**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC04-2476**

**HARRY FRANKLIN PHILLIPS,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

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# SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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WILLIAM M. HENNIS III
Florida Bar No. 0066850
Litigation Director

NEAL A. DUPREE
Capital Collateral Regional Counsel Southern Region
Florida Bar No. 311545
101 N.E. 3rd Ave., Ste. 400
Ft. Lauderdale, FL 33301
(954) 713-1284
Counsel for Appellant

## PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Fla. R. Crim. P. 3.203/3.851 relief following an evidentiary hearing concerning mental retardation, as well as various rulings made during the course of Mr. Phillips=s prior request for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

SuppR -- supplemental record on relinquishment;

T -- transcript of 2006 evidentiary hearing and motions hearings;

All other citations will be self-explanatory or will be otherwise explained.

## REQUEST FOR ORAL ARGUMENT

Mr. Phillips has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the issues at stake. Mr. Phillips, through counsel, accordingly urges that the Court permit oral argument.

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## SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The Initial Brief in the instant case was docketed April 12, 2005 and the State=s Answer on May 24, 2005. Undersigned counsel will rely on the Statement of the Case and the Facts in the prior briefing with only the following supplemental information.

This Court entered an order on May 27, 2005 relinquishing jurisdiction to the circuit court for a determination of mental retardation pursuant to Rule 3.203, Fla. R. Crim. P.[1]

[1] Mr. Phillips does not waive any arguments made in his Initial Brief.

An evidentiary hearing was held before the Honorable Israel Reyes in Miami, Florida on February 13-16, 2006. Mr. Phillips called Dr. Glenn Ross Caddy and Dr. Denis W. Keyes as his only two witnesses (T. 51-189; 190-374). The State called one witness, Dr. Enrique Suarez (T. 374-747). During the hearing, Mr. Phillips= counsel submitted several exhibits into evidence. (SuppR 196-197; 2022-2023).The State also submitted several items into evidence. (SuppR 1851). After the conclusion of the evidentiary hearing, Mr. Phillips submitted the Defendant=s Post-Evidentiary Hearing Memorandum on February 27, 2006. The State also filed a Memorandum (SuppR. 2270-2337). The circuit court then entered its Order Denying Defendant=s Motion to Vacate Judgment of Sentence on May 27, 2006 (SuppR. 2209-2253). Mr. Phillips filed a Notice of Appeal with the lower court on June 1, 2006 (SuppR. 2254).

Mr. Phillips= Motion for Permission to Submit Supplemental Briefing, filed with this Court on June 9, 2006, was granted on July 7, 2006.

## SUMMARY OF ARGUMENT

I. The lower court=s finding, following an evidentiary hearing, that Mr. Phillips was not mentally retarded was not based on competent and substantial evidence, but rather on a misplaced credibility findings, a misunderstanding of the facts and the law concerning mental retardation, and fact finding without competent and substantial evidence to support the findings below. The lower court=s finding also violated Mr. Phillips=s rights under the equal protection and due process clauses of the Fourteenth amendment as well as the Eight amendment=s prohibition on cruel and unusual punishment.

II. Other findings by the lower court were in error. The lower court=s finding that Mr. Phillips is not mentally retarded was in error because it relied on findings concerning maladaptive behavior that are not part of the Florida definition of mental retardation and on a standard of proof assigned to Mr. Phillips to prove the three prongs of the mental retardation definition by clear and convincing evidence, a violation of his due process and equal protection rights.

## I. MR PHILLIPS IS MENTALLY RETARDED AND IS NOT ELIGIBLE FOR THE DEATH PENALTY. THE LOWER COURT=S FINDING, FOLLOWING AN EVIDENTIARY HEARING, THAT MR. PHILLIPS WAS NOT MENTALLY RETARDED, WAS NOT BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE.

The order of the lower court found that Mr. Phillips did not prove by clear and convincing evidence that he is mentally retarded pursuant to Fla. R. Crim. P. 3.203, which was promulgated in order to provide a procedure by which a capital defendant could raise a claim of mental retardation under Fla. Stat. Section 921.137 (2001) (SuppR. 2209). As of October 1, 2004, Florida Rule of Criminal Procedure 3.203 and its definition of mental retardation applied to Mr. Phillips and his capital postconviction case. See Amendments of the Florida Rules of Criminal Procedure, 875 So. 2d 563 (Fla. 2004). This Court

affirmed that Atkins can be applied retroactively in Florida in Phillips v. State, 894 So. 2d 28 (Fla. 2004). Educational psychologist Dr. Denis Keyes prepared reports, dated November 23, 2004 and October 21, 2005 (Psychoeducational Report), that explain the bases of his clinical opinion in 2005 that Mr. Phillips is mentally retarded (SuppR. 210-216). He reaffirmed this opinion during his testimony. (T. 244-264). As detailed below, Mr. Phillips has demonstrated through the reports and testimony of Drs. Caddy and Keyes that he is mentally retarded and should be resentenced to life in prison.

The first prong of the definition of mental retardation is significantly subaverage general intellectual functioning. This generally means an intelligence quotient (IQ) that is two or more standard deviations below the mean, often represented by a IQ score of 70 or below.[2] However, even persons scoring above 70 may be considered mentally retarded given impaired adaptive functioning and onset before age 18. The United States Supreme Court in Atkins stated clearly that "an IQ between 70 and 75 is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition" Atkins, 122 S.Ct. 2242, 2245 n.5. (2002). This view is clearly

[2]The lower court=s finding that a full-scale IQ score of 70 is a borderline score is simply incorrect (SuppR. 2241). An IQ of seventy is exactly two standard deviations below the

reflected in both DSM-IV-TR and in the 2002 AAMR definition of mental retardation.[3]

The order of the lower court relies on Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005,) for the proposition that in Florida an IQ of 70 or below is required to meet the intellectual functioning prong of the mental retardation definition. (SuppR. 2234). Mr. Phillips did have a full scale WAIS III IQ score of 70 on clinical psychologist Dr. Glenn Caddy=s 2005 testing. As noted **supra**, neither the AAMR nor the American Psychiatric Association ever intended a fixed cutoff point for making the diagnosis of mental retardation and such a

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mean on a WAIS III test.

[3] The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments= strengths and limitations. Table 1.2 Operational Definitions, *Mental Retardation, Definition, Classification, and Systems of Support*, 10th Edition, Washington, DC, American Association on Mental Retardation, 2002 at 14.

* * *

Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Mental Retardation-Diagnostic Features , American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association,

cutoff score cannot be justified psychometrically.[4] The lower court did acknowledge that only a WAIS or Stanford Binet IQ test could be considered, thus the TONI III IQ screening test by state expert Dr. Suarez was not appropriate in the mental retardation evaluation context (SuppR. 2234). The lower court=s finding that the defendant=s borderline IQ scores of 74, 75, and 70 are not precise, explicit, lacking in confusion, or of such weight that they produced in this Court=s mind a firm belief or conviction, without hesitation, that the Defendant has noticeable sub average intellectual functioning is not predicated on the weight of the evidence (SuppR. 2242). This finding by the lower court, along with the credibility findings against Drs. Caddy and Keyes and in favor of Dr. Suarez, noted in the context of Dr. Suarez=s validity testing, simply ignore the enormous deficiencies and bias evident in the Suarez evaluation of Mr. Phillips (SuppR. 2242-2245).

In addition, this Court should consider the legislative history of Fla. Stat. 921.137 (2005), which specifically recognized that 70 was ***not*** a cutoff score for intellectual

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2000, at 41-42, 48.

[4] The 2002 AAMR System indicates that the SEM [standard error of measurement] is considered in determining the existence of significant subaverage intellectual functioning. In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error. *Mental Retardation* at 58-59.

functioning. The staff analysis preceding the statute states: The Department of Children and Family Services does not currently have a rule. Instead the Department has established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests.[5] In practice, two or more standard deviations from these tests mean that the person has an IQ of 70 or less, **although it can be extended up to 75**. Id., emphasis in original.

In his report, Dr. Keyes found that Mr. Phillips=s full scale WAIS III IQ score of 74 met the significantly sub-average general intellectual functioning prong of the mental retardation definition. As Dr. Keyes later testified, this was entirely consistent with both the WAIS-R IQ score administered by Dr. Carbonell in 1987 (full scale IQ = 75) and the WAIS III administered by Dr. Caddy in 2005 (full scale IQ = 70).[6]

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[5] Indeed, because the Department of Children and Family Services ( DCF ) designated one of the tests to be administered to determine mental retardation as the WAIS-III, it is implicit in the statute and Rule 3.203 that a standard error of measurement of +/- 5 be considered in assessing IQ. The tests themselves require such an interpretation.

[6]While Dr. Caddy did not offer an opinion as to retardation, but did opine that the full scale WAIS III IQ score of 70 that he obtained in his 2005 testing of Mr. Phillips was extremely low or intellectually deficient. (T. 161). He also agreed that the WAIS-R full scale score of 75 obtained by Dr. Carbonell in 1987 and the WAIS III full scale score of 74 obtained by Dr. Keyes in 2000 all fit within a well accepted margin of error of plus or minus five points on such tests when compared with his results (T. 163-165). He also testified that DSM-IV-TR allows the diagnosis of mental

The lower court failed to rely on the TONI because it is simply not possible that the creators of the TONI-III intended that a fifteen minute multiple choice screening test would be used to determine a nonverbal IQ score to be used to determine whether someone lives or dies. The lower court found that the results of the multiple administrations of the WAIS from 1987 until 2005 were questionable because only Dr. Suarez did any validity testing. (SuppR. 2242-2245). However the testimony below of Dr. Caddy and Dr. Keyes demonstrates that there were validity considerations in their testing (SuppR. 78). Dr. Keyes testified that it is extremely difficult to malinger on a WAIS (SuppR. 219-231; 324; 352-360). Good clinical judgement is all about identifying malingering. The consistency of the IQ scores obtained over the years casts considerable doubt on the lower court=s credibility findings supporting Dr. Suarez=s assertion that Mr. Phillips was malingering on tests that Dr. Suarez did not observe. As Dr. Keyes stated, it is difficult even for experts in mental retardation, like school psychologists, to fake convincingly.[7] There is absolutely no

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retardation in individuals with full scale IQs in the range of 70 to 75 so long as those persons have significant adaptive behavior deficits. (T. 161).

[7]Dr. Suarez did not agree. He said it was easy to say, I don=t know, in answer to questions. This is not born out by the record. On cross-examination, for example, the State took issue with Dr. Keyes=s scoring of two items on the information

evidence that Mr. Phillips gave anything other than full effort during the administrations of the WAIS. Dr. Suarez=s speculations do not diminish that fact. And Dr. Suarez was forced to admit on cross that there are accepted ways, other than validity testing, to guard against malingering (T. 620-629).

The lower court=s order ignores the fact that Dr. Suarez spend an inordinate amount of his total interview and testing time with Mr. Phillips doing what he asserted were validity tests. This is particularly noteworthy in light of his IQ testing taking a mere fifteen minutes and is further evidence of his desire to please the State rather than to reach an impartial and objective result.

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subtest of the WAIS. On one item Mr. Phillips had responded to the question What is winter with the response Winter is the coldest month. This is a wrong response because winter is not a month but a season. To fake such an answer with this degree of subtlety requires a level of sophistication that not even the State alledges Mr. Phillips possesses. Mr. Phillips=s answer as to Who was Gandhi? , Ruler of India , is not a full credit answer because Ghandhi never ruled India. This answer implies honest effort rather than intent to deceive.

The overall results of the validity testing in the record as to potential malingering are inconsistent and equivocal at best as is demonstrated by the Test of Memory Malingering (TOMM) results that indicated that Mr. Phillips was not malingering (SuppR. 485-487).

Dr. Suarez=s decisions about what to put in his final report and what he left out were evidence of his bias (SuppR. 233-240) He excluded from his report most anything helpful to Mr. Phillips claim of mental retardation. On the VIP, which his report noted was invalid as to both the nonverbal subtest and the verbal subtest, he failed to include a sentence from the computer scored Interpretive Report=s Overview of Validity that noted In some cases, a finding of invalidity on the VIP indicates insufficient effort to respond correctly or suboptimal attention and concentration during testing (SuppR. 2122-2132)

Similarly, as to the section of the Interpretive Report concerning Performance Curve Interpretation (Nonverbal Subtest) , Dr. Suarez failed to include the following language in his report:

> Based on the predominant characteristics of this individuals=s Performance Curve, the best conclusion is that he did not intend to answer the items correctly but he did not try very hard to answer them incorrectly. It is also possible that he was not engaged in the task or that he was generally not interested in completing the test as instructed. His response style is characteristic of irrelevant responding.

> Alternatively, he may have an extremely limited capacity to comprehend even the simplest items on the test. Such an extremely limited capacity should be immediately evident from a review of his history (e.g., if he has mental retardation).

(SuppR. 2125).

Dr. Suarez also neglected to include in his report information from the computer interpretation of the verbal subtest that Mr. Phillips answered all of the ten easiest items correctly or that [t]his is a good indication that he intended to respond correctly to these items. His apparent intention to respond correctly is further evidenced by his continued success on most of the 35 easiest items. (SuppR. 2127). This section of the Interpretive Report also noted that Mr. Phillips=s inconsistent responses on the more difficult parts of the test may indicate that the test-taker was tired, distracted, or insufficiently motivated to do his best. The computer report also noted that Mr. Phillips=s performance curve on the verbal subtest suggests that he has at least significantly below average word knowledge. None of this information was included in Dr. Suarez=s report.

There was testimony from both Dr. Keyes and Dr. Caddy that the MMPI, administered by Dr. Suarez, is simply not a suitable test to be administered to the mentally retarded population. Dr. Caddy also testified that a careful review

should be done of any elevated clinical scales to determine what was causing any elevation (T. 86-91; 274-278). Dr. Suarez chose to include very little of the helpful language from the computer scored General Corrections Interpretive Report MMPI-2 that was obtained from his evaluation of Mr. Phillips (SuppR. 2105-2117). Basically, his report states that a profile was obtained, though of questionable validity, that showed significant elevations on eight of the ten scales. He chose to include what was harmful from the computer scored profile and to omit what was arguably helpful.

Dr. Suarez=s clinical judgement as to the results of the Memory Fifteen Item Test (MFIT), as noted in his report, speaks for itself. He testified that MFIT is a very brief screening test for memory malingering (T. 440). Mr. Phillips got 9 of 15 items correct. Dr. Suarez then applied a recognition recall protocol based on research at UCLA in which Mr. Phillips only recognized 6 of the 15 items. Dr. Suarez then concluded that Mr. Phillips was not giving forth full effort and was suppressing his real ability (T. 485).

Mr. Phillips demonstrated below that he meets the second requirement of the definition of mental retardation. Dr. Keyes=s report found that Mr. Phillips met the criteria of having significant deficits in adaptive behavior in multiple areas.

Both formal testing and anecdotal vignettes show that Mr. Phillips=s adaptive functioning is significantly impaired. As Dr. Keyes testified, he obtained information from a variety of sources and performed both formal scaled instruments as well as informal interviews and document review (T. 246). Dr. Keyes administered valid formal adaptive functioning instruments to Mr. Phillips=s sister Ida, his childhood friend Norman Parker, and Mr. Phillips himself.[8] He utilized the Vineland with Ida, and obtained valid scores in all the domains covered by the test, namely communications, daily living skills and socialization.[9] [10] In addition to the Vineland, Dr. Keyes obtained valid scores on the Scales of Independent Behavior - Revised (SIB-R) test, which was administered to Mr. Phillips

[8] The Vineland protocol requires that you are not allowed to get more than five don=t knows in any one area See T. 249.

[9] As Dr. Keyes further testified, these areas are broken down into sub - domains. Communication is the first one which is expressive, receptive and written communication; daily living skills is divided into personal, domestic and community skills; and the socialization domain which is interpersonal relationships, play leisure and coping skills. See T. 250.

[10] Dr. Keyes also administered the Vineland test to Mr. Phillips=s mother, but she did not know the answers to many of the questions, and so Dr. Keyes was unable to get a valid score for her instrument. However, as he stressed, the information from his face to face interview is still qualitatively valuable. Dr. Keyes was not surprised about Mr. Phillips=s mother having less information about Mr. Phillips=s adaptive skills because at the time he interviewed her she was very old, and because she had spent the majority of her time working outside the home when Mr. Phillips was growing up.

himself and to Norman Parker, a childhood friend.[11] He achieved valid results on both administrations. (T. 252) Additionally he conducted several interviews that were not part of the scaled tests with Mr. Phillips=s neighbor Mr. Coachman, his brother Julius, and Mr. Parker. Through these interviews he obtained several stories concerning Mr. Phillips=s lifelong inability to adapt. For example, Mr. Phillips could not understand which bathroom to use in public, not understanding that he couldn=t use either the women=s bathroom or the whites only bathroom. (T. 254). He didn=t understand that one does not enter a swimming pool fully clothed. And he didn=t understand that his father was abusive and so kept returning to him, despite the father=s continual rejection and abuse (T. 256). The lower court=s order relied in part on the administration of the ABAS instrument by Dr. Suarez to Florida prison employees and his testimony about said administration to suggest that Mr. Phillips=s adaptive functioning is not impaired (SuppR. 2245).[12] Dr. Suarez chose to use the Adaptive Behavior Assessment System (ABAS) instrument for purposes of his adaptive functioning evaluation. However,

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See T. 250-251.

[11] The SIB-R may by the terms of its protocol be administered to the subject himself, unlike the Vineland. (T. 251)

[12]Mr. Phillips does not waive his right for counsel to be present when the State=s mental retardation expert interviews DOC employees, state actors, for the purpose of administering ABAS instruments as part of an evaluation pursuant to Fla. R.

Dr. Suarez chose to administer the instrument over the telephone only to individuals working at Union Correctional Institution, where Mr. Phillips is currently housed. He attempted to justify his choice of subject by asserting that adaptive functioning has to be present i.e. concurrent with the IQ testing. In so doing, Dr. Suarez ignored the admonition in the ABAS manual against over reliance on reporters who have to guess on too many of the items in the questionnaire. Dr. Keyes testified that each of the prison employees guessed on between 127 and 211 questions out of a total of 239 on the instrument (SuppR. 269-274). As Dr. Keyes noted, the ABAS protocol strongly admonishes the administrator of the instrument to be cautious in interpreting the instrument when more than four items in any give skill area, or around 40 items in total are guessed. Dr. Suarez simply did not do this, but concretely persevered with his prison sources despite their manifest lack of real hard information.

As Dr. Keyes pointed out, it is not appropriate for prison personnel to be utilized in this sort of evaluation (T. 257). In sum, the structure setting of maximum security prison life helps people with mental retardation very much. (T. 257).[13]

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Crim. P. 3.203(c)(4). See SuppR. 139-152; 157-158.

[13] Dr. Suarez claimed that he was able to utilize the

he execution of mentally retarded offenders serves neither the purposes of retribution nor deterrence and thus violates the Eighth Amendment=s prohibition against cruel and unusual punishment. Atkins 122 S.Ct 2251. Thus, the primary reason for excluding persons with mental retardation from execution is their lesser culpability. Mr. Phillips=s ability to adapt to prison life is simply not relevant to his relative culpability for a crime well before Dr. Suarez=s ABAS administrations.

**II. OTHER FINDINGS BY THE LOWER COURT WERE IN ERROR.**

Rather than conducting a qualitative analysis based on all the adaptive functioning data available, Dr. Suarez chose to focus on several instances of alleged maladaptive behavior on the part of Mr. Phillips, the circumstances of which have been

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prison respondents because he could analogize their guessed responses to real life observations in the prison settings. He claimed that he made a notation when this was so. However, the incredibly sketchy number of notations on his ABAS score sheets tells another story. On the six score sheets, there are respectively 1, 1, 3, 5, 6 and 16 notations compared with the hundreds of guessed items on each score sheet. Furthermore, Dr. Suarez=s testimony as to the type of analogy he drew from the prison guards is patently false. Suarez testified that the guards could tell how Mr. Phillips could manage, for example, by seeing him pack up his belongings when he goes to court. The lower court relied on this testimony in support of its findings below. (SuppR. 2245). However of the DOC employees interviewed, only the psychological specialist Lisa Wiley, who does not have day to day contact with Mr. Phillips had even been at UCI in 1994, the last time Mr. Phillips was transported to court prior to the 2006 evidentiary hearing!

disputed during the life of this case.[14] While these facts may be constituted within the law of the case, they are just part of the attempt to impeach a diagnosis of mental retardation with a generic charge of street smarts. The State introduced their exhibits No. 1 and No. 2 during the cross-examination of Dr. Keyes. (T. 253-260). Dr. Keyes testified that he had seen the Bro. White letter, State No. 2, but not the alibi note, State No. 1. Dr. Keyes testified that standing alone and based on the State=s representation that both documents were authored by Mr. Phillips, the level of planning and the handwriting ability displayed in the documents does not fit in with the picture [of Harry Phillips] that I have seen. (T. 260).

The State introduced these two documents and represented

[14]The State and Dr. Suarez made much of the so called Bro. White letter and the alibi letter, which it is claimed were written by Mr. Phillips. It is true that Mr. Phillips=s fingerprints were found on two of the five documents introduced at trial. However, while Mr. Phillips may or may not have physically written both the documents introduced at the 2006 evidentiary hearing (as was stipulated at trial long before the Brady evidence presented at the 1988 evidentiary hearing was known), there is absolutely no evidence that he actually authored their contents. Indeed, snitch witness Larry Hunter stated in his November 1987 affidavit, which was admitted into evidence at the 1988 evidentiary hearing, that it was Hunter and not Mr. Phillips who dictated the alibi note. Affidavit of Larry Hunter at 4-5. Hunter=s account presents Mr. Phillips as someone who was so easily manipulable that he believed the snitch witnesses were trying to assist him. Furthermore, the Bro White letter is internally inconsistent. On the one hand it professes Mr. Phillips=s innocence, and on the other suggests the need for snitch witness elimination. This is highly inconsistent and

that they impeached Mr. Phillips= low adaptive functioning and skill levels by providing evidence that he had highly developed maladaptive behavior, specifically great planning skills directed to creating a false alibi and plotting to kill potential snitch witnesses in his case. (T. 293). Dr. Keyes agreed on re-direct that the American Association on Mental Retardation did not consider problem behavior that is maladaptive as a characteristic or dimension of adaptive behavior. The AAMR considers such maladaptive behavior as something to be considered as part of clinical judgment when making a diagnosis based on interpretation of adaptive behavior scores (T. 351).The lower court=s order adopted the State=s position that maladaptive behavior, criminal acts and so-called street smarts negated any deficits in Mr. Phillips=s adaptive behavior noted in Dr. Keyes=s testimony and report[15] (SuppR. 2246)( The sophistication, the incredible planning, resources,

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demonstrates disordered thinking rather than a clever plan.

[15]The first page of Dr. Keyes=s 2005 report includes the scores and percentile ranks obtained on his administrations of the Vineland Adaptive Behavior Scales and the Scales of Independent Behavior-Revised. His findings were summarized on Page 2: [Mr. Phillips=s] adaptive skills such as communication, daily living skills, socialization, community living and independence skills are so distorted as to put him in the lowest tenth of a percentile of the general population. Academic achievement testing indicated that Mr. Phillips=s past and present learning in areas such as written language and math, is also impaired. The results of this evaluation and the lengthly associated adaptive interviews confirm that Harry Franklin Phillips has a significant cognitive and

coordination and collaboration show planning skills ). This Court should note that cross-examination of Dr. Suarez concerning the alibi note and the Bro. White letter indicated that he was simply unaware of any of the history of these issues in Mr. Philips=s case. Dr. Caddy testified that he really thought the Bro. White letter showed evidence of concrete thinking and a lack of appreciation of the likely consequences of sending it (SuppR. 152). [T]he notion that you would send something like that into a jail system and not expect that it may be detected and just get you in far greater problems is a lack of judgment, and that lack of judgment would be consistent with someone who is not functioning (SuppR. 153). The lower court=s order ignores the fact that the presence of adaptive or maladaptive strengths does not preclude or refute a diagnosis of mental retardation.[16]

The same considerations hold true for Mr. Phillips=s relatively good performance in the Woodcock Johnson test of academic achievement administered by Dr. Keyes. Some improvement in the Mr. Phillips raw scores on the Wide Range Achievement Tests administered by Dr. Carbonell in 1987 and Dr. Suarez in 2005 was also evident. These improvements are contra-indicative

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adaptive impairment, mental retardation.

[16] As Dr. Keyes noted, the DSM-IV requires significant adaptive deficits on only 2 of a total of 10 areas of adaptive functioning for a diagnosis of mental retardation to be made. Mentally retarded people can have adaptive and maladaptive strengths.

of malingering. Dr. Keyes stated that this is not an unusual phenomenon in individuals who have been on death row for a number of years (T. 399-400). Academic achievement that is higher than an individual=s IQ simply does not preclude mental retardation. It simply means that the individual has worked hard to better himself in that field and has a relative adaptive strength in that one discrete area.

The lower court found that Mr. Phillips has not shown by clear and convincing evidence that the onset of his low IQ and adaptive deficits occurred before age 18 (SuppR. 2248-2249). It is entirely appropriate to diagnose mental retardation in an adult where there is no definitive diagnosis of mental retardation before age 18, through the technique of retrospective diagnosis. Indeed it is necessary in individuals such as Mr. Phillips who came up through a segregated school system, in which no provision for special education was made. Dr. Keyes took into account Mr. Phillips=s school records, and his interviews with friends and family as well as affidavits to formulate his opinion that Mr. Phillips=s disability is long standing and was evident before the age of 18.[17] Thus the

[17] Clearly Dr. Suarez did not look at this prong of the mental retardation definition because he purported not to find the first two prongs.

evidence is un-refuted that Mr. Phillips=s condition had its onset before he reached 18. Relief should be granted.

The lower court relied on the legal standard of clear and convincing evidence as applicable to proving up a defendant=s mental retardation in Florida. (SuppR. 2228-2229; 2250). Florida=s use of the clear and convincing standard places it in the minority of the 18 states with pre-Atkins statutes that prohibited the death penalty for the mentally retarded in some form. The United States Supreme Court=s decision in Cooper v. Oklahoma, 517 U.S. 348 (1997), sets the Constitutional floor regarding the standard of proof. The Cooper Court found that the procedural consequences to a defendant of an erroneous determination of competency were dire, and outweighed any interest the State had in creating procedural rules or standards, especially those with little or no historical roots of modern acceptance. Cooper, 517 U.S. at 364-68. The consequence of an erroneous determination regarding mental retardation for a capital murder defendant is even more dire, because such a determination could result in the impermissible imposition of a death sentence.

Currently, 24 of the 30 jurisdictions to have decided the issue of the standard of proof required in mental retardation presentations have adopted the preponderance of the evidence

standard.[18] And, because of the New Jersey Supreme Court=s recent decision, 25 of 30 States or jurisdictions require less than clear and convincing evidence to prove mental retardation.[19]

This Court=s holding in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), suggests that there are limits on the lower court=s discretionary power when different results emerge out of similar factual circumstances. Dr. Suarez=s approach to determining Mr. Phillips=s adaptive functioning was objectively unreasonable and the lower court=s reliance on his data and testimony to the exclusion of Drs. Caddy and Keyes was objectively unreasonable and an abuse of discretion.

**CONCLUSION**

[18] Ark. Code Ann. 5-4-618; Cal. Penal Code 1376; Idaho Code 19-2515A; Ind. Code 35-36-9-6; 725 ILCS5/114-15; K.R.S. 532.135; L.S.A.- R.S. 28:381 (28); Md. Code 2-202; Mo. Rev. Stat. 565.030; Neb. Rev. Stat. 28-105.01; Nev. Rev. Stat. Ann. 174.098; N. M. Stat. Ann. 31-20A.- 2.1; N.C. Gen. Stat. 39-13-203; Utah Code Ann. Sec. 77-15a-104; Va. Code Ann. 19.2-264.3:1.1; Rev. Code Wash. 10-95-030; 18 U.S.C.A. 3596 ( c ); See also Chase v. State, 873 So.2d 1013 (Miss. 2004); State v. Lott, 779 N.E. 2d 1011 (Oh. 2002); Blonner v. State, 127 P.3d 1135 (Okla. 2006); Commonweath v. Miller, 888 A.2d 624 (Pa. 2005); Franklin v. Maynard, 588 S.E. 604 (S.C. 2003); Ex parte Briseno, 135 S.W. 3d 1, 12 (Tex. Crim. App. 2004).

[19] Thirty-six States and the United States Government provide for the death penalty. Thus, six States with the death penalty, including Florida, have not ultimately decided what burden of proof is required in determining mental retardation. Recently, the New Jersey Supreme Court accepted a similar argument and now requires the State to prove beyond a reasonable doubt that a capital defendant is not retarded. See State v. Jimenez, 880 A.2d 468 (N.J. 2005).

**WHEREFORE,** counsel for Mr. Phillips respectfully requests that this Court enter an order finding Mr. Phillips to be mentally retarded pursuant to Florida Rule of Criminal Procedure 3.203 and thus ineligible for the death penalty pursuant to Atkins v. Virginia, 122 S. Ct. 2242 (2002).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant=s Initial Brief has been furnished by first-class postage prepaid to Ms. Sandra S. Jaggard, Asst. Attorney General, Office of the Attorney General, Capital

Appeals Division, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131-2407 on March 27, 2007.

**CERTIFICATE OF COMPLIANCE**

I hereby affirm that this Supplemental Initial Brief satisfies Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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WILLIAM M. HENNIS III
Florida Bar No. 0066850
Litigation Director
Capital Collateral Regional
Counsel-Southern Region
101 NE 3rd Avenue, Ste. 400
Fort Lauderdale, FL 33301