did not satisfy any of the prongs of the mental retardation standard.

First, although the defense experts opined – based on IQ scores of 75 (1987), 74 (2000), and 70 (2005) – that Mr. Phillips had significantly subaverage intellectual functioning, the state's expert had a contrary view, concluding that the low scores were the "result of malingering." *Id.* at 510. Because the defense experts had not tested for malingering, the trial court accepted the opinion of the state's expert, and the Florida Supreme Court gave deference to the trial court's evaluation of the experts. *Id.* As an alternative ground, the Florida Supreme Court concluded that Mr. Phillip's IQ scores did "not indicate that he is mentally retarded," and specifically noted that the majority of the IQ scores were above the 70 IQ threshold set forth in the Florida statute. *Id.* at 510-11.[18]

[18] In 1987, Mr. Phillips' IQ was 75 (testing by Dr. Joyce Carbonell for competency). In 2000, Mr. Phillips' IQ was 74 (testing done by Dr. Keyes). In 2005, he scored an IQ of 70 on the WAIS-III (testing done by Dr. Caddy) and an IQ of 86 on the TONI-III (testing done by Dr. Suarez). *See Phillips*, 984 So.2d at 507-10. Even if I did not take into account the score on the TONI-III because it is not known as the gold standard for intelligence testing, Mr. Phillips has an averaged IQ of 73. Coincidentally, the Department of Corrections listed his IQ as 73 in a Psychological Screening Report dated February 28, 1984. That same report describes his intelligence as "below average." D.E. 13, App. MM, Vol. 10 at 1567. However, in January of 1963, an untitled report by the Department of Corrections indicated that Mr. Phillips had an IQ of 88, indicating "dull normal intelligence." Mr. Phillips was also administered a Beta Test for intelligence in February of 1963, when he was 17 years old and incarcerated, and his IQ was

Second, the Florida Supreme Court explained that the adaptive functioning testing conducted by Dr. Keyes, the defense expert, was not contemporaneous with his IQ testing. Dr. Keyes had relied on the "technique of retrospective diagnosis, focusing on [Mr.] Phillips's adaptive behavior before age 18." *Id.* at 511. Retrospective diagnosis, however, had already been held "insufficient to satisfy the second prong" of the mental retardation standard: "[B]oth the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently* with deficits in adaptive behavior." *Id.* (citing *Jones v. State,* 966 So.2d 319, 325-27 (Fla. 2007)). Dr. Keyes had tested Mr. Phillip's intellectual functioning in 2000, but did not assess Mr. Phillip's adaptive functioning as of that date. *Phillips*, 984 So.2d at 511.

In addition, the Florida Supreme Court found that the record contained competent substantial evidence that Mr. Phillips did not suffer from deficiencies in adaptive functioning. He supported himself by working as a short-order cook, a garbage collector, and a dishwasher, and the mental health experts "generally agreed that [he] possessed job skills that people with mental retardation lacked." *Id.* "The experts also agreed that the planning of the murder and cover-up in this case [were] inconsistent with a finding that [Mr.] Phillips suffers from mental retardation." *Id.* at 512. Specifically, Mr. Phillip'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." *Id.* "It is clear from the evidence," the Florida Supreme Court said, that Mr. Phillips "does not suffer from adaptive impairments. Aside from personal independence, [Mr.] Phillips has demonstrated that he is healthy, wellnourished, and wellgroomed, and exhibits good hygiene." *Id.*

Third, the Florida Supreme Court found that there was "ample evidence" to support the trial court's conclusion that Mr. Phillips failed to show the onset of low IQ and adaptive deficits before the age of 18. *Id.* Mr. Phillip's school history did not suggest onset before the age of 18, and his Cs and Ds in school were "easily attributed" to his truancy, his repeated suspensions from school, and his juvenile delinquency." *Id.* "Moreover, anecdotes about [Mr.] Phillip's childhood do not suggest a manifestation of low IQ and adaptive deficits before age 18." *Id.* at 513.

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83. D.E. 13, App. MM, Vol. 8 at 1324. When he was re-tested by the Department in June of 1964, his score was 85. (*Id.*). At that time, he was classified as having "dull normal intelligence."

3. Mr. Phillips' Arguments

In his habeas petition and accompanying memorandum of law, Mr. Phillips asserts that the Florida Supreme Court's determination that he is not mentally retarded, under Fla. Stat. § 921.137(*l*) and Rule 3.203 of the Florida Rules of Criminal Procedure, was an unreasonable application of, and in conflict with, clearly established federal law as recited by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). It is difficult to parse out Mr. Phillips' exact arguments. But, as explained below, I do not see a basis for habeas relief.

Mr. Phillips first attacks the Florida Supreme Court's rejection of retrospective diagnosis a way to assess adaptive functioning. He argues that "the Florida Supreme Court has created a separate class of older death row inmates with mental retardation whose ability to prove that status has been eliminated by the Florida Supreme Court's interpretation of the rules." D.E. 1 at 65-66. *See also* D.E. 3 at 12-14. As Mr. Phillips puts it: "When a defendant is incarcerated and cannot be observed in typical community based environments, clinical experts must apply their experience and judgment to available information about the defendant's adaptive skills in typical environments **prior to confinement**." *Id.* at 67 (emphasis in original). Mr. Phillips also points out that the Florida Supreme Court overlooked publications which recognize that a retrospective diagnosis may sometimes be required. *See* American Association on Intellectual and Developmental Disabilities, User's Guide: Mental Retardation, Definition, Classification, and Systems of Support (10th ed. 2007).

Whatever the merits of Mr. Phillip's position on retrospective diagnosis, it does not entitle him to habeas relief. As noted earlier, the Florida Supreme Court did not rule against Mr. Phillips on adaptive functioning by simply rejecting retrospective diagnosis. It alternatively found that the record contained substantial evidence that Mr. Phillips did not suffer from deficiencies in adaptive functioning. *See Phillips*, 984 So.2d at 511-12. Mr. Phillips does not challenge this alternative ground, so he is "deemed to have abandoned any challenge of that ground, and it follows that the judgment [of the Florida Supreme Court] is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

Mr. Phillips loses on this argument for another reason as well. Whether Mr. Phillips suffered from deficiencies in adaptive functioning is a finding of fact, *see Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014), and Mr. Phillips has not shown that the Florida

Supreme Court's determination that he did not suffer from deficiencies in adaptive functioning is an unreasonable one in "light of the evidence presented" in the state court proceedings. Nor has he rebutted, by clear and convincing evidence, the presumption of correctness that is afforded to the factual findings of the Florida Supreme Court. *See* 28 U.S.C. §§ 2254(d)(2) & (e)(1). With or without AEDPA deference, Mr. Phillips loses on this factual issue.

Mr. Phillips next asserts that the Florida Supreme Court's categorical requirement of an IQ score below 70, as expressed in cases like *Cherry v. State*, 959 So.2d 702, 714 (Fla. 2007), is an unreasonable application of *Atkins*. D.E. 1 at 69; D.E. 3 at 9-11. That argument, insofar as it goes, is legally sound, for the Supreme Court came to the same conclusion in *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (holding that a state may not execute a person whose IQ test score falls within the test's margin of error unless that person has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits). But that, again, does not entitle Mr. Phillips to relief, for the Florida Supreme Court did not use the 70 IQ cut-off to reject Mr. Phillips' argument as to significantly subaverage intellectual functioning. Instead, the Florida Supreme Court reviewed all of the evidence in the record, including Mr. Phillips' IQ scores 70 or above, and found (1) that the trial court had not erred in concluding that Mr. Phillips' low scores were the result of malingering, and (2) that in any event most of Mr. Phillips' IQ scores were above 70, thereby showing he was not mentally retarded. *See Phillips*, 984 So.2d at 510-11.

Mr. Phillips further contends that the Florida Supreme Court simply got its fact-finding on mental retardation wrong. *See* D.E. 1 at 70-71. On this record, however, that argument cannot succeed given AEDPA deference. The Florida Supreme Court's factual determinations are not unreasonable given the evidence presented to the trial court. *See Fults*, 764 F.3d at 1321 ("[W]e are not sitting as the initial triers of fact determining whether Mr. Fults is in fact mentally retarded. We are not even assessing factual findings made by a district court for clear error. We are reviewing the factual findings of the state . . . court through the prism of AEDPA, which calls for a presumption of correctness that can only be overcome by clear and convincing evidence.").

Finally, Mr. Phillips argues that the requirement of the onset before age 18 prong discriminates against older petitioners because of the lack of available information. At the evidentiary hearing, Mr. Phillips argued that, as an African-American attending schools in the

segregated South, he is unable to prove his claim because his school records are only marginally complete and there were no programs such as special education or IQ testing of African-American children at that time. Therefore, Mr. Phillips argues that he lacks the records that would have been reviewed to make the "onset before age 18" determination.

To be sure, Mr. Phillips could have been at a disadvantage because of his age and the fact that his schools did not keep detailed records or offer special education programs. Mr. Phillips, however, did have certain school records and had some family and friends available for interviews even if they only provided anecdotal evidence. Further, unlike other older habeas petitioners, Mr. Phillips has an extensive record from the Department of Corrections and the Florida Parole and Probation Commission because he was incarcerated during much of his youth.[19] None of these records showed significant deficits in adaptive functioning manifesting before age 18.

F. Mr. Phillips' Summary Denial Claim

Mr. Phillips argues that the summary denial of some of his post-conviction claims denied him due process and the right to a full and fair evidentiary hearing. Specifically, Mr. Phillips asserts that the post-conviction court erred by summarily denying his ineffective assistance of counsel, *Ake*, judicial bias, and request for juror interview claims. Mr. Phillips states that he had both a neurologist and a mental retardation expert ready to testify, but the post-conviction court summarily denied his claims without an evidentiary hearing. The State responds that "the precise nature of the claim or claims Petitioner is attempting to present is unclear."

After reviewing the pleadings, I agree with the State. In his petition, Mr. Phillips categorizes this claim as a denial of due process due to the summary denial of some of his post-conviction claims, but his memorandum of law titles the claim as a denial of a full and fair

[19] Mr. Phillips' criminal history began at age 15 and he was in and out of penal institutions for most of his life. In a Classification Report completed in 1968, when Mr. Phillips was 23 years old, he was described as having a "rather low IQ." D.E. 13, App. MM, Vol. 8 at 1312. There are many of these types of reports in the record. These reports span a significant period of time and range in their assessment of Mr. Phillips from being a below average worker and a disciplinary problem to a good worker with a good attitude and with no discipline problems. Prior to the crime for which he is now incarcerated, Mr. Phillips was twice paroled. A Pre-Parole Investigation Report from January 10, 1963 indicated that Mr. Phillips' grades in high school were poor, improved "considerably" while attending a different school, but declined again when returning to his old high school. D.E. 13, App. MM, Vol. 8 at 1339.

evidentiary hearing, and his reply states that this claim is an ineffective assistance of penalty phase post-conviction counsel claim. Under AEDPA, Mr. Phillips must establish that the state court's determination was either a legal decision that involved an unreasonable application of clearly established federal law, a factual determination that was unreasonable in light of the evidence presented in the state court proceeding, or both. In order for me to analyze this claim properly, Mr. Phillips should clearly delineate his precise argument. Unfortunately, he has not done so.

Nonetheless, I have reviewed the arguments made to the Florida Supreme Court, the Florida Supreme Court's decision, and the pleadings before me. Here, Mr. Phillips complains only about the errors of the re-sentencing post-conviction court. However, I must review the decision of the Florida Supreme Court, the last court to rule on the claim.[20] To properly exhaust state remedies such that a federal habeas court may review his claim, Mr. Phillips must fairly present every issue raised in his federal petition to the *state's highest court*. *Castille*, 489 U.S. at 351 (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone*, 556 U.S. at 465 (internal citations omitted).

On appeal from the denial of his post-conviction motion, Mr. Phillips argued to the Florida Supreme Court that the post-conviction court erred in summarily denying his claims without an evidentiary hearing. The Florida Supreme Court, in fact, summarized Mr. Phillips' claim as "the trial court improperly denied his post-conviction claims without an evidentiary hearing." *Phillips*, 894 So.2d at 34.

The Florida Supreme Court found that a "comprehensive mental mitigation investigation" was performed in his case and that the record showed that mitigation evidence was presented through other witnesses at trial such that Mr. Phillips did not have a valid ineffective assistance of counsel claim for failure to present adequate evidence. *Id.* at 38. The Florida Supreme Court also stated that "[g]iven that the record reflects that two mental health experts were appointed in

[20] Mr. Phillips' lone citation to the Florida Supreme Court's opinion is located in his memorandum of law and is the concurring, in part, and dissenting, in part, opinion of Justice Pariente. *Phillips v. State*, 894 So.2d 28, 44-45 (Fla. 2004). This is not the opinion that I am to give deference to pursuant to AEDPA.

Phillips' 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' *Ake* claim," *id.* at 39, and concluded that Mr. Phillips had not shown he was entitled to an evidentiary hearing.

To the extent that Mr. Phillips is arguing that the denial of the evidentiary hearing is an independent basis for granting federal habeas relief, his claim is not cognizable. "It is beyond debate that Petitioner is not entitled to relief on [this] ground[ ]. We have held the state court's failure to hold an evidentiary hearing on a petitioner's 3.850 motion is not a basis for federal habeas relief." *Anderson v. Sec'y, Dep't of Corr.*, 462 F.3d 1319 (11th Cir. 2006) (*citing Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987).[21]

In an abundance of caution, I have also read this so-called "summary denial" claim by Mr. Phillips to include a substantive ineffective assistance of counsel claim. I have reviewed Mr. Phillips' claim to the Florida Supreme Court and find that, based on the record before me and considering the stringent standards imposed by AEDPA, Mr. Phillips is not entitled to relief. Mr. Phillips asserts that at an evidentiary hearing he would present the testimony of two expert witnesses, which "would have established that at the time of the offense [he] suffered from both organic brain damage and mental retardation (not merely 'low IQ')." Based on these mental disturbances, Mr. Phillips argues he would be entitled to two statutory mitigating circumstances. I find that the Florida Supreme Court's determination that defense counsel's performance was not deficient "where the record shows similar mitigation evidence was presented through other witnesses" was not an unreasonable application of federal law. *See Phillips*, 894 So.2d at 37-38. The record shows that Mr. Phillips did present mental health mitigation evidence at his re-

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[21] If Mr. Phillips is arguing that he is entitled to an evidentiary hearing in federal court, an argument he has not expressly made here, his request is rejected.

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. *See, e.g., Mayes v. Gibson*, 210 F.3d 1284, 1287 (10th Cir. 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. *See id.*, at 1287–1288 ("Whether [an applicant's] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]").

Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

sentencing. While it may not be the exact testimony that Mr. Phillips now seeks to assert, that does not make counsel's performance deficient, nor does it necessarily require an evidentiary hearing. In view of the evidence, it is not possible to say that the Florida Supreme Court's denial of Mr. Phillips' claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Harrington v. Richter*, 131 S.Ct. 770, 786-87 (2011).

G. MR. PHILLIPS' JUDICIAL BIAS (POST-CONVICTION COURT) CLAIM

Mr. Phillips asserts that the judge assigned to oversee his re-sentencing post-conviction proceedings was biased against him, which violated his due process rights because he was not before an impartial tribunal. Mr. Phillips provides very little factual basis for this claim aside from the adverse rulings on his public records requests. The one fact that Mr. Phillips cites in support of his claim of judicial bias is that, two months prior to the filing of his post-conviction motion, Judge Ferrer at Mr. Phillips' re-sentencing post-conviction stated on the record that "[i]f there is an evidentiary hearing, I don't expect you to have a hearing." Even if this statement were enough to support a claim for judicial bias, this claim is not cognizable for federal habeas review. "[H]abeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief." *Quince v. Crosby*, 360 F.3d 1259, 1264 (11th Cir. 2004) (*citing Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987)). Judge Ferrer presided only over Mr. Phillips' re-sentencing post-conviction proceedings. He did not preside over Mr. Phillips' initial trial or his re-sentencing. Thus, even if Judge Ferrer had been biased against Mr. Phillips, this bias would be unrelated to the cause of Mr. Phillips' detention and is not a basis for habeas relief. *See id.*

I also read the transcript of the re-sentencing post-conviction hearings and find that the quote cited by Mr. Phillips does not accurately reflect the proceedings. The statement was made at a status conference on September 23, 1999. The re-sentencing post-conviction court was notified that certiorari was denied by the United States Supreme Court and Mr. Phillips' conviction and sentence was final on October 5, 1998. Counsel had reported that in the past year he had not received any documents from the repository. The re-sentencing post-conviction court inquired as to what steps counsel had taken to obtain these documents. Counsel reported that he had filed the single request in February and thereafter had failed to make further inquiries or file

any motions to compel. The court found that counsel was involved in the delay and there would be no further extensions of time. The re-sentencing post-conviction judge then said that the "final hearing" would be on January 6, 2000. The Assistant State Attorney then inquired whether the "final hearing" was the *Huff* hearing or an evidentiary hearing.

> MS. BRILL: When you say final - - this is what is a Hoff [sic] hearing. When you say final hearing, I'm assuming that is the hearing, what parameters will the evidentiary hearing be if there is - -
>
> THE COURT: If there is an evidentiary hearing. I don't expect you to have a hearing. On that day, I'm going to thin out the heard[sic] and this is not a hearing. This is not a hearing.

D.E. 13, Appx. KK, Vol.2 at 318. The statement could easily be read to mean that the January 6th hearing would not be an evidentiary hearing but simply a *Huff* hearing, which determines what claims, if any, require an evidentiary hearing. Mr. Phillips has not shown a legal or factual basis for a judicial bias claim. Moreover, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," do not establish bias or partiality. *Id.* at 555–56. Habeas relief is denied.

H. Mr. Phillips' Judicial Bias and Jury Issues at Resentencing Claim

To begin, Mr. Phillips' claim is insufficiently pled. While I liberally construe a habeas petitioner's petition and attempt to address and adjudicate every argument on the merits, Mr. Phillips' petition does not offer the first true glimpse into what claim for habeas relief he is asserting. In order to state a valid claim for federal habeas relief, Mr. Phillips must argue that he is a person in custody in violation of the Constitution or laws of the United States. A generous reading of this claim would indicate that Mr. Phillips *may* be asserting a judicial bias claim as to the re-sentencing court, a judicial bias claim as to the post-conviction court, an erroneous jury instruction claim, an ineffective assistance of counsel claim, a wrongful denial of a motion to interview jurors claim, an erroneous denial of an evidentiary hearing claim, and/or a newly discovered evidence claim. To further complicate matters, Mr. Phillips' memorandum of law for this claim contains legal argument regarding the CCP aggravator and premeditation instructions to the jury, where Mr. Phillips argues that his Eighth Amendment rights were violated. His

habeas petition, however, contains no such claim. Since no cogent argument was made here, I have no way of knowing what constitutional right Mr. Phillips was denied or what determination if any by the Florida Supreme Court was an unreasonable application of clearly established federal law or an unreasonable determination of the facts.[22] Given the gravity of the sentence imposed on Mr. Phillips, I do the utmost to consider all arguments on their merits. The state of this specific claim, however, does not allow me to make such a determination. The claim is insufficiently pled. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face," under 28 U.S.C. § 2254 Rule 4. *McFarland v. Scott*, 512 U.S. 849, 855 (1994); *see also Spillers v. Lockhart,* 802 F.2d 1007, 1010 (8th Cir. 1986) (holding that it is proper to dismiss a petitioner's claims that do not provide "any specifics to identify precisely how his counsel failed to fulfill those obligations"). Habeas relief as to this claim is denied.

I. Mr. Phillips' Burden Shifting Claim

Mr. Phillips' ninth claim for habeas relief consists of two sentences. The crux of the claim is that the "[c]ourt and the state both advised the jury that they had to find that sufficient mitigating circumstances existed to outweigh any aggravating circumstances they found to exist." D.E. 1 at 85. Likewise, Mr. Phillips' memorandum of law consisted of two sentences. Like the preceding claim, this claim is insufficiently pled.

Although Mr. Phillips did not point out to the Court precisely which statements were objectionable, I nonetheless reviewed the opinions of the Florida Supreme Court on direct appeal and Mr. Phillips' appeal of his Rule 3.851 motion. It appears that this claim was first made on appeal from the denial of the Rule 3.851 motion. The Florida Supreme Court determined, therefore, that this claim was procedurally barred. *Phillips*, 894 So.2d at 35.

This claim, furthermore, suffers from multiple infirmities. First, it does not allege a violation of federal law. While the implication may exist, the actual claim states that the State urged the jury to apply aggravating circumstances "in a manner inconsistent with the Florida

[22] While not entirely clear, it appears that some of these arguments could have been made on direct appeal, whereas others may have been made in Mr. Phillips' Rule 3.851 motion. *Compare Phillips v. State,* 705 So.2d 1320 (Fla. 1997) and *Phillips v. State*, 894 So.2d 28 (Fla. 2004). If these claims were asserted in his Rule 3.851 motion, the Florida Supreme Court found that they were procedurally barred because they should have been raised on direct appeal. *Id.* at 35, n.6.

Supreme Court's narrowed interpretation of those circumstances." D.E. 1 at 85. "Under 28 U.S.C. § 2241, a writ of habeas corpus disturbing a state-court judgment may issue only if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3) (1976). A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). As alleged, Mr. Phillips' claim is based on a state court's interpretation of state law, which bars us from granting a writ.

Further, the Florida Supreme Court found this claim procedurally barred and did not make a merits determination. A state procedural default precludes consideration of an issue on federal habeas review when the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar.[23] *See Coleman v. Thompson*, 501 U.S. 722, 734 (1991). *See also Harmon v. Barton*, 894 F.2d 1268, 1272 (11th Cir. 1990). To overcome a procedural bar, a petitioner must demonstrate objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the identified error.[24] *See United States v. Frady*, 456 U.S. 152, 167-68 (1982). Mr. Phillips has done neither. Habeas relief is denied as to this claim.

J. MR. PHILLIPS' CLAIM REGARDING NON-STATUTORY AGGRAVATING FACTORS

Mr. Phillips maintains that the re-sentencing court erred when it denied his motion to preclude the State from using a "large door-sized chart that laid out the alleged behavior of Petitioner during the period of November 1980 through August 31, 1982." D.E. 1 at 86. The facts surrounding this claim are as follows.

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[23] Except under limited circumstances, Florida law requires that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983). Further, a successive motion for post-conviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. *Moore v. State*, 820 So.2d 199, 205 (Fla. 2002).

[24] To establish cause for a procedural default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate that there is at least a reasonable probability that the outcome of the proceeding would have been different. *See Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

On April 4, 1994, at a hearing on the motions in limine, Mr. Phillips argued that the State should not be allowed to put on a chart that catalogued the events leading up to the murder of Mr. Svenson because this was a re-sentencing and not a guilt determination. The State countered that because this information illustrated the cold, calculated and premeditated manner of the crime, along with the fact that it was an aggravated offense, it should come in at re-sentencing. The state court found that if the jury had a right to hear it during the guilt phase, then it had a right to hear it during re-sentencing.

Mr. Phillips raised a different variation of this claim on direct appeal. The Florida Supreme Court denied it finding it "procedurally barred or without merit." *Phillips*, 705 So.2d at 1321. Because the court grouped together several of Mr. Phillips' claims when making this determination, I cannot tell from the opinion whether the court found this claim to be procedurally barred or meritless. Regardless, because the claim presented on direct appeal is not the same as the claim Mr. Phillips presently raises, the Florida Supreme Court's determination is not relevant here. Mr. Phillips did, however, raise the present claim on appeal from the denial of his Rule 3.851 motion. *Phillips*, 894 So.2d at 35. The Florida Supreme Court denied the claim then as "procedurally barred because [it was] raised and rejected on direct appeal." *Id.*

This was error. The claim made on direct appeal was for prosecutorial misconduct, whereas the claim on appeal from the denial of the Rule 3.851 motion was for trial error as to the denial of Mr. Phillips' motion to preclude the State's use of the chart. While it certainly may be that this claim would have been procedurally barred because it could have and should have been made on direct appeal pursuant to state law, that was not the decision of the Florida Supreme Court. The court denied this claim without considering the merits because it found that this claim had been previously made and was rejected. This determination does not preclude me from reviewing this claim. *See Wellons v. Hall*, 130 S.Ct. 727, 730 (2010) (*citing Cone v. Bell*, 129 S.Ct. 1769, 1781 (2009)) ("When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review.")

Procedural bar aside, this is not a recognizable claim for federal habeas relief. Mr. Phillips' claim appears to assert either that (1) the state court erred in an evidentiary ruling, an issue of state law, or (2) the state court allowed the introduction of non-statutory aggravating factors, also an issue of state law. Neither one of these errors can be remedied by a federal

habeas court. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 131 S.Ct 13, 16 (2010) (*quoting Estelle v. McQuire*, 502 U.S. 62, 67-68 (1991). If the state court at re-sentencing had allowed evidence that tended to show that Mr. Phillips was engaged in conduct that could be or was interpreted as "non-statutory aggravating factors," it would have been a state law error, which we cannot review on federal collateral appeal. *See id.*

Moreover, a review of the sentencing order does not show that the re-sentencing court considered the non-statutory aggravating factors about which Mr. Phillips complains when it sentenced Mr. Phillips to death. Rather, the re-sentencing judge 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." *Phillips*, 894 So. 2d at 33. Even if the re-sentencing court had allowed the impermissible argument on non-statutory aggravating factors, it was harmless error. Thus, habeas relief is denied.

K. Mr. Phillips' Claim that He is Innocent of the Death Penalty

Mr. Phillips asserts that he "can show either innocence of first degree murder or innocence of the death penalty." D.E. 1 at 86. But he is not claiming actual innocence. Rather, Mr. Phillips asserts that had he been granted an evidentiary hearing, he could have presented evidence that he lacks the mental capacity to support the heightened level of premeditation required to sustain the CCP or the intent to disrupt or hinder the governmental function aggravating factors.

Mr. Phillips first raised this claim on appeal of the denial of his Rule 3.851 motion. The Florida Supreme Court denied it as "procedurally barred because [it] should have been raised on direct appeal," *Phillips*, 894 So.2d at 35, n.6, and as a result Mr. Phillips is unable to bring this claim here. When a petitioner has failed to present a claim to the state courts and "it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998). Here, Mr. Phillips' failure to raise his innocence claim on direct

appeal in the Florida courts bars him from raising the issue in a state post-conviction petition. *See Smith v. State*, 445 So.2d 323, 325 (Fla.1983). Thus, his claim is procedurally barred.

To overcome a procedural bar, Mr. Phillips must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). At best, Mr. Phillips has alleged that the re-sentencing judge should not have found two of the four aggravating factors. But Mr. Phillips has never provided any cause for failing to raise his innocence claim on direct appeal. On the record before me, Mr. Phillips has not shown the required cause to overcome the procedural bar. Habeas relief is therefore denied.

L. MR. PHILLIPS' INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM

Mr. Phillips argues that the admission of hearsay testimony during his re-sentencing violated the Sixth Amendment and that his appellate counsel was ineffective for failing to raise this claim on direct appeal. The backdrop of this claim is that in the time between Mr. Phillips' original trial in 1983 and his re-sentencing in 1994, several witnesses had recanted their testimony. In an evidentiary hearing held in 1988, some of those witnesses testified under oath that they had perjured themselves during the 1983 trial. Mr. Phillips argues that, during the re-sentencing, Detective Smith was allowed to testify as to statements made by the recanting witnesses, but Mr. Phillips was not allowed to present evidence that showed that those witnesses later recanted their statements. While it is not entirely clear from the petition, it appears that Mr. Phillips is arguing that because his right to confrontation was denied, appellate counsel was ineffective for failing to raise this issue on direct appeal.[25]

Mr. Phillips first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme Court denied this claim because "[r]esentencing 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

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[25] The difficulty in discerning the actual claim begins with Mr. Phillips' failure to cite *Strickland* or to argue either deficiency or prejudice. The extent of Mr. Phillips' substantive argument appears to be that "appellate counsel's failure to raise on appeal this preserved and meritorious issue warrants habeas relief at this time." D.E. 3 at 28.

appeal." *Phillips*, 894 So.2d at 40. I have reviewed the record. In his state petition for writ of habeas corpus, Mr. Phillips titled this claim as "Failure to Raise on Appeal Detective Smith's Testimony." In the instant petition, Mr. Phillips titled his claim as "Detective Smith's Hearsay Testimony at Re-sentencing." After careful review, I find that the Florida Supreme Court did not reach the merits of Mr. Phillips' claim because the Florida Supreme Court misinterpreted his argument.

The Florida Supreme Court found that Mr. Phillips did not object to the admission of hearsay evidence. This is true. In fact, counsel for Mr. Phillips reached an agreement with the State on the admission of hearsay prior to the re-sentencing. Counsel, however, expressly stated on the record that "it seems like [the State's] position is pretty well taken. It's permissible. It's within your discretion how far it can go. *I'm just permitted to rebut it*." D.E. 13, Vol.4, Appx. JJ at 14. This is the precise issue Mr. Phillips asserts here. Mr. Phillips' claim is not that the hearsay testimony was erroneously admitted, but rather that he was disallowed from rebutting the testimony and that appellate counsel was ineffective for failing to raise that claim on direct appeal.

I have reviewed Mr. Phillips' claim as presented to the Florida Supreme Court in his state habeas petition and find that his claim was indeed confusing. He appears to argue two bases for relief. One of the bases raised was appellate counsel's failure to argue error based on the denial of re-sentencing counsel's objections and requests to cross-examine the detective with rebuttal testimony. Specifically, Mr. Phillips argued "[t]he testimony of Detective [sic] was clearly inadmissible, irrelevant, and unduly prejudicial to Mr. Phillips' case under the United States Constitution and Florida Constitutions, *where Mr. Phillips' counsel was helpless to rebut*." D.E. 13, Vol. 6, Appx. W at 40 (emphasis added). Mr. Phillips also asserted that "[t]he trial court simply failed to allow a *complete defense rebuttal* of the hearsay that came in through Detective Smith from the snitch witnesses." *Id.* at 39. The Florida Supreme Court's opinion failed to address these arguments. The court focused solely on the underlying admissibility of the detective's testimony without considering Mr. Phillips' argument that the error was not the admission of the testimony but the denial of the opportunity to rebut the testimony as admitted. Therefore, I review this claim *de novo*. *See Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) ("When, however, a claim is properly presented to the state court, but the state court does

not adjudicate it on the merits, we review *de novo*. (citing *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 1784, 173 L.Ed.2d 701 (2009)))."

While federal habeas courts consider summary denials by state courts as adjudications on the merits, if, as is the case here, a state court opinion expressly ruled on what it considered a dispositive element of the claim and, therefore, did not rule on an additional element, there is no ruling to which to defer. *See, e.g.*, *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 930 & n.9 (11th Cir. 2011). ("The Court's instruction from *Harrington* does not apply here because the Florida Supreme Court did provide an explanation of its decision which makes clear that it ruled on the deficiency prong but did not rule on the prejudice prong, and it is also clear that the trial court's ruling on the prejudice prong did not address counsel's investigation and presentation of non-statutory mitigating circumstances evidence."). Like the two-pronged analysis of a *Strickland* claim, Confrontation Clause claims require that the evidence admitted was testimonial hearsay and that the defendant was not given the opportunity to rebut it. The Florida Supreme Court did not rule on Mr. Phillips' inability to rebut the testimony because it denied the claim based on his failure to object when the evidence was originally admitted. Thus, the court did not consider appellate counsel's deficiency for failing to assert that Mr. Phillips was denied his right to confrontation because he was not allowed to rebut the hearsay presented or the prejudice which resulted from counsel's deficiency. Therefore, I do not give AEDPA deference to the opinion.

The Strickland Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, 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." *Id.* at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* Thus, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

Claims of ineffective assistance of appellate counsel are governed by the standard articulated in *Philmore v. McNeil*:

> In assessing an appellate attorney's performance, we are mindful that the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue. Rather, an effective attorney will weed out weaker arguments, even though they may have merit. In order to establish prejudice, we must first review the merits of the omitted claim. Counsel's performance will be deemed prejudicial if we find that the neglected claim would have a reasonable probability of success on appeal.

575 F.3d 1251, 1264-65 (11th Cir. 2009) (internal quotation marks and citations omitted). Here, the omitted claim is that the re-sentencing court erred in denying counsel an opportunity to rebut the hearsay testimony of Detective Smith. The record shows that Mr. Phillips' counsel wanted to cross-examine Detective Smith about the reductions in sentence and other rewards given to these hearsay witnesses, but that the court denied his request. To make a record for appeal, the re-sentencing judge allowed counsel to have Detective Smith proffer for the record what he would have testified had he been asked these questions. At the conclusion of the proffer, the re-sentencing court found this testimony was not allowed. While it is not entirely clear, it appears that the re-sentencing court found that the hearsay witnesses' original statements to Detective Smith could come in to show Mr. Phillips' mental and intellectual ability because that would support the State's arguments regarding aggravating factors and would also rebut Mr. Phillips' arguments regarding mental retardation mitigation. Mr. Phillips, however, was not allowed to ask whether these hearsay witnesses had subsequently recanted or had been given benefits by the State following their testimony at the guilt phase in 1983 because the re-sentencing court perceived that information as bringing up impermissible lingering doubt, which the appellate court had already "ruled upon." D.E. 13, Vol. 6, Appx. JJ at 412.[26] For the reasons that follow, I find that the re-sentencing court erred.

[26] In his initial Rule 3.851 post-conviction motion, Mr. Phillips asserted a *Brady/Giglio* claim arguing that "the State failed to disclose the nature or extent of the benefits offered to these inmates in exchange for their testimony." *Phillips*, 608 So. 2d 778, 779 (Fla. 1992). The post-conviction court and the Florida Supreme Court considered the testimony of the hearsay witnesses at an evidentiary hearing wherein they recanted. The post-conviction court found this testimony to be "completely unbelievable," and the Florida Supreme Court found "competent, substantial evidence to support this finding." *Id.* at 780–81.

Under Florida law, after a defendant is convicted of a capital felony, the trial court must conduct a separate proceeding before the jury to determine whether the defendant should be sentenced to death or to life imprisonment. Each side may present evidence relating to aggravating or mitigating factors for the jury to weigh in its advisory sentence to the judge. "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements.*" Fla. Stat. § 921.141(1) (1997) (emphasis added).[27]

Therefore, to prevail on his Sixth Amendment claim, Mr. Phillips must demonstrate he was prejudiced when his appellate counsel deficiently failed to argue that Mr. Phillips was deprived of the opportunity to rebut hearsay testimony at his sentencing hearing in violation of § 921.141(1). I can find prejudice only if, but for appellate counsel's omission, there was a reasonable probability that the Florida Supreme Court would have concluded the following (1) that Mr. Phillips was denied a fair opportunity to rebut hearsay evidence and (2) that this denial was grounds to remand the case for a new sentencing hearing. *See Strickland*, 466 U.S. at 695.

Rebuttal

The Florida Supreme Court has held that "[a]llowing the testimony of a jailhouse informant to be heard through the testimony of another witness" at the penalty phase without giving the defendant an opportunity to rebut out-of-court statements constitutes error. *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000) (*citing Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998); *Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985); *Gardner v. State*, 480 So. 2d 91, 94 (Fla. 1985); *Engle v. State* 438 So. 2d 803, 813 (Fla. 1983)). "[T]he mere fact that a defendant has an opportunity to cross-examine the witness who is testifying to the hearsay does not alone constitute a fair opportunity to rebut the hearsay statement." *Id.* at 45. However, the Florida Supreme Court also held that such error can be harmless beyond a reasonable doubt where the case has several strong and indisputable aggravators. *Id.* This was the law in Florida at the time

[27] In this respect, Florida's death penalty statute is congruent with federal law. *See also Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1076 (11th Cir. 2013) ("[H]earsay is admissible at capital sentencing and . . . a defendant's rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay.").

Mr. Phillips' appellate counsel could have raised the claim on direct appeal and of which he should have been aware.

At the *Spencer* hearing, the re-sentencing court found four aggravating factors when sentencing Mr. Phillips to death (1) the capital felony was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (3) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (4) the homicide was cold, calculated, and premeditated. The first two aggravators were clearly established. At the time of his conviction, Mr. Phillips was on parole for armed robbery and was previously convicted for assault with intent to commit first degree murder. D.E. 13, Vol. 8, Appx. JJ at 827-88. As to the third and fourth aggravators, however, the re-sentencing judge relied, in part, on the trial and hearsay testimony of the inmate informants, which Mr. Phillips argues he was unable to rebut at re-sentencing.

After careful review, I find that Mr. Phillips was denied a fair opportunity to rebut the State's hearsay evidence. The re-sentencing court barred Mr. Phillips from cross-examining Detective Smith about exchanges made between the prosecution and hearsay witnesses, including sentence reductions and monetary compensation. D.E. 13, Vol. 6, Appx. JJ at 269-70. Mr. Phillips was able to cross-examine Detective Smith without objection about the State's plea deal with Larry Hunter; a two-hundred dollar reward that Mr. Hunter was paid by the prosecution in exchange for testifying against Mr. Phillips, and about Mr. Hunter's affidavit that recanted his trial testimony. D.E. 13, Vol. 6, Appx. JJ at 685-86. But the jury was not permitted to hear about similar benefits given to witnesses Malcolm Watson (vacating his life sentence) and Tony Smith (reinstating him to probation). D.E. 13, Vol. 6, Appx. JJ at 450-55. The re-sentencing judge should have permitted Mr. Phillips to cross examine Detective Smith about these other hearsay witnesses in an effort to rebut the State's case. Failure to do so constituted error. *See Rodriguez*, 753 So. 2d at 44. My inquiry, however, does not end there. To prevail on his ineffective assistance of appellate counsel claim, Mr. Phillips also must show that such error was not harmless. *See Strickland*, 468 U.S. at 695. If the error was harmless, appellate counsel cannot be deficient for failing to raise the claim on direct appeal.

Remand for New Sentencing

As the jury voted 7-5 for the death sentence, it is not a foregone conclusion that such error was harmless. Nevertheless, Mr. Phillips' claim fails because, at best, the omitted rebuttal testimony could only have eliminated the third and fourth aggravating factors found by the trial court (disrupting a governmental function and homicide committed in a cold, calculated and premeditated manner). As to the CCP aggravator, the re-sentencing judge relied upon forensic evidence related to nature of the gunshot wounds, bullet casings found on the scene, and the testimony of witnesses near the crime scene—in addition to the disputed hearsay testimony—in concluding that the homicide was cold, calculated, and premeditated. D.E. 13, Vol. 8, Appx. JJ at 832. Analyzing the record most favorably towards Mr. Phillips, the jury would have had two aggravators which were established without the hearsay testimony of the informants (the capital felony was committed by a person under a sentence of imprisonment and the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person) to weigh against only one non-statutory mitigator of a difficult upbringing, which the judge gave little weight. D.E. 13, Vol. 8, Appx. JJ at 842.

In addition to Detective Smith, the prosecution called (1) Lieutenant Gary Handcock, the police officer who investigated the armed robbery that Mr. Phillips was convicted of in 1973; (2) Nannette Brochin, the parole officer who was the subject of Mr. Phillips' affection and was at the heart of the dispute between Mr. Phillips and Mr. Svenson; (3) Mike Russell, the parole office married to Nannette Brochin who had contact with Mr. Phillips during his parole revocation proceedings; (4) Benjamin Rivers, a parole officer present at the meetings between Mr. Svenson and Mr. Phillips regarding parole revocation and special conditions of his probation; (5) Reggie Robinson, a corrections probation supervisor, who investigated the shooting at the Brochin/Russell home and who interviewed Mr. Phillips during the investigation; (6) Michael Mangoso, a probation supervisor who had dealings with Mr. Phillips about transferring parole officers and Mr. Svenson's denial of Mr. Phillips' request; (7) Dr. Barnhart, a forensic pathologist at the Dade County Medical Examiner's Office, who testified regarding the autopsy report and medical examiner's notes; (8) Dr. Miller, a psychiatrist who interviewed Mr. Phillips and conducted a diagnostic interview, and (9) Detective Greg Smith (Detective Smith's testimony was not limited to the hearsay statements of the informants). The record reflects that

the admission of hearsay statements, which went unrebutted, was harmless beyond a reasonable doubt because the State established several strong and indisputable aggravators separate and apart from the hearsay statements. Further, I am not convinced that even if the statements had been rebutted as requested by defense counsel, this would have made a difference in the determination that those four aggravating factors existed. Therefore, I find that the re-sentencing court's error was harmless beyond a reasonable doubt. Because Mr. Phillips has failed to show that this claim would have had merit on direct appeal, he has not met his burden to successfully assert an ineffective assistance of appellate counsel claim. *Philmore*, 575 F.3d at 1265. Habeas relief is denied.

L. Mr. Phillips' Claim Regarding the Standard of Proof

Mr. Phillips' final claim for habeas relief is that the standard of proof that Florida applies to determination of mental retardation is unconstitutional. Mr. Phillips argues that *Cooper v. Oklahoma*, 517 U.S. 348 (1996), "sets the Constitutional floor regarding the standard of proof." D.E. 3 at 28. Mr. Phillips raised this claim on appeal from the denial of his Rule 3.203 motion.

Mr. Phillips asserted that he is mentally retarded and, therefore, he cannot be executed. *See Atkins v. Virginia*, 536 U.S. 304 (2002). In denying his mental retardation claim, the circuit court applied the "clear and convincing evidence" standard of Fla. Stat. § 921.137(4), (2001). Mr. Phillips argues that the application of this standard to this claim is unconstitutional. The Florida Supreme Court did not decide this specific claim because it found that, based on the record, Mr. Phillips failed to meet even the more lenient "preponderance-of-the-evidence" standard. *Phillips*, 984 So. 2d at 509 n.11. I agree.

I have analyzed Mr. Phillips' mental retardation claim at great length in this order and find that even under an application of a less stringent and much more lenient preponderance standard, Mr. Phillips' claim would still fail. Therefore, I can resolve Mr. Phillips' claim without reaching the merits of his underlying claim regarding the standard of proof.

Even if Mr. Phillips had satisfied the preponderance of the evidence standard but had fallen short of the clear and convincing evidence standard, however, I note that his claim still fails because "*Atkins* simply did not consider or reach the burden of proof issue, and neither has any subsequent Supreme Court opinion. There is the possibility that the Supreme Court may *later* announce that a reasonable doubt standard for establishing the mental retardation exception

to execution is constitutionally impermissible." *Hill v. Humphrey*, 662 F.3d 1335, 1348 (11th Cir. 2011) (*en banc*). Under AEDPA, I can analyze only what the holdings of the Supreme Court established the law to be in 2008, when the Florida Supreme Court decided *Phillips*, 984 So. 2d at 509.

Further, even if Mr. Phillips' claim regarding the standard of proof shows a rule in Florida which is "incorrect or unwise," it is not enough to overcome the AEDPA deference. "[I]n the 219–year history of our nation's Bill of Rights, no United States Supreme Court decision has ever suggested, much less held, that a burden of proof standard on its own can so wholly burden an *Eighth Amendment right* as to eviscerate or deny that right." *Hill*, 662 F.3d at 1338. Therefore, even if I had concerns that Florida's clear and convincing standard of proof was problematic, absent clearly established law, I am constrained by AEDPA. "*Atkins's* decision to leave the task to the states not only renders the federal law *not* 'clearly established,' but also makes it 'wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant's mental retardation.'" *Id.* at 1348 (quoting *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) (noting that *Atkins* explicitly left the procedures governing its implementation to the states)). Regardless, Mr. Phillips has failed to meet the less stringent preponderance of the evidence standard that he asserts should be his burden of proof under the Constitution. D.E. 3 at 28. Habeas relief is denied.

XV. CONCLUSION

For all the reasons set forth above, it is

ORDERED AND ADJUDGED that Mr. Phillips' petition for writ of habeas corpus is **DENIED**. The Clerk of the Court is instructed to **CLOSE** the case.

DONE and **ORDERED** in chambers at Miami, Florida, this 19th day of November, 2015.

Adalberto Jordan
United States Circuit Judge

Copies to counsel of record

APPENDIX K

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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:

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

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

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

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

Affirmed.

West Headnotes (12)

[1] **Sentencing and Punishment** Questions of fact

Supreme Court reviews the circuit court's determination that capital defendant is not mentally retarded, within meaning of statute exempting the mentally retarded from the death penalty, to determine whether it is supported by competent substantial evidence. West's F.S.A. § 921.137.

1 Case that cites this headnote

[2] **Sentencing and Punishment** Evidence

Capital defendant's mental retardation claim failed even under the more lenient preponderance-of-the-evidence standard, and thus Supreme Court would not address defendant's claim that the clear and convincing evidence standard of statute prohibiting the execution of a mentally retarded defendant was unconstitutional; there was no evidence demonstrating capital defendant had significant subaverage intellectual functioning existing concurrently with deficits in his adaptive behavior. West's F.S.A. § 921.137.

10 Cases that cite this headnote

[3] **Sentencing and Punishment** Evidence

Capital defendant did not satisfy "significantly subaverage intellectual level" prong of definition of mental retardation in statute prohibiting the execution of a mentally retarded defendant, even though defendant scored a 70 on one IQ test, where a majority of defendant's IQ scores exceeded 70, and defense experts, who opined that defendant had significantly subaverage intellectual level, failed to perform a complete evaluation of defendant in that they did not test for malingering. West's F.S.A. § 921.137(1).

8 Cases that cite this headnote

[4] **Criminal Law** Opinion evidence

Supreme Court gives deference to trial court's evaluation of the expert opinions.

1 Case that cites this headnote

[5] **Sentencing and Punishment** Evidence

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Capital defendant did not satisfy "deficits in adaptive behavior" prong of definition of mental retardation in statute prohibiting the execution of a mentally retarded defendant; the only defense expert to evaluate defendant's adaptive functioning relied on technique of retrospective diagnosis, mental health experts generally agreed that defendant possessed job skills that people with mental retardation lacked, defendant functioned well at home, and defendant's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicated that he had the ability to adapt to his surroundings. West's F.S.A. § 921.137(1).

4 Cases that cite this headnote

[6] **Sentencing and Punishment** Persons with intellectual disabilities

Capital defendants claiming mental retardation in order to preclude execution are required to show that their low IQ is accompanied by deficits in adaptive behavior. West's F.S.A. § 921.137(1).

3 Cases that cite this headnote

[7] **Sentencing and Punishment** Persons with intellectual disabilities

To be diagnosed mentally retarded within meaning of statute prohibiting the execution of a mentally retarded defendant, defendant 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. West's F.S.A. § 921.137(1).

2 Cases that cite this headnote

[8] **Sentencing and Punishment** Planning, premeditation, and calculation

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.

[9] **Sentencing and Punishment** Planning, premeditation, and calculation

A cold, calculated, premeditated 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.

1 Case that cites this headnote

[10] **Sentencing and Punishment** Persons with intellectual disabilities

The actions required to satisfy the cold, calculated, and premeditated aggravator are not indicative of mental retardation.

1 Case that cites this headnote

[11] **Sentencing and Punishment** Evidence

Capital defendant failed to prove "onset before age 18" prong of definition of mental retardation in statute prohibiting the execution of a mentally retarded defendant; defendant's poor performance in school was easily attributed to his truancy, his repeated suspensions from school, and his juvenile delinquency, and anecdotes about defendant's childhood did not suggest a manifestation of low IQ and adaptive deficits before age 18. West's F.S.A. § 921.137(1).

[12] **Sentencing and Punishment** Evidence

Competent, substantial evidence supported trial court's determination that capital defendant was not mentally retarded within meaning of statute prohibiting the execution of a mentally retarded defendant; the majority of defendant's IQ scores exceeded 70, defendant supported himself and functioned well at home, and defendant's school history did not suggest onset of significantly subaverage general intellectual functioning with deficits in adaptive behavior before the age of 18. West's F.S.A. § 921.137(1).

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9 Cases that cite this headnote

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).

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.

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.

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

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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.

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.

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

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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.

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]

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.

[1] **[2]** 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]

*510 A. Intellectual Functioning

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[3] 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.")

[4] 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

[5] **[6]** **[7]** 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

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"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."

[8] [9] [10] 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."

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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

[11] **[12]** 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

Footnotes

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.

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).

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.

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.

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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.

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.

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.

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.

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