IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,731

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that the Court allow oral argument in this capital appeal.

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STATEMENT OF THE CASE AND FACTS

Harry Franklin Phillips was convicted of first degree murder in the death of Bjorn Thomas Svenson. Phillips v. State, 476 So. 2d 194 (Fla. 1985). The trial court imposed a death sentence. This Court affirmed. Id. Mr. Phillips received ineffective assistance of counsel at capital sentencing and the death sentence was vacated. Phillips v. State, 608 So. 2d 778 (Fla. 1992).

a. The State's Resentencing Case

Lt. Gary Handcock of the Metro-Dade Police Department testified that two black males had committed a robbery at a liquor store (R. 276). He described several specific and random details about this liquor store robbery (R. 277, et seq.). Although he was not present during the incident, he speculated that they had prior knowledge of where the money was (R. 277-78); described what the manager had done before the robbery (R. 278); suggested that "the subjects" knew their way around the store (R. 278); testified that the robbers had guns (R. 279); talked about the robbers going through the warehouse area (R. 279); gave his opinion about their thinking (R. 279, "You had to know your way through the warehouse"); testified about what different people saw during the robbery (R. 279, 'They were seen by different people along the way"); said that an employee had been tied up (R. 279); said that an employee chased them and a "shoe came off one of the subjects" (R. 279); and testified about their driving away in a damaged car (R. 279-80).

A "BOLO" was put out (R. 280). Within two days, a similar car was stopped (R. 280). Mr. Phillips was in the car (R. 280). Mr. Phillips signed a Miranda Rights Waiver and a consent to search and agreed to go to the police office (R. 281). He agreed to have his photo taken (R. 281). He wafted at the office while the police showed his photo to people (R. 281). People at the scene identified his photo (R. 281). Lt. Handcock arrested Mr.

Phillips (R. 281). Mr. Phillips agreed to a shoe imprint (R. 282). The shoe from the scene was matched to Mr. Phillips by the police (R. 282). Mr. Phillips was convicted of the robbery (R. 282). The defense posed no questions to Lt. Handcock, but objected to the testimony, first in a pretrial objection to nonstatutory aggravation, then during the testimony, and then after the testimony (See e.g., R. 289-90). Defense counsel also argued that certified copies of convictions were all that was allowed at the original sentencing and additional details and witnesses should not be allowed in the resentencing (R. 290). The objections was overruled (R. 290).

Nanette Brochin/Russell is a parole officer (R. 283). She first talked about what probation and parole officers do (R. 283-84). In 1980, she was assigned to the north Dade office (R. 284). Tom Svenson was her supervisor and dealt with problems she had with cases (R. 284). She lived in Mirimar (R. 284), ten minutes from the parole office where she worked (R. 285). She drove a green Toyota which she parked in the office lot (R. 285). She worked from 8 until 5 (R. 285).

At the time, she lived with Mike Russell, another parole officer; they are now married (R. 286). In June-August, 1980, Mr. Phillips was a parolee (R. 286). "He was doing fine. I had no problems with him. He was reporting. He was cooperative." (R. 286; 287, "I had no problems."). He got a job (R. 287).

She talked about how a parole officer discusses matters with a supervisor if there are problems and then with the Florida Parole Commission (R. 287-88). She said she thought Mr. Phillips was in violation of parole in November, 1980 (R. 288). Defense counsel's objection was overruled (R. 288). She was asked to describe the violation (R. 289). Defense counsel objected, reiterating his pretrial motion "to exclude evidence of nonstatutory aggravating circumstances" (R. 289). The trial court overruled the

objection (R. 289). The prosecutor and the trial judge agreed that the defense would have a "standing objection" to non-statutory aggravating evidence so that there would be no interruptions (R. 289).

Ms. Brochin then specifically testified about her belief that Mr. Phillips was in violation of parole (R. 290). She said he "followed" her into a grocery store on a Friday night (R. 290). She was shopping (R. 290). She went home from work and then to the grocery store (R. 290), a Publix (R. 291). The Publix was a "few blocks" from the Dade County line -- technically in Broward County (R. 29 1).

> I noticed Mr. Phillips. I was in the grocery store and he approached me indicating that he wanted to talk to me about something and I told him it wasn't the time or place to do that. We had previously set on appointment on that Monday to discuss anything that he wonted to discuss at that time. He insisted on speaking with me and after several moments I told him okay, that I would talk with him after I finished my grocery shopping and I did finish the grocery shopping and checked out. I brought my groceries out to the car. The bag boy at Publix helped me out to the car and loaded my groceries and Mr. Phillips was standing by the car (R. 291).

Mr. Phillips asked to talk to her again (R. 292). He asked if he could sit in the car with her and talk (R. 292). She said, "No, you can talk to me right outside of the car" (R. 292). She sat in the car (R. 292). He asked her for a kiss (R. 292).

She testified that "parolees giving kisses" to their officers is "not proper behavior" (R. 292). She told him that she was terminating the conversation and he was to report to her office on Monday (R. 292). She went home (R. 292).

At her house, she and Mike Russell (who was also a parole officer, R 294) noticed a car while they unloaded groceries (R. 292). The car's lights were off (R. 292-93). The car drove by twice (R. 293). Ms. Brochin testified that it was Mr. Phillips' car (R. 293-94).

After they went inside, Ms. Brochin and Mr. Russell called the Mirimar Police Department and Mr. Svenson (R. 294). The next day, Saturday, Mr. Phillips called her at home

> with some bizarre story about having followed me and known where I was living because he was checking out for somebody else something about Mike Russell. This apparent woman that he had met previously wanted to do some harm to Mike Russell. Do harm or something so he had known where I lived and it was just a bizarre story (R. 296).

Ms. Brochin recalled "[s]omething about he had met a woman at a park and she wanted to paralyze Mike Russell" and that Mr. Phillips said he was coming around to check (R. 296). Mr. Phillips, according to Ms. Brochin, said he called to tell her about this situation with Mr. Russell and the woman (R. 313).

On Monday, Mr. Phillips had a pre-scheduled appointment with Ms. Brochin (R. 298). He come to the office (R. 298). Tom Svenson, Mike Russell, Nanette Brochin, an investigator and "some other people" were also there (R. 298). Mr. Svenson "indicated to Mr. Phillips that he was going to reassign him to another officer" (R. 298). "He was instructed to stay away from me and not to call me...and not to report to me for any reason" (R. 299). She wrote Mr. Phillips up (R. 299). One month later, in December, 1980, Mr. Phillips was arrested for this "technical violation for visiting [Ms. Brochinl in Broward" (R. 299). Ms. Brochin testified at the revocation hearing at the Lake Butler prison, along with Mike Russell and Tom Svenson (R. 300-01).[1] She told the parole commissioners 'about the technical violations" regarding "the trip to Broward County" and "the phone call about a woman wanting to do harm to Mike Russell. And seeing me in Broward County and asking me for a good night kiss" (R. 30 1). Parole was revoked (R. 302).

'Defense counsel again renewed his pretrial objections (R. 300-0 1).

Mr. Phillips **was** released from prison in August, 1982 (R. 302). Another parole officer was assigned (R. 303). Mr. Phillips went to Ms. Brochin's office "asking to speak to me" (R. 303). She refused to see him (R. 303). She told Mr. Mangoso (of the parole office) and Mr. Svenson (R. 303-04). On August 23, 1982, she and Mr. Russell heard sounds (R. 304). "[A]bout four bullets" had been shot at their curtains (R. 304). They called the police (R. 305). They did not see who fired (R. 305). She had around 100 parolees (R. 284; 311). She thought Mr. Phillips had fired.

One week later (August 3 1, 1982) she appeared in the courthouse on a matter unrelated to Mr. Phillips (R. 305). She noticed Mr. Phillips by the courthouse elevator (R. 306). She went up to the fourth floor on the escalator (R. 306). Mr. Phillips was up on the fourth floor and she saw him when she got off the escalator (R. 306-07). She did not speak to him, but told a bailiff that Mr. Phillips was following her (R. 307). She finished her "business here [in court] and went across the street" to the parole office (R. 308).

Mr. Phillips was scheduled for a meeting at the parole office later that day with administrator Rivers, supervisor Svenson, supervisor Robinson and "some prison inspector" (R. 308). Ms. Brochin was "at the meeting after" (R. 308). They spoke to Mr. Phillips (R. 308). They told Ms. Brochin that "he was told again to stay away from me, not to have any contact with me. He had no business being around me" (R. 308). She and Mr. Svenson went to lunch (R. 310). He didn't have money for lunch (R. 310). That evening, Mr. Svenson **was** shot (R. 309-10).

On cross-examination, Ms. Brochin testified that Mr. Phillips was a model parolee during the first seven months of her supervision (R. 312).[2] The first "incident" was on November 14, 1980, at the supermarket (R. 3 12). Harry asked her for **a** "good night kiss"

[2]Ms. Brochin acknowledged that she does not know who shot Mr. Svenson (R. 3 10).

(R. 312). Harry never threatened her (R. 312). He was a cooperative parolee with her (R. 312-13). In 1982 (when he went to the parole building to see her after his release) he made no threats (R. 3 13). He had no violent incidents and was revoked for a technical (being at the Broward County Publix and asking for a good night kiss) violation (3 14). He had a job (R. 3 14). She has violated many other people (R. 3 14).

when she walked into the courthouse, Mr. Phillips was already there (R. 3 15). He did not follow her in (R. 315). He was by the public elevators first on the first floor and then on the fourth floor; did not threaten her; and did not say anything to her (R. 3 15). He was scheduled to be in the parole building across the street later that morning (R. 316). The courthouse and parole buildings are public buildings (R. 3 16).

Mike Russell testified that he is a parole officer (R. 3 17) and supervisor (R. 323). Ms. Brochin told him about seeing Mr. Phillips at the supermarket (R. 318). Mr. Phillips then drove by their house (R. 318). He knew Mr. Phillips was one of Ms. Brochin's parolees (R. 319). He was not there when Mr. Phillips called Ms. Brochin on Saturday about the woman who Mr. Phillips said had threatened Mr. Russell (R. 320). Mr. Russell said he does not know such a woman.

Technical violations were filed and a parole warrant was issued for Mr. Phillips' arrest (R. 320). Mr. Russell, Ms. Brochin and Mr. Svenson testified at the revocation hearing a-t Lake Butler (R. 320-21, 322). Mr. Phillips had been arrested on the technical violation on December 13 (R. 321). After Mr. Phillips was taken into custody he called Mr. Russell and "told me he understood what was going on. He understood why he was in jail and that he had no problem with me and I had nothing to fear from him" (R. 321).

Mr. Phillips did not call while he was in prison (R. 322). When he was re-paroled he reported to the parole office (R. 323). Mr. Russell was **a** supervisor in the office

(R. 323). He saw Mr. Phillips waiting for cm appointment at the intake office shortly after the re-release (R. 323). They made eye contact but did not speak (R. 323-24). Mr. Russell contacted his supervisor about seeing Mr. Phillips (R. 323-24). A few days later, Mr. Russell saw Mr. Phillips again during an appointment at the office (R. 324). Mr. Phillips wonted to see Mr. Russell (R. 324). Mr. Russell did not talk to him and reported him to supervisors (R. 324). Supervisors Wear and Rob met with Mr. Phillips (R. 324). They later told Mr. Russell that they had told Mr. Phillips to stay away from Ms. Brochin and "that he has another parole officer to report to" (R. 324).

Days later, shots were fired at Mr. Russell's and Ms, Brochin's curtains (R. 325). Mr. Russell called the police (R. 325). Mr. Russell does not know who fired the shots (R. 326).

Mr. Russell testified on cross that the supermarket incident was two years before Mr. Svenson was shot (R. 326). On the Monday following the supermarket (good night kiss) incident, Mr. Russell spoke to Mr. Phillips (R. 326-27). Tom Svenson was present (R. 327). Mr. Phillips was told to stay away from Nanette Brochin and was assigned to Gene Brown, another parole officer (R. 327). At the meeting, Harry **was** not threatening or violent; he listened to what they said (R. 327). However, his parole was revoked (R. 327). After the revocation, he called Mr. Russell and said "he understood what was going on and he doesn't have any hard feelings" (R. 328, 329). Mr. Phillips never threatened Mr. Russell (R. 329).

As a parole supervisor, Mr. Russell had hundreds, thousands of parolees (R. 330). Many are violent (R. 330). Mr. Russell has violated many (R. 330). When Mr. Phillips come to see Mr. Russell after re-release, Mr. Russell would not see him (R. 330). He had Mr. Wear see him (R. 330). Mr. Phillips caused no problem, no threats or violence, and

just left (R. 330). Mr. Russell does not know who shot at this house (R. 331). Mr. Phillips "never threatened violence to Mr. Svenson" (R. 332).

Benjamin Rivers is a parole supervisor (R. 333). On November 21, 1980, he and Tom Svenson met with Mr. Phillips at a parole office (R. 334). They spoke to Mr. Phillips about phone calls to Ms. Brochin (R. 335). They gave Mr. Phillips "instructions... centered around him being . . . near the county line where Nanette [Brochin] would be to and from work . . . . He **was** instructed that he **was** not to be seen there again . .." (R. 335-36).

On August 31, 1982, Mr. Rivers, Mr. Svenson and other supervisors had another meeting with Mr. Phillips in the parole building across the street from the courthouse (R. 337). The meeting **was** scheduled for 9:00 a.m. (R. 338). Mr. Wear said there had been a problem with Mr. Phillips (R. 337). Ms. Brochin called at 8:00 a.m. that morning and said that Harry **was** in the courthouse (across the street) and "she felt that he was following her" (R. 338). Supervisors Rivers and Robinson went over to the courthouse and "talked with Nanette [Brochin] and tried to calm her down . . . [W]e did not see Harry Phillips. We went back to my office and about that time Mr. Phillips and Mr. Svenson arrived because he **was** supposed to be at the meeting with me that morning" (R. 339).

Mr. Rivers and Mr. Svenson met with Mr. Phillips (R. 339). He **was** told "not to go to the north office which was the office that Nanette and Tom Svenson worked in and he was not to be seen in that **area** . .." (R. 339). He was told to stay away from Mr. Russell (R. 340). Mr. Rivers told him that he, Mr. Rivers, would violate him if he failed to follow Mr. Rivers' instructions (R. 340).

Mr. Rivers testified on cross-examination that **a** parole officer's schedule (e.g., court appearances, scheduled meetings) is not known to the public or parolees (R. 341-42). The information is not given out (R. 342). On August 31, 1982 (the day Mr. Phillips

was in the courthouse), Mr. Phillips' oppointment was for 9:00 a.m. and Mr. Phillips was there a few minutes early (R. 342). He sat in the waiting area until Mr. Svenson and Mr. Rivers were ready (R. 342-43). When they met, Mr. Phillips did not show anger towards or threaten Mr. Rivers and Mr. Svenson (R. 343).

During a break in the proceedings, defense counsel renewed his standing objection to such matters, including the testimony of Mr. Russell and Mr. Rivers, as relating to non-statutory aggravation (R. 344). The judge indicated that the standing objection is clear (R. 344).

Reggie Robinson is a parole supervisor (R. 347). He supervised Mike Russell (R. 347). Mr. Robinson, Mr. Rivers and Mr. Wear met with Mr. Phillips in 1982 and told him to stay away from the north office and not to "come around any [parole] office unless it was deemed necessary" (R. 348). They also told him to stay away from Mike Russell (R. 348). They told him he would be violated if he did not follow these instructions (R. 348).

The day after shots were fired into Brochin/Russell's house, Mr. Robinson went to Mr. Phillips' home and searched for weapons (R. 348). Mr. Robinson, Mr. Phillips and Mr. Phillips' mother were there (R. 349), as was supervisor McKinney (R. 350). Permission was given for Mr. Robinson to search (R. 349). Mr. Svenson showed up an hour later (R. 348). "[T]his was serious" and they wanted the "big boss" (Mr. McKinney) to be there (R. 350).

While they were there, "Mr. Phillips became very outraged and went towards Mr. Svenson and Mr. McKinney. At that time I pulled him back and told him to calm down, but he just kept shouting and shouting" (R. 350). Mr. Phillips was upset over how he perceived them acting towards his mother. He "didn't want Mr. Svenson there" (R. 350). "I told him that his mother had no complaints . . . and that the questions that we were asking were not something for him to get upset about" (R. 350). Mr. Phillips was still

somewhat upset over how he perceived his mother was treated although Mr. Robinson did not see Mr. Svenson "do anything abrupt" to his mother (R. 351). Nothing else significant happened that day (R 351).

One week later, there was a scheduled meeting with Mr. Phillips at the parole office across from the courthouse (R. 351). That was the day that Nanette Brochin complained about seeing Mr. Phillips in the courthouse (R. 35 1). Mr. Rivers, Mr. Wear, Mr. Svenson, Mr. Robinson (all supervisors) and Mr. Phillips were at the meeting (R. 352).

Mr. Robinson then testified about conversations he had "with Chabrier . . . She had called . . . I don't remember the exact date, but she called and asked what could someone do in order to remove residue if they fired a weapon" (R. 352). Mr. Robinson said that Ms. Chabrier said "that she was talking with Mr. Phillips and he started asking her these questions and she knew he was on parole and she called the office" (R. 352). Mr. Mangoso was sent out to take a statement from her (R. 353). She said something about Mr. Phillips saying that they had fired a "gun in the woods or something of that nature" (R. 353-54).

Mr. Robinson sow Mr. Phillips again on September 1, 1992, the day after Mr. Svenson was shot, when Mr. Phillips was being interviewed by detectives (R. 353). Shooting a gun in the woods was a parole violation (R. 354). Mr. Phillips was taken into custody on that violation (R. 354). Mr. Robinson also questioned him about the previous evening (when Mr. Svenson had been shot) (R. 354). Mr. Phillips said he was at Winn Dixie until about 8:30 p.m. and then went home (R. 354).

On cross-examination, Mr. Robinson testified that Mr. Phillips lived with his mother, Laura Phillips (R. 355). Mr. Phillips shared his earnings with his mother (R. 355). Mrs.

Phillips said they could search, Harry did not object or protest and they were allowed to search (R. 355-56). They found nothing (R. 356). Mr. Svenson then arrived (R. 356).

Mr. Svenson started questioning Harry's mother again (R. 356, 357). Harry got angry at this questioning (R. 357). Mr. Robinson tried to calm Harry down (R. 358). "Harry kept repeating over and over to Mr. Svenson that you have no right to talk to my mother" (R. 358). Harry did not have a problem with Mr. Svenson being there, but was upset at the questioning of his mother (R. 358).

On September 1, 1982, when Mr. Robinson interviewed Mr. Phillips (R. 358), Mr. Phillips told him that he was at Winn Dixie getting groceries until about 8:30 p.m. on the day Mr. Svenson was shot (R. 359). Mr. Phillips was cooperative and agreed to describe his day (R. 359). He said that at 5:30 p.m. he picked up his sister at the library and took her home (R. 359). He then went to Winn Dixie, picked up some groceries at around 8:00 and returned home at about 8:30 (R, 358-59). Harry was cooperative during the interview (R. 360).

Michael Mangoso is also a parole supervisor (R. 360). He was asked to describe various parole documents about Mr. Phillips introduced by the prosecution (R. 362). These included the intake processing form (R. 363); the certification of parole (R. 364); documents about general conditions of parole (R. 364-65), such as obeying parole officers (R. 365); documents about the November 17, 1980, meeting when a new officer was assigned to take Ms. Brochin's place (R. 365); case notes containing parole officers' comments (R. 365-66); a letter sent to Mr. Phillips which indicated his new parole officer was Gene Brown (R. 366); a letter from Nanette Brochin to the file regarding "an incident with Harry Phillips" (R. 366); a December 2, 1980, file notation from Mr. Svenson about Mr. Phillips -- that Mr. Phillips called and "wanted a transfer from Gene Brown. Told him not

possible due to investigation and it looks to be a pending investigation" (R. 367); the arrest warrant for technical parole violation (R. 367); several documents regarding the revocation hearing (R. 368); the transcript of the revocation hearing (R. 368); documents about the presence of administrators (Howard, Jack and Bomick) at the hearing (R. 368-69); documents about the revocation (R. 369); and documents about the August 10, 1982, re-parole (R. 369). The files also included several additional documents about the revocation hearing (R. 369); statements of reasons for the violation warrcmt (R. 370); a violation report, incident report and other reports (R. 370); and investigative reports (R. 370).

The documents in the file indicated that Mark Royster was Mr. Phillips' new parole officer (R. 369). Mr. Phillips was assigned to the parole building across the street from the courthouse (R. 369). Additional documents included a notation about Mr. Phillips going to the parole building to see Mike Russell and Mr. Russell's declining to see him (R. 371); cm entry about supervisors Mangoso and Robinson instructing Mr. Phillips that he should not try to visit Ms. Brochin (R. 371-72); case notes from November, 1980, about Mr. Phillips' transfer to Gene Brown (R. 372); additional notes from November, 1980, about Mr. Svenson telling Mr. Phillips to have no contact with Ms. Brochin (R. 373).

Mr. Mangoso also testified that on August 19, 1982, he saw Mr. Phillips in Ms. Brochin's parole building (R. 373). Mr. Phillips "and Tom [Svensonl were walking towards Tom's office for a meeting of some sort" (R. 373-74). Mr. Svenson did not make an entry about that meeting (R. 374). Mr. Mangoso said: "Nanette was kind of scored with him being there. . ." (R. 374). He went home with her (R. 374). They took a different route to

her house (R. 374). When they drove, they saw Mr. Phillips sitting on the fender of his car at a Chicken Unlimited parking lot (R. 374).[3]

Mr. Mangoso was also instructed by Mr. Robinson to interview Ms. Chabrier (R. 374). His notes from what she said were introduced (R. 375). "I believe that her father had worked for the Metro-Dade Police Department and she said she had information that might be worth to investigate about . . . a conversation she had with Mr. Phillips about shooting **a** gun into a canal and the police had been called and he wanted to know if washing his hands with Comet would erase any kind of gun that was fired." (R. 375). It was days later (2 days) that some unknown person fired at Ms. Brochin's house (R. 375). Defense counsel asked no questions.

All of the documents that Mr. Mangoso testified about were introduced.

Greg Smith is a Metro-Dade detective (R. 376). He was designated lead investigator in the Svenson case (R. 377). He described photographs and crime scene sketches (R. 378). The photographs and sketches were described at length (R. 381, et seq.). The parole building parking lot has a gate which is occasionally found open (R. 379). There were no cars in the parking lot when Det. Smith arrived (R. 381). Mr. Svenson's car was by a sand pile in the lot (R. 382). There were several such piles, 5 or 6 feet high (R. 382).

Mr. Svenson had "white chalky stuff' on his hands (R. 383). The same "stuff" was on a dumpster in the lot (R. 383). Det. Smith testified about comparisons, although he did not conduct the comparisons (R. 383). He sat in during the trial and recently read the

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[3]Mr. Phillips lived blocks from the building, although this was not mentioned by the parole officers.

testimony (R. 384). He testified about law enforcement's conclusion that Mr. Svenson had been throwing out phone books at the dumpster (R. 384-85).

People from the office and neighborhood were interviewed about the incident (R. 385-86). At 8:30 p.m., when they were walking out of their door, two neighborhood women heard "a rally of shots" (R. 386). "They looked over and they saw a figure running in a northeasterly direction towards the . . . gate..," (R. 386). They then heard a "second rally" of shots and "then saw a figure running in a southeasterly direction..." (R. 386). A casing was found by a medical building next to the parole office (R. 387). Det. Smith testified it **was a** .38 caliber casing (R. 387). He also testified about interviewing two police officers who had been dispatched for unrelated reasons to an area two blocks from the scene (R. 388). He said they said they heard a gun-shot like sounds at around 8:30 p.m. (R. 388). Two kids also heard gunshot rallies (R. 396). No casings were found near Mr. Svenson's body (R. 389) and no bullets, shells or other evidence **was** found anywhere else (R. 394).

Det. Smith then provided opinions about how a .38 and .357 (he said he has has both) work and how to load them (R. 389). Although he described no special expertise in the **area,** Det. Smith also testified about "blood splatter" (sic) (R. 390). He talked about how liquids 'puddle" and "tail off" (R. 390). He said they saw no "blood splatter" (sic) by the dumpster (R. 390). He said they were able to get photographs of the area around the body, but were unable to check or analyze the back area of the parking lot (R. 391). He said there was "blood splatter" (sic) evidence by Mr. Svenson's body (R. 39 1). He provided opinions about photographs depicting the spatter (R. 39 1-92), the direction of the "blood splatter" (sic) (R. 39 1-92), and how Mr. Svenson would have been moving when the blood fell (R. 392-97).

Det. Smith testified about "slap marks" and "grazes" that bullets leave on walls (R. 392-93). There was a "slap mark" on one wall where an unidentified bullet had hit (R. 393). Det. Smith said this did not appear to be a robbery (R. 393). Mr. Svenson was shot eight times (R. 393). Det. Smith spoke to parole officers -- Mr. Phillips "was our suspect" (R. 395).

Det. Smith drove to Mr. Phillips' home (R. 397). He said it was about a mile and a half from the parole office (R. 398).[4] Driving at 30 miles and hour, it took Det. Smith 3 minutes and 4 seconds to get to Mr. Phillips' home (R. 399). Driving 30 to 45 miles an hour, Det. Smith said it took him 4 minutes and 25 seconds to get from Mr. Phillips' home to Winn Dixie (R. 400). There were two stop signs and four traffic lights along the way to Winn Dixie and three traffic lights and a stop sign along the way to the parole office, so the actual times could vary (R. 400). Det. Smith estimated about five minutes from Winn Dixie to Mr. Phillips' home and about five minutes from the home to the parole office (R. 401). Mr. Phillips' home is halfway between the parole office and the Winn Dixie (R. 401). Mr. Phillips' home **was** put under surveillance (R. 401).

At five or six in the morning, Mr. Phillips left with his mother (R. 40 1). Detectives followed them (R, 401). Mr. Smith and his mother went to the home of Ida Styley, Mr. Phillips' sister (R. 402). Det. Smith said Mr. Phillips was seen (although not by Det. Smith) carrying a brown bag (R. 402). He came out of the house, lifted his car's hood and looked inside the hood (R. 402). Mr. Phillips then drove off with his mother to a Neighbor's Restaurant in Hialeah (R. 402). No gun was ever recovered (R. 403).

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[4]Defense counsel's renewed objection to such testimony being introduced "to go on to discredit Mr. Phillips' alibi" was overruled (R. 399).

Det. Smith testified that an unidentified person ("I don't recall who it was") told him Mr. Phillips knew he was being watched (R. 402). Although he was not present, Det. Smith testified that Mr. Phillips was stopped at the restaurant and asked "to go with the detectives to the scene to be interviewed" (R. 403). Mr. Phillips agreed (R. 404). He was asked about on alibi (R. 404).[5] He "explain[ed] to other officers his whereabouts" (R. 405). He denied being involved in the homicide (R. 405). They insisted that he explain his whereabouts and Mr. Phillips told them he got off work at 5:00 p.m. and arrived home at 5:20 (R. 405). At 5:30 p.m. he left his house and went to the library where he picked up his sister, Ida (R. 405). He took his sister to his home where their mother was watching Ida's children (R. 405). At about 5:45 he took the children to the park, got to the park at about 6 or 6: 15 and sat there for a while watching the children (R. 406). He then drove to a game room -- which the detective showed on the map -- and stayed there playing pinball until 7:30 or so (R. 406). He returned home, then went to Winn Dixie a few minutes later to get groceries (R 406). He shopped and got back home around 8:30 or so (R. 406). After putting away the groceries, he drove his mother to his sister's home (R. 406-07).

With permission from Mr. Phillips and his mother, the detectives searched the home (R. 407). They found an 8/31/82 Winn Dixie receipt (R. 407). The receipt said 9: 13 a.m. (R. 408). The store manager told the police that his registers were not working properly (R. 408-09). Det. Smith testified that he (the detective) reconstructed the time on the receipt as 9:32 p.m. (R. 409). Mr. Phillips was not arrested for homicide (R. 4 10). He was token into custody for parole violation and taken to the Dade County Jail (R. 4 13).

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[5]Defense counsel renewed his objections, but the court overruled them (R. 404).

Det. Smith then testified about what informants had said." Det. Smith said that Malcolm Watson said that he spoke to Mr. Phillips in 1980 ("I cannot be more specific on date and time") (R. 4 11). Smith said that Watson said that Mr. Phillips in 1980 "was in possession of what he said appeared to be a .38 or .357 revolver and said that it's a police type of gun" (R. 411). Smith said Watson said that Phillips wanted to pawn the gun for $50 (R. 411). Smith said Watson said that Phillips said his parole officers were trying to violate him in 1980 (R. 411).

Det. Smith said that Malcolm Watson said that in 1982 he "ran into Harry Phillips ... in Dade County Jail" (R. 4 12). Smith said Watson was aware about the parole officer being murdered; Watson, according to Smith, asked Mr. Phillips if he "did it" (R. 4 12). Smith said Watson said that Phillips said, "Yes, they got to prove it and they can't prove it; something to that effect" (R. 4 12).

Det. Smith also testified about another informant, "Will Scott or Will Smith' (R. 4 12). Scott/Smith was in the jail with Mr. Phillips (R. 4 12). On the basis of Scott/Smith's interview with Det. Smith and original trial testimony -- not the Rule 3.850 testimony and evidence -- Det. Smith said informant Scott/Smith said that he knew Phillips and that Phillips said "I downed one of those mother fuckers" (R. 4 14).

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[6]The informant testimony was attacked, with admissions to perjury from informants themselves, during the Rule 3,850 proceedings. See Phillips v. State, 608 So. 2d 778, 779-81 **(Fla.** 1992). The prosecutor nevertheless had Det. Smith describe what the informants originally said. The informants were not called by the prosecutor at the resentencing.

Det. Smith then provided hearsay gathered from another informant, Tony Smith (R. 414).[7] Det. Smith said informant Tony Smith said that he sow Mr. Phillips at a bar in 1982 (R. 414-15). Several people in the bar were parolees (R. 4 15). Det. Smith said Tony Smith said that Phillips said he was having trouble with his parole officer (R. 4 15). According to Det. Smith, Tony Smith said that Phillips said a male and a female officer were hassling his mother, that "he tried to shoot the female" and that he was "going to put a stop to the hassle" (R. 4 15).

Det. Smith spoke to Harry Phillips on October 14, 1982, at Lake Butler (R. 4 16). Mr. Phillips said he would cooperate (R. 416). "Mr. Phillips denied being involved" (R. 417). Det. Smith saw Mr. Phillips again on December 15, 1982 (R. 420). Mr. Phillips was cooperative (R. 420). He told Det. Smith that people in the jail were making disparaging remarks about Det. Smith (R. 421). Det. Smith asked him about when he ran into Ms. Brochin at the courthouse and Mr. Phillips said he was in the courthouse trying to find an attorney named Jim Wood (R. 423). Mr. Wood was the prosecutor in Mr. Phillips' 1973 robbery conviction and was a private attorney in 1982 (R. 423). Det. Smith said Mr. Wood had no business with Mr. Phillips (R. 423). Mr. Phillips said he did not see Ms. Brochin in the courthouse (R. 424). Mr. Phillips denied being instructed to stay away from Nanette Brochin or the parole office (R. 424). He said Ms. Brochin and Mr. Russell testified falsely at the parole revocation hearing, but Mr. Svenson "could not go along with the lies . . . [and] he could not blame Mr. Svenson [for] . . . being revoked . .." (R. 426).

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[7] During the detective's testimony, the prosecutor referred to a "chart" of evidence that was being shown to the jury (E.g., R 414, 425, inter alia, referring to entries on the chart). This "chart" was also used by the prosecutor throughout the proceedings and shown to the jury.

Mr. Phillips denied knowing Malcolm Watson (R. 427-28). He said he knew "Will Smith" but did not tell him that he killed a parole officer (R. 428). And he "specifically denied being involved in the murder of Mr. Svenson. He said he admired Mr, Svenson, that he had the utmost respect for Mr. Svenson . .." (R. 428). He acknowledged talking to "Vivian[8]" about "a test where a person's hands are wiped or swabbed . .." (R. 428).

Det. Smith went to the jail to tell Mr. Phillips about the indictment (R. 430). They went to the police office (R. 434). Mr. Phillips maintained that he was innocent and would cooperate (R. 434). Det. Smith said Mr. Phillips said they had no eyewitnesses and no gun (R. 435). During the questioning, Mr. Phillips became angry and excitable and said, "I did not kill the mother fucker but I'm glad he's dead" (R. 435). He said that he and Ms. Brochin had had sex (R. 436).

On cross-examination, Det. Smith testified that Harry's demeanor changed when he was told about the murder indictment (R. 437). Before that, he was cooperative and helping in the investigation (R. 437). Det. Smith admitted that he considered it a valid emotion for Mr. Phillips to be angry and upset when told about the indictment (R. 437).

Harry asked if anyone had testified for him in the grand jury (R 437). In their interactions, Harry did not ask for a lawyer and cooperated (R. 440). Det. Smith knows that doctors said Harry has a history of mental problems (R. 44 1).

Swabs, hair and nail scrapings (R. 442), 39 fingerprints (R. 443), and other evidence was collected from the scene, Mr. Svenson, and the dumpster (R. 442-43). No physical evidence connected Mr. Phillips (R. 443-44). The witnesses could not identify Mr. Phillips as being present (R. 445). The .38 casing found near the scene could not be connected positively with the projectiles from Mr. Svenson (R. 446). Mr. Phillips denied

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[8]Chabrier, although Det. Smith could not remember her last name (R. 428).

being involved in the shooting and denied "ever telling anyone" that he killed Mr. Svenson (R. 449).

At sidebar, defense counsel told the court he wanted to challenge the informant accounts that the prosecution had introduced. The prosecutor objected to the defense challenging the informant accounts as unreliable: "Basically, his whole cross examination was trying to show that Mr. Phillips didn't commit the crime. There's doubt here and that's part of it and it's before the jury. It has nothing to do with the circumstances of the offense" (R. 448). The judge said he would take a proffer later (R. 448). After the proffer, defense counsel argued that he should be allowed to rebut the hearsay about the informants that the prosecutor introduced (R. 456). The trial judge denied the request (R. 456).

Dr. Jay S. Barnhart is a pathologist (R. 458). He was not at the scene and not in Dade County in 1982 (R. 459). He reviewed the original medical examiner's autopsy and trial testimony (R. 459).

Dr. Barnhart stood up and pointed to photographs while describing the gunshot wounds in detail, how a heart pumps, whether a person would immediately fall and die, how someone might be able to move for 5 seconds after being shot, how oxygen goes into the brain (R. 46 1-69). The prosecutor stipulated pretrial that "heinous, atrocious, cruel" was inapplicable to this case. Nevertheless, defense counsels several objections to such detailed testimony was not sustained (R. 469-70). The judge did warn the prosecutor: "We already know the fact that all of these shots could cause instant death . . . Let's not go into [e]ffect. Show where the shots went and then ask the question. . ." (R. 470). There were eight shots (R. 461, et seq.). The shots were to the head and body

(Id>. Mr. Svenson could have been alive to up to five seconds after some of the shots (R. 467).

Dr. Lloyd Miller, a psychiatrist, was called out of order by the prosecution (R. 481-82). Dr. Miller saw Mr. Phillips for the prosecution during the Rule 3,850 proceedings, in January, 1988 (R. 483). He questioned Mr. Phillips (R. 483). Dr. Miller said he did not find psychosis or schizophrenia (R. 484). He said he did not diagnose organic brain damage but acknowledged, "[o]f course in on interview that I conducted I was not in the company of a brain wave or an MRI scan. I did not perform written testing of Mr. Phillips" (R. 485). There are cases of brain damage that "you may not pick it up" in any interview -- with "sophisticated testing it may detect some deterioration of the brain matter . .." (R. 485). Mr. Phillips' tested I.Q. of 72 to 76 is "clearly below an average individual" (R. 485). People with such an I.Q. are impaired. They can perform some work-related activities (R. 486). "They may or may not hove the capacity to operate a motor vehicle or pass a driver's license exam... If they pass it would be tough. It could be done... you don't have to be very smart to drive a car" (R. 486). People with Mr. Phillips' low intelligence level "could perform manual work, labor work related. The activities follow simple instructions being supervised and doing what a supervisor asked..." (R. 486). According to Dr. Miller, a person with such borderline intelligence could understand "what is required of that person by the law" by recognizing "that is the same [as] the work situation of what's your position to do and what you're supposed to do at work" (R. 487).

In his interview with Dr. Miller, Mr. Phillips was able to answer "gross questions" about "things that were in the news" (R. 489-90). Mr. Phillips had some ability to learn but it was "not good obviously . . . [T]his [interview] is not your most sophisticated type of testing. It's the gross test of the person's apprehension of what's going on and, for

example, television news media people.. ." (R. 490). Dr. Miller had similar conclusions when he saw Mr. Phillips in 1994 (R. 493).

In 1994, Dr. Miller learned about Mr. Phillips' being shot in the head (R. 490) -- "he was grazed on right temple at least where he touched and where the bullet struck him in the head because I was asking him questions about head injuries, sutures and things of that nature" (R. 491). Mr. Phillips was taken to the hospital (R. 491). Mr. Phillips may not remember all the details (R. 491).

Dr. Miller testified that Mr. Phillips indicated no malicious or ill will towards Mr. Svenson (R. 494). When asked by the prosecutor, "So, there is nothing in his mental condition that would prevent him from following the law?" Dr. Miller answered "I would say not necessarily" (R. 495). Dr. Miller also said he "found no extreme emotional disturbonce," referring to Mr. Phillips' being "well mannered" and "cooperative" (R. 495). The prosecutor gave Dr. Miller a 3-page hypothetical outlining the prosecutor's **case** (R. 496-98). Defense counsel's objection was overruled (R. 497-98). Dr. Miller testified that a person with an I.Q. of 72 to 76 is capable of doing the things the prosecutor said, including killing someone (R. 498).

On cross-examination, Dr. Miller testified that he had no notes of his 1988 evaluation, did not remember that Dr. Haber was with him when he saw Mr. Phillips and stated: "I couldn't tell you the details of who I went with or the circumstances. I just don't remember other than I have no notes from seeing him" (R. 499, 508). He testified that the information he obtained during his examination "was unconclusive" and that he did not recall obtaining "any firsthand information about Mr. Phillips" (R. 500). He did not speak to family members, only looked at material provided by the prosecutor (R. 50 1), did not ask Mr. Phillips' counsel for information (R. 50 1-02), did not review the court file, did not

review Mr. Phillips' education records, and did not review DOC or prison records (R. 502). He did not test Mr. Phillips (R. 503, "didn't submit Harry to any psychological testing instruments").

Dr. Miller did not test Mr. Phillips for brain damage (R. 503), although he could have (and has in other cases) done a Render Gestalt Test which does not require special instruments (R. 503-04). Dr. Miller **was** asked about several other tests that could have been done and acknowledged that he did not do them (R. 505). Dr, Miller was retained by the prosecutor. When asked about documents he did not consider (such as DOC records) he said that defense counsel was "just as guilty as me for not sending me something" and that the prosecutor "didn't provide me with anything" (R. 506). "If you fault me for not having reviewed that or anything else I'll accept any . . . guilt that you want to impose upon me on that" (R. 507). Records and materials, Dr. Miller testified, are useful (R. 507).

Mr. Phillips was cooperative and did not give Dr. Miller a hard time (R. 509). Dr. Miller did not test Mr. Phillips' intelligence (R. 5 10). Dr. Carbonell's testing results were consistent with what Dr. Miller saw in Mr. Phillips (R. 5 10). Mr. Phillips denied committing the crime (R. 5 10- 11).

The questions Dr. Miller asked Mr. Phillips about who current media personalities are involve "no abstract reasoning" ability (R. 5 11). Mr. Phillips can perform "simple work instructions" (R. 5 12). When asked about the conclusions he provided to the prosecutor, Dr. Miller explained that "[t]he conclusions can change with more information" that he did not have -- "for instance personality testing or more diagnostic personality or diagnostic brain damage testing or background check with family members **as** to the personal history and other matters that may have occurred" (R. 5 12). These procedures

and this information could change Dr. Miller's view about whether Mr. Phillips could conform conduct to the requirements of law (R. 5 1 2- 13).

Facts not stated by the prosecutor's hypothetical, mental health tests (which he did not conduct) and background information (which he did not have) "can change" his view about the substantially impoired capacity to conform conduct to law mitigator in Mr. Phillips' case (R. 5 13). These facts, tests and background information could also change Dr. Miller's view about extreme mental or emotional disturbance (R. 5 13).

Even on the basis of the limited examination and information he had, Dr. Miller testified that he found mitigating factors in this case. When asked whether Mr. Phillips' low intelligence establishes mitigation, Dr. Miller answered "[t]hat is correct" and outlined matters he had learned from Mr. Phillips confirming the low intelligence -- such as not performing well in school, repeating classes and low grades (R. 5 13- 14).

Dr. Miller also testified that the mitigating circumstances in this case include a "history of child abuse by his father" (R. 5 14). The father was often not home (R. 5 14). The father beat Mr. Phillips -- for example, "Mr. Phillips was around 10 and ... he was beaten serious enough that [the beating] resulted in at least injuries to tissues" (R. 514). Such mistreatment has an effect and "could hove a bearing on his personal development" (R. 5 14). Repeated beatings ccm result in closed head injuries (R. 5 14- 15). A closed head injury occurs "[w]hen there's no breaking of the bone region of the head" but there is injury to the brain -- contusion of the brain or a degree of deterioration of the brain (R. 515).

b. **The Defense Case**

Laura Phillips is Mr. Phillips mother (R. 5 18). She is 79 years old (R. 5 18) and lives in Opa Locka (R. 5 17). Her two other children ore Julius, who is older than Harry, and Ida, who is younger that Harry (R. 518). Harry was born in Belle Glade (R. 518). The family did farm work, "Live in labor. Pick and cut celery" (R. 5 19). It **was** migrant work (R. 5 19). Conditions on the farm were "pretty rough' (R. 520).

Harry's father, Julius Clarence Phillips, **was** "in and out" (R. 520). He came home when he wanted to and did not help the family much (R. 52 1). Mrs. Phillips supported the family by picking beans in the fields and doing domestic work (R. 521). She had to support the whole family (R. 521). People eventually moved them to Miami (R. 521). In Miami, Mrs. Phillips continued to work several jobs (R. 522).

Mrs. Phillips could not be with her children because she had to work (R. 522-23). She worked days and evenings (R. 523). The kids stayed alone at home (R. 523). A "lady next door" would sometimes look after them (R. 523). The father did not watch the kids (R. 523). "[L]ife for my family . . . [was] rough because we were not making nothing" (R. 523). There was not enough money to live on (R. 523). There were times when the father would not bring home his paycheck (R. 523-24). The father stayed home only "sometimes some nights" (R. 524). He gambled (R. 524). She talked to him about it and "[h]e didn't listen to me. He walked away sometimes" (R. 524).

The father had children with other women (R. 524). His daughter from another relationship lived with Mrs. Phillips and her children (R. 524). This added another mouth that had to be fed on Mrs. Phillips' one paycheck (R. 525).

The father was violent (R. 525). He argued with Mrs. Phillips and beat her (R. 525). He broke her teeth with his fist (R. 525). He did this because he "[j]ust wanted to do it"

(R. 525). "He was arguing with me and I didn't argue back with him much because [of] the children and he would get angry and he just hit me sometimes" (R. 525). He beat Mrs. Phillips several times (R. 525). He would beat her in front of the children (R. 525). Harry saw more beatings of the mother than the other children (R. 525).

The father also would get violent with the children (R. 525). He beat Harry (R. 525-26). This included beatings with ironing cords (R. 526). The cords used on Harry were thick (R. 526). He also would beat Harry with his fist (R. 526).

He would hit Harry "[o]n top of his head" (R. 526). These beatings happened often -- "when he came in he got angry and then he would take it out on the children and me too" (R. 526). He was much bigger than Mrs. Phillips and she could not stop him from mistreating Harry and the other children -- he was 6' 5 and he was big, heavy set (R. 526).

The father would drink (R. 526). When he drank he became violent and would start mistreating the family (R. 527). Harry would see him drink and get violent (R. 527). The father eventually abandoned the family and left home (R. 527). This had an effect on Harry and the other children -- they felt they did not have anyone but their mother, but she was working and trying to bring in what she could (R. 527). Even though their father "would hurt them" the children loved him and his abandoning the family affected them (R. 527-28). Mrs. Phillips tried to sue him for child support (R. 528). The judge suggested that the father go back to his family (R. 528). The father went back for a while but then abandoned the family again (R. 529). Even when he was with them, Mrs. Phillips was paying the bills (R. 529). To try to help her family get by she worked several jobs -- for example, picking beans during the week and domestic work on weekends (R. 529).

The family moved to Miami (Opa Locka) and lived in projects (R. 529). There were times when the power was shut off because they could not pay the light bill (R 529). Neighbors tried to help them (R. 529).

When Harry was a growing child he was not talkative (R. 530). He was quiet and "stayed to himself" (R. 530). He did not bring friends home and did not date girls (R. 530). Mrs. Phillips knew Harry went to school but did not know how he was doing there because she worked all of the time (R. 531).

When Harry **was** around 12 or 13 someone shot him in the head (R. 531). Mrs. Phillips found him "[l]aying on the porch" (R. 531). There was blood on his head (R. 531). Mrs. Phillips called out to a neighbor who called the paramedics and Harry was taken to the hospital (R. 532). At the hospital, they told her her son had been shot in the head (R. 532). When Harry was released from the hospital he stayed in his room (R. 532).

Harry went to prison when he was 17 (R. 532). It was difficult for Mrs. Phillips to visit from Miami to Starke, and she only saw him 2 or 3 times (R. 532). He was incarcerated for nine years (R. 532-33). When he was released, he lived with his mother and sister in Opa Locka (R. 533). Harry found a job working sanitation (R. 533). He helped his mother out with his paycheck (R. 533). He helped pay bills and buy food for the family (R. 533). After prison, Harry was even more quiet than he was before he went in (R. 534). He had no friends and dated no one (R. 534). He went to prison again and Mrs. Phillips was again unable to visit him more than a couple of times R 534). After his release, he again worked (R. 534).

Harry did menial work at Neighbor's Restaurant (R. 534). He helped his mother with bills and gave her his money (R. 535). From childhood, Harry always listened to his mother and was always quiet (R. 539).

Reverend Jankins knows the Phillips family (R. 540). When Harry was in the Dade County Jail, Rev. Jankins would visit him (R. 54 1). He visited him in the 1980's (R. 54 1, 544, 545).

Harry was always quiet (R. 54 1). Rev. Jankins, who has eight years experience as a psychiatric aide at a Florida State Hospital (R. 541), explained that when he visited Harry in jail, Harry was "out of it. I talked to Harry and he wouldn't say anything. He would smile at you and at the end you would find out you were just [the only one] talking" (R. 542). "I was like kind of talking to somebody that doesn't answer" (R. 542).

Julius Phillips is Harry Phillips' brother (R. 546). Julius works at the VA Medical Center arid served in the Navy (R. 546). He is 5 or 6 years older than Harry (R. 546). He and Harry were born in Bell Glade, where their parents worked as migrant workers (R. 547). The family lived in a migrant camp (R. 547). It was "shacks" with very little electricity (R. 547). The family did not hove much money (R. 548). They eventually moved to Opa Locka (R.548). There was a stepsister, Anne, with the family (R. 548). She was their father's daughter from another relationship (R. 548-49). She was older than the Phillips children (R. 548).

The father favored the stepsister over the rest of the family and treated her differently than Harry, Julius and Ida (R. 549). The father allowed Anne to do what she wanted (R. 549). But he was abusive to the other children, Julius described an instance when he wonted to "change the television and my father got mad and he beat me up for it . . . he messed my nose up... I had a scar right across the nose" (R. 549). Harry saw what his father did to Julius (R. 549).

Their mother worked and was not home to take care of them (R. 550). "Basically we were on our own" (R. 550).

"My father would go out on a drinking spree. He was a very violent man" (R. 550). Their parents argued in front of Harry and the other children (R. 550). The father "beat me and Harry up several times" (R. 55 1). He would also beat their mother (R. 55 1). He chipped her teeth (R. 55 1). He hit her in the mouth (R. 55 1). He hit her with his fist (R. 55 1). Harry saw these things (R. 55 1). Julius could not stop his father because he was a big man, "two hundred and something pounds. About six [feet and] something [tall]" (R. 55 1).

The father beat Harry (R. 551). He would hit Harry with his hands, fist and belt (R. 551). He would hit Harry in the face and the head (R. 552). Julius saw their father beat Harry many times (R. 552). He would hit Harry for "any little thing. He [the father1 drank and he gambled" (R. 552).

The father was also not home regularly (R. 552). Their mother took care of the family (R. 552). The father did not show affection (a kiss or a hug) or attention to the children (R. 552). Julius recalled only one or two times when their father gave him attention (R. 552).

Harry did not have friends (R. 553). He did not bring friends home (R. 553). He did not go out with girls (R. 553). He was "a loner", "quiet", "stayed to himself" and did not talk, confide or share his feelings (R. 553).

The father eventually left the family (R. 553). He left without warning (R. 553); he just "left for good and I guess he went with another woman" (R. 554). This had an effect on Harry (R. 554).

The school they went to was "an all black school" as was the neighborhood in Opa Locka (R. 554). Julius joined the Navy to get away (R. 555). Julius could not believe it when he learned Harry was arrested on the murder charge (R. 556). He loves his brother (R. 556).

On cross-examination, Julius Phillips reiterated that it was difficult being raised in that agricultural community in Belle Glade; there was little money (R. 556); their father was not a good father; and he beat their mother and the children (R. 557). Julius did not stay in close contact with Harry when he was overseas in the Navy (R. 558). He had close contact before he left for the military and after returning (R. 560).

Ida Phillips Styley is Harry's sister (R. 561). She is married and has four children, all teenagers (R. 561). She has been a public library assistant for 26 years (R. 561). Harry is the middle sibling (R. 56 1). The children were born in Belle Glade and the family later moved to Opa Locka (R. 561). Their life "was rough. It was rough" (R. 562). Even while their mother and father were together, their mother "had quite **a** few [jobs] . . , one day she worked for these people and the next day for someone else" (R. 562). She worked days and nights (R. 562). No one was home with the children (R. 562).

Ida was in school with Harry (R. 563). Harry went to school but was not a good student, had problems learning and eventually dropped out (R. 563). Ida, who is younger than Harry, tried to help him with schoolwork (R. 564).

Their parents' relationship "was pretty rough" (R. 564). "My dad used to beat on my mother. . ." (R. 564). It would happen in front of the children (R. 564). Their father hit Ida (R. 564). He would hit Harry (R. 564). He would also "beat us with an ironing cord" (R. 564). He would beat Harry with the cord (R. 564). It would leave marks (R. 564). the beatings would be 'anywhere" (R. 565).

The father was often not home; he was "[o]ut in the street"; and he was a "heavy gambler" (R. 565). It was rough for the children (R. 565). They were poor and their mother had a hard time raising the family (R. 565). Ida was troubled by their father's gambling

money away but never tried to talk to him about it because she was scared "[t]hat he might do something to me" (R. 565).

Q. Was your father affectionate in any way?
A. No, no affection.
Q. Now, you said that your father would beat you. Did he ever strike your mother?
A. Yes, he did.
Q. Did he do that in front of you?
A. Yes.
Q. Did he do that in front of Harry?
A. Yes, he did.
Q. Did you ever see him injure your mother?
A. Yes (R. 566).

Their father "put bruises" on their mother's face and chipped her tooth (R. 566). When he eventually left their home, he did not say why -- "he just got up and left. I guess he didn't want a family" (R. 566).

Before he left, he had a daughter from another woman live with them (R. 567). She was older than the Phillips children (R. 567). She created confusion in the home (R. 567). The father did not provide much for any of the children -- their mother had to support her own children and the older stepchild (R. 567). Their father was a drunk who beat their mother and the children (R. 572).

After their father abandoned them, it was rougher (R. 567). What little he contributed was gone. "The lights were turned off, no water and the neighbors used to let us use their bathroom to take baths" (R. 567). They were always very poor (R. 571-72). Life was always very difficult (R. 572).

Harry 'was a loner" and did not have any friends (R. 567). He never had girlfriends (R. 567). He was quiet and reserved (R. 568).

Harry was shot on the side of the head when he was a young teenager (R. 568). Ida went to the hospital where Harry was taken (R. 568). He has a scar from the injury

(R. 568). Ida was unable to visit Harry when he was sent to prison because of the cost of the trip (R. 569). When he was released, he lived with his mother and Ida (R. 569). He worked as a garbage collector (R. 569). He helped pay the family bills (R. 569-70, 573, "helped support the family"). Later, Harry worked at Neighbor's Restaurant (R. 573) doing "busboy" work and cleaning off the tables (R. 574).

Ida's children love Harry (R. 571) -- "[t]hey're crazy about him , . . Uncle Harry" (R. 570). He spent time with them (R. 570). He took them to the park and would babysit them (R. 570-71). He "was crazy about the family. He wanted to help the family out" (R. 573). They visit him at the jail, as does Ida (R. 571).

Samuel Ford[9] knows the Phillips family (R. 575). He knows Harry because he was a teacher in the school Harry attended and lived in the neighborhood in Opa Locka (R. 575). He also taught Julius and Ida (R. 575-76).

As a student, Harry "was very, very quiet" (R. 576). He "was not very fast as far as his school work was concerned" and was "sort of withdrawn" (R. 576). He "was in school on a daily basis" but "was not very fast" (R. 576). Academically, he was in the lower percentile (R. 576). Harry's siblings, "Ida and Julius Phillips were average students and energetic, but Harry was withdrawn and was below average" (R. 575). He was "substantially below Ida and Julius in terms of his academic ability" (R. 577).

"Julius and Ida ran circles around Harry's performance" (R. 577). Harry was "a follower" (R. 577). He did not speak up in class -- "even today . . . Ctlhe thing of Harry was that he didn't really speak up" (R. 577). "He didn't say anything most of the time to help

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[9]Mr. Ford passed away. His testimony from the 3.850 proceedings was read into the record.

explain himself, or anything like that" (R. 577). "There was something that was wrong" with Harry (R. 578).

Mr. Ford lived close to the Phillips family and would see Harry in the community, outside of the teacher-student setting (R. 578). Outside of school Harry "was still virtually non-assertive, he was quiet" (R. 578). His grades were "D's and possibly Fs" (R. 578).

Dr. Joyce Carbonell (R. 584)[10] is a psychologist and neuropsychologist (S.R. 3- 10). She is a professor of psychology at Florida State University (S.R. 4). She consults for mental health hospitals in Florida and Georgia and has an extensive professional background (S.R. 3- 10). She trains law enforcement officers and evaluates the work of mental health professionals for state agencies (Id.). Dr. Carbonell evaluated Mr. Phillips (S.R. 1 1), reviewed voluminous records about Mr. Phillips, his background and the case (S.R. 12-13) and conducted extensive testing of Mr. Phillips (S.R. 13-14).

Mr. Phillips functions in the lowest sixth percentile (S.R. 16). 93.6 percent of the population functions at a higher level (S.R. 15). He has a full scale (W.A.I.S.-R.) I.Q. of 75 (S.R. 15). The results on the intelligence testing are "uniformly low", indicating that the intellectual deficits have been there a long time (S.R. 16). He functions at a level "several deviations below what normal would be" (S.R. 16). He has "significantly sub-average intellectual functioning" (S.R.16).

He did poorly on the W.R.A.T. and P.I.A.T. achievement tests (S.R. 17, 18). His level of achievement on the testing is lower than his impaired I.Q. (S.R. 19). On the

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[10]Dr. Carbonell was unavailable at the resentencing (R. 584). Her Rule 3.850 hearing testimony was read to the jury. The transcript of her testimony was not included in the original record, but is now included in **a** supplemental volume, cited herein as "S.R. ____". The Carbonell testimony supplemental volume, however, is not an actual transcript of what was read to this jury, but is simply a photocopy of Dr. Carbonell's Rule 3.850 testimony from the rule 3.850 record on appeal. The Rule 3.850 pagination is crossed **out** and new page numbers are given (see ea., "S.R. 3, et seq.).

Canter/Bender Gestalt testing of brain damage, Mr. Phillips' performance was poor and not good (S.R. 20). The difficulty in cases of individuals as intellectually impaired as Mr. Phillips is that it is hard to differentiate whether the impaired functioning is due to the low I.Q. or brain damage (S.R. 21).

Rorschach testing **was** congruent with his low I.Q. (S.R. 22). His responses were indicative of social isolation and withdrawal and being influenced easily by his environment (S.R. 22). The M.M.P.I. personality testing (S.R. 24) produced valid results (S.R. 25). This testing showed that Mr. Phillips has "very naive and unsophisticated thinking" (S.R. 25). He has a "low energy level . . . prefers to be alone . . . [feels] relatively isolated . . . [and] may be overly sensitive to criticism from others" (S.R. 26). He is "isolated, alienated, inadequately socialized" (S.R. 26). Mr. Phillips does not have an antisocial personality (S.R. 26). No testing reflected an antisocial personality (S.R. 26). This is relatively unusual in a prison population (S.R. 26).

DOC also tested Mr. Phillips' I.Q. and reported **a** score of 73, consistent with Dr. Carbonell's testing (S.R. 32). He did poorly in school, consistent with his impaired I.Q. (S.R. 32-33). The testing results were also consistent with what the family and teachers reported about Mr. Phillips -- that he has always been socially isolated, withdrawn and lacked social and inter-personal relationship skills (S.R. 34). "Because he's easily frustrated, he has the additional overly of an emotional problem" (S.R. 33). Mr. Phillips has suffered from deficient intellectual functioning throughout his life (S.R 33) and has mental health problems (S.R. 34).

He has the characteristics of a schizoid individual (S.R. 34). He is i solated and does not relate well to other people outside his family (S.R. 34). His prison reports indicate that he is easily led and very quiet, consistent with the family reports (S.R. 39).

His prison records also reported a mental condition (S.R. 40). His school teacher described him as just sitting there (S.R. 39).

> He has difficulty dealing with people for two reasons. One is he is intellectually deficient. And, that combined with this schizoid kind of problem is going to make him essentially a loner . . . He's not going to relate well to other people. He's not going to be effective in interacting with the world around him. He's going to have difficulty coping with that world (S.R. 35; see also S.R. 55-56).

He cannot deal competently with things in his environment (S.R. 35). His language and ability to express himself are not good, as can be expected given his I.Q. (S.R. 35). His responses to questions are concrete (S.R. 36).

The family reports that Mr. Phillips was abused by his father; they were poor; the mother reported emotional stress in the family; the father deserted the family when Mr. Phillips was around pre-adolescent, a particularly bad time; "the one person he would want approval from not only abused him, but left"; Mrs. Phillips worked a good deal of the time, leaving Harry with very little supervision; and, "given his I.Q. level, given his personality problems, he didn't cope well" (S.R. 48-49).

> He had very little direction. Even his D.O.C. records point out . . . that he had too little supervision. His age and his I.Q. level -- it's very confusing to grow up in a household where you're the brunt of someone's wrath for no particular reason. That person then deserts (S.R. 49).
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> * * * *
>
> By all reports he [the father] was physically abusive to him. He was also physically abusive to Julius. But, according to family reports it was worse for Harry (S.R. 49).
>
> * * * *
>
> By the reports, the abuse was . . . bad abuse . . . It was severe enough that Mrs. Phillips reported that she was worried that the boys would suffer permanent damage from the beatings (S.R. 50).
>
> * * * *
>
> That kind of abuse does leave . . . emotional scars, in addition to any physical. It seems to be a real paradox. Children who are abused, one of the things they most frequently want is approval from that parent who is abusing them (S.R. 50).
>
> * * *

> [Then the father1 left . . . [and] left them more poverty stricken . . . Desertion is a very difficult thing for a child to handle. They not infrequently blame themselves also (S.R. 51).
>
> • • * *
>
> On an emotional level Mr. Phillips withdrew even further after that. And, according to his brother and sister, began to cling to his mother. They said he withdrew into his own world. Apparently he wouldn't speak about it to anyone (S.R. 51).

Evidence indicating organic broin damage in Mr. Phillips' case includes the history of his "being severely beaten as **a** child" and his being shot in the face area and subsequent loss of consciousness when he fell back and hit his head on the pavement (S.R. 36). Affidavits from family and friends who were there when Mr. Phillips was shot describe the head injury (S.R. 37). After the shooting, "he developed more headaches" and 'blurred vision" and those "headaches continued throughout his life" (S.R. 38). Those kinds of closed head injuries cause brain damage (S.R. 36). Although organic brain damage is hard to test because of Mr. Phillips' impaired I.Q., it should not be ruled out (S.R. 36).

Mr. Phillips' deficits are life long (S.R. 38). He had the deficits before he was shot and the shooting may have made them worse (S.R. 38). He is "not particularly competent in interacting" with the world, getting things done or getting his ideas across (S.R. 40). He gets easily frustrated because of his functioning problems (S.R. 40-4 1). "When you're in a complex situation and you don't have the skills to deal with it, it gets very frustrating" (S.R. 41).

Dr. Carbonell described what she learned from the family about Mr. Phillips' upbringing: he was "quiet, shy, not . . . close to anyone except the family . , , he was severely abused as a child . . . they lived in relative poverty . . . Harry was essentially different" than others (S.R. 42). "[A]fter the father left, in spite of the fact that he'd been

abused, he become. . . much more withdrawn" (S.R. 42). The teacher, Mr. Ford, talked to Dr. Carbonell about how Harry "tried hard but didn't do well" (S.R. 43). Mr. Ford explained that Ida was not that smart but she, like her brother Julius (S.R. 42), could still "run rings around Harry in terms of his performance in school" (S.R. 43).

Mr. Phillips' mother had to work -- there was little adult supervision (S.R. 52). "He didn't get a lot of what you could describe as nurturance or emotional support. There was very little time for that, dealing more with survival issues" (S.R. 52). Mr. Phillips, however, needed additional nurturance and support -- special help (S.R. 52). The only such support Mr. Phillips reported was a special education class (S.R. 52). Mr. Phillips "doesn't deal very well with the world" (S.R. 53). He has a "low level of intellectual functioning", "inability to cope effectively with what's going on" and gets easily frustrated (S.R. 53). "Even when. . . he may be right about something, he doesn't seem to know how to press his point or express himself in a way that gets understood" (S.R. 53). For example

> Mr. Phillips was violated on is parole for being in Broward County. And, Mr. Phillips was making statements at the time that he had permission to be in Broward County, and that he had been told he could go there.
>
> If you look carefully at the [parole office] record, there is an office memo [from Ms. Brochinl that says in fact that **as** of the next day, the day after the incident that he was seen in Broward, it said from this date on his travel privileges to Broward ore revoked or terminated . . . They were terminating something that he had, and yet he was violated because of that because apparently he couldn't effectively find any way to demonstrate that he had permission. He said all along I had permission to go there. Arid, a day later, in fact, after that incident there was a memo that said that that was revoked, and he never effectively did anything about that (S.R. 54).

A parole office memo described Ms. Brochin seeing Mr. Phillips in the supermarket in Broword County and then said 'The following morning the subject called, wanted to explain that, what he did. I advised him that we made a police report, and any

privileges regarding travel into Broward County are terminated" (S.R. 81-82). Mr. Phillips, however, could not explain himself (S.R. 54-55).

His problems have been with him since childhood (S.R. 58). He has deficits in adaptive functioning (S.R. 58). He has never adapted well and never done well (S.R. 59). He gets along by being passive (S.R. 59). "When he tries to do anything else, he's relatively ineffective" (S.R. 59). He is intellectually impaired (S.R. 59). He has difficulty rationally grasping things due to his impairments (S.R. 74). His impoirments include his intellectual and emotional dysfunctions (S.R. 74). His thinking is child-like, rudimentary, on a very basic level (S.R. 78).

Mr. Phillips insists that he is innocent and turned down an opportunity to plead guilty (S.R. 74). However, due to his impairments, he has difficulty providing a coherent account of events -- his memory is sketchy (S.R. 79). His ability to testify relevantly is limited by his impaired I.Q. and social and emotional factors (S.R. 84). Because of his I.Q., background and mental health problems, he does not deal well with complex situations (S.R. 84). He does not know how to intervene effectively to solve problems (S.R. 85). When he tries to do so, he gets himself in trouble (S.R. 85).

> What he does most of the time is he does not make any waves. He just sits there until things build up, things that he can't cope with, . . . and then he makes a big wave and gets himself in trouble (S.R. 86).

Mr. Phillips' problems planning and thinking ahead get him into trouble (S.R. 87-88). He is passive and when he can no longer cope explodes irrationally (S.R. 86-88). He does not deal well with emotionally charged situations and does not even want to talk about such situations (S.R. 92). "It's very difficult [for him]. When he disagrees with something, he doesn't have any rational way of expressing it. He can't" (S.R. 92). A "classic example is when his father left, he become very withdrawn" (S.R. 93).

> [O]ne of the analogies . . . is the difficulty that someone has who has **a** physical injury that prevents them from doing things, and . . . they have periods of frustration -- you go to do something and you can't and you're limited, you're trying to reach a goal and you can't do that (S.R. 93).

Mr. Phillips can improve and attain some basic competency with special troining (S.R. 89-90) but "it's going to be a whole lot slower, **a** lot more painful" because of his deficiencies (S.R. 90). He will never completely understand (S.R. 90).

People noticed Harry's problems (S.R. 93). DOC people "noted for years in his record that he had problems, that . . . his mental stability is questionable, . . . that his I.Q. isn't good . . ." (S.R. 94). DOC "noticed it for years. His family noticed it, his teacher noticed it . . ." (S.R. 94).

Informants could manipulate Mr. Phillips into saying things because he is easily led and people with low intellectual functioning are vulnerable in two **areas:** one is coercion and the other is friendliness and wanting to fit in (S.R. 95). He is also impulsive and has trouble understanding consequences (S.R. 95).

Regarding mitigating circumstances, Dr. Carbonell explained:

> His intellectual problems would clearly fall under mitigating circumstances. He has a history of low level I.Q. functioning. He has **a** history of difficulty in achievement.
>
> He has a history of emotional and mental health problems. He's always been a loner. He's been isolated, he's been withdrawn.
>
> There is a combination of factors, including not only an impoverished upbringing in a physical sense, but in a sense that he had no supervision and had no opportunity to receive much in the way of nurturance. He received very little guidance.
>
> In spite of this, he was described by people as a good boy, he went to school, he tried to behave. He was there.
>
> His record for the last few years of high school I think indicates only about eight days absent in two years,

He went. He tried. He was there,

* * * *

He was at times able to hold employment, and he was thought of as a good worker when he worked for the Sanitation Department, for example, which would make sense. He's passive. He wants to go along. It's something he can do and is getting rewarded for. Those kind of instances are going to be few and far between.

* * * *

He worked, he provided in spite of his deficits. He provided the money to his family, help take care of his sister's children.

He was an &used child. He was a seriously impoverished child.

I recognize in that area at that time most everybody living there was impoverished. It's not like he was isolated in that sense. But, given his other deficits, he was unable to do the kind of things his brother and sister did, which is get out of it. . . [T]here was no one around to help.

He was limited by [his] intellectual functioning, his basic social background, and his mental and emotional problems.

And, in spite of that there is some evidence that in fact he did try to do the right thing.

Q. What about his emotional problems?

Describe those for us.

A. He's schizoid. He's sincerely schizoid; meets the diagnostic criteria for a schizoid.

Q. People that are schizoid, what kind of people --

A. They're isolated, they're loners. They don't relate well to' other people. They don't have close relationships outside their family.

It's not schizophrenia. This isn't delusions.

But, if you put schizophrenia on a continuum and watered it down, you end up a-t [his level] . . . he has what essentially used to be called autism.

That's withdrawing into himself, doesn't deal with anyone else. He has sort of ambivalence . . . [s]chizoid has that sort of alienation that you see that makes you unable to cope.

Q. What about in terms of his upbringing, in terms of his childhood?

Is there any mitigation there . . .?

> A. . . . [H]e was certainly abused as a child, . . . was in a situation of serious deprivation, . . . was abandoned by the father at an early age, . . . his other role model left, . . . had a head injury that could hove in fact further damaged his level of functioning, . , . had little or no supervision in the home, . . . [and] in spite of that, he did in some situations try and behave.
>
> * * * *
>
> His family was very poor. , . [This is] important because Mr. Phillips' deficits were such that that poverty was a serious compounding factor (S.R. 97- 10 1).

Mr. Phillips, Dr. Carbonell explained, has suffered from extreme mental/emotional disturbance associated with his impoirments throughout his life and at the time of the offense (S.R. 102-03). Mr. Phillips also suffers and suffered from a substantially impaired capacity to conform his conduct to the requirements of the law due to his impairments (S.R. 103-04). Mr. Phillips "never seems to grasp in terms of what was required of him . . ." (S.R. 103-04). Mr. Phillips has trouble learning, has a deficient I.Q., "hasn't a very good achievement level" and is deficient in his ability to understand (S.R. 104).

"With regard to cold, calculated, which I presume means planned, thought out, done in some rational and cold manner, that's not how Mr. Phillips operates" (S.R. 105). He has never operated that way (S.R. 105). The ability is lacking, given his impairments (S.R. 105). There is no evidence that he thinks through even in his general behavior (S.R. 105). "He has that pattern of going along and then getting very frustrated and having some kind of an outburst" (S.R. 106).

The reports of Dr. Haber and Dr. Miller had several flaws (S.R. 106-19), including the lack of testing (S.R. 108, 115-19), and the lack of review of background and collateral information and records (such as DOC records, family accounts, school records, etc.) about Mr. Phillips (S.R. 109-14, 117-18, 119, 121).

Mr. Phillips took the driver's license test several times before he finally passed it (S.R. 132). His functioning is at the level of many retarded people (S.R. 129). Mr. Phillips is a man with cm I.Q. "in the 70's, with all kinds of deficits" (S.R. 140).

Dr. Carbonell was also asked during the State's cross-examination about a "Brother White" letter that Mr. Phillips wrote pretrial (S.R. 144). Mr. Phillips had informant names wrong on the letter (S.R. 146). Regarding Mr. Phillips' letters, Dr. Carbonell answered the prosecutor's questions by noting:

> What this letter tells us is that he's angry, he [is] distressed.
>
> It's pretty primitive. It hardly speaks to his ability to help defend himself. He writes to another inmate and tells him about this.
>
> He doesn't talk to his lawyer about it. , . (S.R. 148).
>
> * * * *
>
> This is pretty bad. This is very primitive. . . (S.R. 149; see also S.R. 150, "bravado", "he was angry").
>
> * * * *
>
> And, recognize, of course, that he got some of the names wrong. . . (S.R. 149; see also S.R. 145-46, specific names he got wrong)
>
> * * * *
>
> Q. Could this be part of that aggressive part of the passive-aggressive personality that was frustrated?
>
> He just lashes out?
>
> A. In fact he's lashing out in a totally useless way again. (S.R. 150).

"Bro White, I'm innocent as hell. I don't core what happens to me anymore,' That's hardly someone who is real invested in their own defense" (S.R. 152). The prosecutor also used other letters Mr. Phillips had written and Dr. Carbonell explained that Mr. Phillips' letters indicated he was trying to help himself "on a very, very primitive level" (S.R. 154).

Mr. Phillips has trouble with concepts (S.R. 162). "Given his functioning, he doesn't make good connections" (S.R. 162). "He has difficulty with abstraction. He reasons very

concretely. You can see that on his WAIS [intelligence testing] scores. There are tests that require more abstract reasoning than others. He doesn't do well on those" (S.R. 163).

> Q. Is it fair to say that it is a defense mechanism for a person with substantial intellectual impairments such as Mr. Phillips to sort of put on a facade of being tough?
>
> A. There is evidence that he put on a facade.
>
> He also told one of the other --
>
> He told one of the informants in the case that he killed lots of people, that he's killed guards in the prison, that he kills snitches.
>
> He doesn't kill guards in prison, doesn't kill snitches. . .
>
> Q. Why would a person with intellectual impairment have that type of defense mechanism?
>
> A. One of the things that happens with people with those kinds of impairments is they want very much to be one of the guys and they're easily coerced by attitudes of friendliness and be one of us or by attitudes of threats and coercion.
>
> You're one of us, we accept, sort of prompts more of that stuff. In a strange way he wants to be one of the boys. . .
>
> * * * *
>
> Q. . . Is there anything [based on all the records, police reports, etc.1 to indicate when Mr. Phillips says he has on ability to contact people at F.S.P. and U.C.I. that that's in any way connected to reality, that he has that kind of pull?
>
> A. He's a loner, he's always been a loner. He doesn't hove any friends.
>
> In fact, lots of times in prison he won't go out in the yard. He has some history for refusing to do that.
>
> There is no indication that he has friends, that he ever had friends. Even in prison he's a loner. (S.R. 163-65).

Mr. Phillips did not have the intellectual wherewithal to get his alibi defense across (S.R. 167). His notes "are sad . . . It's pathetic. It's not much of an alibi defense" (S.R. 167).

He is on the level of a child who breaks a cookie jar (S.R. 168). His actions and letters speak to "his deficits rather than his abilities" (S.R. 168).

Mr. Ford described to Dr. Carbonell that Mr. Phillips was one of the slowest students he ever had (S.R. 165-66). "He said even his sister, who was not very bright, could run rings around him" (S.R. 166). The overall impression that he gave was that Harry was in fact a pathetically poor student who simply couldn't function, and who tried hard, and was polite, and who sat there, and not only couldn't function in an academic sense, but didn't function in a social sense" (S.R. 167).

Mr. Phillips' behavior is that of an impaired individual -- "he has . . . deficits in his adaptive functioning. He has life-long deficits in his ability to adapt . . . He has deficits in all of those spheres. He's not able to cope with any adversities. He can't cope with any problems with his life. He doesn't seem to learn from his experience about what kind of behavior will keep him out of trouble and what kind will get him in trouble . . ." (S.R. 170). "He lacks that capacity for that" (S.R. 170).

The margin of error on intelligence tests is plus or minus five points. Given Mr. Phillips' history of deficits in adaptive functioning, the fact that he functions like mentally retarded individuals and the fact that his actual intelligence could be lower than cm I.Q. 73 or 75, he could be classified in the mentally retarded range (S.R. 170). cf Phillips v. State, 608 So.2d 778, 783 (Fla. 1992) ([E]ven [the State's] experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded").

Mary Hill Williams knows the Phillips family since the children were young (R. 587-88), in Belle Glade (R. 589). Harry was quiet (R. 588) and would not talk too much (R. 589). She became reacquainted with the family in Opa Locka (R. 589). Mrs. Phillips' relationship with her husband was not good (R. 589). Often, he did not stay with her and

the children (R. 589, 59 1). He would stay for a while and then leave (R. 589-90, 59 1). He would not help support the family (R. 590). Mrs. Williams' family therefore tried to help out the Phillips family (R. 590). They would lend the Phillips family money to help them get by (R. 590). Mrs. Phillips did form work (R. 591). They (Mrs. Phillips and her children) were poor people (R. 59 1).

Dr. Jethro Toomer is a psychologist with a substantial background (R. 595-96). He is a Diplomate of the American Board of Professional Psychology (R. 594) and a university psychology professor (R. 595). He evaluated and tested Mr. Phillips using several psychological and neuropsychological tests (R. 597, 599-600, 602-03, 608-10). He reviewed various materials about Mr. Phillips, his case and his background (R. 598, 600, 603-04, 605, 6 18). An accurate evaluation requires background information (R. 60 1, 603-04).

Dr. Toomer employed intelligence testing that does not rely on acquired information (R. 605-06). Mr. Phillips' I.Q. on this instrument was 76 (R. 606). The margin of error is plus or minus 5 points (R. 607). The guidelines for retardation adopted by the American Society for Mental Retardation indicate an I.Q. range of 70 to 75 or below (R. 607). Mr. Phillips has significantly impaired intelligence and, given the 5 point potential differential, could be classified as mentally retarded (R. 607). Mr. Phillips' actual functioning, whether his intelligence is characterized as retarded or borderline is such that it "would affect how one operates and how one functions and how one processes information" (R. 607).

The brain damage screening testing that Dr. Toomer conducted indicated motor perception problems, other discrepancies reflective of broin damage and an individual

whose overall affective level was very flat (R. 610). Dr. Toomer also saw the flat affect during his interaction with Mr. Phillips (R. 6 10).

On abstract reasoning testing -- distinguishing concrete child-like thought from abstract-developed thought (R. 613) -- Mr. Phillips showed **a** "very concrete level of thinking that is reflective in a much younger chronological age [and] doesn't go beyond the literal meaning of the words . . ." (R. 614). Mr. Phillips functions at the level of a low chronological age (R. 614). Physically he grew, but he remained "at a much younger chronological age in terms of reasoning ability" (R. 6 15).

On personality testing, Mr. Phillips scored very low on substance abuse (R. 616, he is not a drug / alcohol abuser) and antisocial personality scales (R. 6 17, he does not have inherent antisocial tendencies), Harry has deficits in his views and feelings about himself (R. 618). This testing is consistent with his having been abused by his father (R. 618).

On Rorschach and TAT (Thematic Apperception) testing (R. 619) Mr. Phillips' responses were consistent with his impaired intellectual functioning (R. 621-22) and showed the repressed state and withdrawal tendencies associated with impaired intelligence (R. 622). Mr. Phillips was an abused child and did poorly in school (R. 618). He has deficits in all areas of functioning -- intellectual functioning, emotional functioning and mental status (R. 622). Department of Corrections testing reflected an I.Q. of 73 (R. 622).

Mr. Phillips has "significant intellectual deficiencies" that "adversely affect how one operates" (R. 623). His thinking is concrete and child-like (R. 623). He is an individual who "would have difficulty functioning at cm abstract level of reasoning" (R. 624).

Due to his impairments, Harry lacks the heightened mental capacity necessary for the "cold, calculated, premeditated" aggravator (R. 624, 625). He lacks that high mental capacity and level of intellectual functioning (R. 624, 625). His long-term planning ability is lacking, as is the intellectual capacity to weigh alternatives and consider consequences (R. 624). His ability to consider his best interests is deficient (R. 624), as are higher order thought processes (R. 624-25).

Mr. Phillips acts spontaneously (R. 625). He does not have higher or abstract thinking (R. 625). His reasoning is concrete (R. 625). He is like children -- "impulsive and they do things without weighing the consequences . . ." (R. 625). Unlike his brother and sister, Harry has serious intellectual problems. Harry was impaired and therefore different than his siblings:

> [I]f you look at statements rendered by his teachers, his family members, they all describe the fact that Harry has a problem. [The siblings] were outgoing and self-starters . . . [and had] initiative . . . Harry was the opposite. Harry was more withdrawn, more isolated . . . (R. 626).

The prosecution's doctors (Dr. Haber and Dr. Miller) did not consider the historical information about Mr. Phillips' impairments and did not conduct thorough testing when they prepared their reports (R. 626-27). Their seeing Harry together, at the same time, is also problematic (R. 627), because it creates a likelihood of contamination (R. 628).

Mr. Phillips has suffered from the effects of his emotional deficits (R. 629). At the time of the offense, Mr. Phillips suffered from extreme emotional disturbance, Dr. Toomer explained, based on all of the testing, historical information and the evaluation (R. 630). He has suffered from such disturbance and deficits throughout his life (R. 630). His low I.Q. level does not change over time (R. 630). As all the background information and the testing shows, his low functioning and deficiencies hove been there a long time (R. 63 1).

The longstanding nature of his emotional disturbance is consistent with what the people who know him have explained: "His teachers and family members have described in their affidavits his behavior in terms of being withdrawn and in terms of being isolated and . . . not having a lot of friends. His teachers talked about the fact that he attended school on a regular basis, but was very isolated and could not function appropriately in terms of mastering the material . . . so we're talking about long term" (R. 631). The deficits continue today (R. 631).

The mitigating circumstance relating to impaired capacity to conform conduct to the requirements of law also applies to Mr. Phillips (R. 631). This impairment is also lifelong in Mr. Phillips (R. 631-32).

> [I]f you look at his history and . . , the testing and . . . the totality of everything [regarding Harry] . . . what you basically have with Harry is a kind of developmental disorder, and if you look at his history you see there has been impairment life long in terms of the development of social interpretation skills. There's been deficits in terms of his overall intellectual evaluation. . . and that combined with the intellectual deficits that we have been discussing would preclude his functioning [at] a level [congruent] with his age (R. 632).

Mr. Phillips is deficient and "his behavior . . . is basically motivated by the intellectual deficiencies that [hove] been described to you and therefore what he does is motivated primarily by those deficits" (R. 632).

Throughout his life, Mr. Phillips has had the affective characteristic of depression (R. 642). DOC records, Dr. Toomer explained on the State's cross-examination, describe Mr. Phillips at times as mild and peaceful and at times as aggressive (R. 645). Harry suffered injury to his head when he was shot (R. 645). "His mother described in great detail a large amount of blood and him being taken to the hospital and being incoherent and describing her attempts to have him remain in the hospital, but because they did not

have insurance and could not afford to pay he was sent home. Upon being sent home they described him as having . . . headaches that were so severe that they would cause him to cry, having blurred vision and having a residual [e]ffect from [the injury]" (R. 646). The history of head trauma also includes the beatings from his father (R. 644).

When asked by the State about Mr. Phillips' dealings with the parole officers, Dr. Toomer noted: 'You have an individual who has experienced serious trauma. You have an individual who suffers from intellectual deficiencies. You have an individual who is isolated and who is withdrawn and who has tremendous emotional deficits . . , [and who will] act out . . ." (R. 648-49). Mr. Phillips is influenced by the array of deficits that he has, including his intellectual and emotional problems (R. 650). The prosecutor, over the objection (R. 65 l), stated a two-page hypothetical (R. 650-52). Dr. Toomer explained that the prosecutor was making assumptions about Mr. Phillips' mental functioning that are not consistent with Mr. Phillips' impairments (R. 652). The prosecutor then used the letters Mr. Phillips had written, over objection, and asked questions about competency. Dr. Toomer answered the questions. The prosecutor completed his examination by stating in front of the jury: "I hope the jury understands you, doctor, I'm not quite sure" (R. 662). Defense counsel's objection was sustained (R. 662).

c. **The State's Rebuttal**

Det. Greg Smith was recalled (R. 670). He was questioned about informant Larry Hunter (R. 670-71, et seq.). Defense counsel's objection was overruled (R. 670-71).

Det. Smith was asked to tell the jury what Hunter told him:

> I talked to Mr. Hunter and he explained to me that he was familiar with the defendant, Harry Phillips, and knew him for some time from the north end living in the north end of the Dade County Jail. He ran into him in the Dade County Jail subsequent to him having been charged with the murder of Mr. Svenson.
>
> Mr. Hunter advised me that Mr. Phillips approached him regarding the shooting of Mr. Svenson in the law library.
>
> Mr. Phillips admitted to him that he was responsible for the killing of Mr. Svenson and attempted to elicit in Mr. Hunter to formulate an alibi for the night that Mr. Svenson was killed (R. 671).

The detective then was asked about notes that informcmt Hunter said he received from Mr. Phillips (R. 672). Defense counsel's objection was again overruled (R. 672). Det. Smith testified: "In my interview with Mr. Hunter he advised me that he was again approached by Mr. Phillips to attempt to formulate or put together an alibi for that night. Mr. Phillips explained to Mr. Hunter that he had to remember certain times and certain places and specific dates" (R. 672).

> Q. Did you give him any papers to help him remember this information?
>
> A. Yes, from May until I believe it was seven or eight months later. Mr. Phillips wrote four notes to Mr. Hunter so as to him remembering (sic) the date, the times and location where he had to testify to show that Harry was not at the parole (R. 673). The documents were then described in detail, all in an effort to suggest that Mr. Phillips was trying to fabricate an alibi (R. 673).

Another document was shown to Det. Smith:

> Q. Can you tell us about the next document that come into your possession?
>
> A. The next document is also dated 4/20/83. This is a copy of the original, for the record, State's exhibit number 67. My initials are also on top with my badge number and this one is much shorter. It says August 3 1, 8:25 to 8:55. Conversation items, chicken and orange juice.

Q. Did Hunter give you any explanation that he got from the defendant in regard to that document?

A. Again, that is a reminder for him to remember these items (R. 674).

Another document was shown and the same explanation was given by the detective (R. 674-75).

The detective was then asked about additional interviews with informant Hunter (R. 675):

Q. And let me ask you this. Hunter, did he actually come in and testify to the alibi?

A. No, sir

Q. He testified about getting the notes?

A. Correct.

Q. Suppose a circuit court judge and clerk said they were with your defendant in the Winn Dixie between 8:25 and 8:55 on the day in question, would that have seriously damaged your case?

[DEFENSE COUNSEL]: Objection. Your Honor, relevance and speculative.

[PROSECUTOR]: That's relevant

[DEFENSE COUNSEL]: Improper question,

THE COURT: Overruled.

THE WITNESS: Most definitely.

BY [THE PROSECUTOR]:

Q. Okay. Have you had any other conversations with Larry Hunter?

A. Yes, sir.

Q. Let me show you State's exhibit 15 and tell us what if anything you know about that document and how it came into your possession?

[DEFENSE COUNSEL]: We review [sic] our objection with respect to that document, Your Honor.

THE WITNESS: This is **a** letter that was given to me by Mr. Hunter.

BY [PROSECUTOR] :

Q. Do you recall where and when?

A. It would have been in the Dade County Jail or it might have been through his attorney at the time that provided it to me, but it originated through Mr. Hunter (R. 675-76).

The detective testified about another letter and read it into the record (R. 677-78). Defense counsels renewed objection was overruled (R. 679).

Detective Smith was then asked to tell the jury what "Will Smith" (William Scott/Smith) said (R. 680). Defense counsel's objection was overruled (R. 680). Det. Smith then testified: "Mr. Phillips told Mr. Smith that he disposed the gun and that the police could not get it" (R. 680). As to another informant, Malcolm Watson, Det, Smith was allowed to testify:

He said something to the [e]ffect or after he asked for this loan and Mr. Watson refused to give him the loan, and having told him the problems he was having with his parole officers he explained again to Mr. Watson that, "You're acting like my parole officer by not giving me this loan (R. 681).

Det. Smith also testified:

Q. Let's go forward to September of '82 when they met up in the law library. You told us about the conversation but at that time I asked you to leave a few things out. I would like you to tell us about the few things that we didn't discuss before about the conversation between the defendant and Malcom Watson in the law library.

A. Yes, sir. He told Mr. Watson during this conversation where he said or indicated to Mr. Watson that he was responsible for the death of Mr. Svenson, that he was not going to go back to prison, that he had warned them on one occasion prior to the shooting at one of them. He went a little bit further and said that he shot into his parole officer's home (R. 681).

Defense counsel's immediate objection was overruled (R. 68 1-82). Det. Smith continued:

Q. What if anything did he say about the gun?

A. That he disposed of the gun and the police would not be able to locate it.

Q. Did he indicate who the parole officer **was** who had something to do with his problem?

A. He didn't indicate anybody. He indicated that it was **a** female.

Q. And what if anything -- did the defendant make any threats towards Malcom Watson?

A. Yes, he did.

[DEFENSE COUNSELI: I'm going to object to the defendant threatening somebody. It's not a statutory aggravating circumstance.

[PROSECUTOR]: We're not offering it as aggravating. It's rebuttal.

[DEFENSE COUNSEL]: What does it rebut?

THE COURT: Overruled.

THE WITNESS: Harry Phillips explained to Mr. Watson that there were no eyewitnesses that could identify him and that they had no gun, therefore they won't be able to prove his case, they being the State of Florida. He then told Mr. Watson that he would kill him or his family if he would testify (R. 683).

Defense counsel objected again: "I object. . . what he's threatening to Mr. Watson. It's clearly outside the scope" (R. 683). This objection was also overruled (R. 683).

During defense cross-examination, Det. Smith then denied that Hunter recanted his testimony: "Well, factually no, he didn't" (R. 685). He called the affidavit where Hunter recanted "unreliable" (R. 686). Defense counsel then had him read the affidavit where Hunter admitted that his trial account **was** false:

A. "Phillips never made a confession to me. He never spoke to me about the murder. The only knowledge that I have about the events that I testified to was provided to me by Detective Smith and Mr. Waksman. I testified because they wanted me to and I told them what they wanted to hear."

Q. Can you also read paragraph 13?

A. "After Phillips was convicted Detective Smith and Mr. Waksman went to court with me. I changed my plea to guilty and the judge sentenced me to five years probation at the time, I had been charged with car theft, sexual batter and possession of cocaine. This happened right after Phillips was found guilty in December of 1983. Shortly after that I got $200 from Detective Smith. (R. 686).

On the state's redirect, without any specific details, Det. Smith speculated that Hunter was put under "duress and threatened" by Mr. Phillips' post-conviction counsel (R. 687). Det. Smith also said that Hunter did not know when he testified that he would be receiving money for his testimony (R. 688).

Dr. Leonard Haber was then called by the prosecutor (R. 689). Dr. Haber received his Ph.D. in 1960 (R. 690). He began private practice in 1965 (R. 690). He has worked at a state hospital (R. 691). He does "a lot of testifying in court" (R. 691).

Dr. Haber saw Mr. Phillips in 1988 (R. 692). He read the reports of Dr. Carbonell and Dr. Toomer (R. 692). He was shown motions and other writings of Mr. Phillips (R. 693). Defense counsel renewed his objection to the introduction of the documents and the objection was overruled (R. 693). Dr. Haber testified that he evaluated competency and sanity (R. 694). He did not test Mr. Phillips, other than one screening test (R. 694).

Dr. Haber testified that he looked at the testing of Drs. Toomer and Carbonell, "satisfied myself that the complete battery had been done and there was no point to repeat it" and then relied on that testing (R. 694).

Dr. Haber testified that Mr. Phillips was competent (R. 695). Without citing any specific test -- and in contrast to the scores actually reported -- he said that the testing of Drs. Toomer and Carbonell had an I.Q. "'range of approximately 75 and 84 roughly.

It might be 73 or 83 or 75 and 85 but it's in that range" (R. 696).[11] He cited the (supposed) 80's scores during his testimony (R. 696-97). He said people can be more intelligent than their I.Q. level (R. 696-97).

Dr. Haber did acknowledge that people with such I.Q. scores would not be highly skilled; could be laborers; could be trained for some jobs, although not a "highly technical job"; and could drive a car (R. 697).

Letters attributed to Mr. Phillips indicate good handwriting; "the spelling was okay but there are spelling errors" (R. 698); and Mr. Phillips could communicate some ideas (R. 699). Dr. Haber went through the competency criteria and again said Mr. Phillips was competent (R. 699-700).

Dr. Haber was asked about motions and letters again (R. 700). Defense counsels renewed objection was overruled (R, 700). Dr. Haber described the letters as referring to issues in the trial (R. 700).

Dr. Haber's "opinion was that there was insufficient evidence to conclude that Mr. Phillips was affected by or was damaged by or had an emotional disorder or such as a disturbing emotional disorder" (R. 701). Dr. Haber also said that in his opinion Mr. Phillips could conform his conduct to law (R. 701). Dr. Haber said he did not find evidence of organicity but "noted in the record of Dr. Toomer and Dr. Carbonell that the matter of orgcmicity or brain damage which is an issue that is frequently raised when an I.Q. score [is] in the 70's or when there's an indication of a possible learning disability that the issue has been raised as a possibility that was not ruled out but noted" (R. 702).

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[11] "There was nothing like that in the testing: the actual I.Q. score in Dr. Toomer's testing was 76; Dr. Carbonell's 75; and DOC 73, The 83, 84 and 85 scores are not these doctors' scores and not DOC's scores. Dr. Haber never tested Mr. Phillips' I.Q. In the 3.850 proceedings both Dr. Haber and Dr. Miller stated that Mr. Phillips was "possibly borderline retarded." Phillips, 608 So.2d at 783.

Damage to the brain, according to Dr. Haber, "may or may not" get better (R. 702). Dr. Haber also testified: "Anybody could be brain damaged. That's a possibility for anybody" (R. 705).

Dr. Haber said there is some evidence that Mr. Phillips can plan events and that he does not agree that Mr. Phillips is compliant (R. 704). "I would agree that Mr. Phillips appeared to be quiet and shy and a reserved person but not necessarily a passive person" (R. 704).

Dr. Haber also testified that: "Schizoid is a person who likes to be alone rather than with lots of other people" (R. 704-05); schizoid is not a mental illness (R. 705); schizoid is just a "characteristic" describing "how people are" (R. 705); schizoid is a trait (R. 705); schizoid "denotes . . . your personality for being alone" (R. 705); and schizoid is not an emotional disturbance or mental disorder (R. 705).

Mr. Phillips was candid and straightforward when questioned by Dr. Haber (R. 707). Dr. Haber described what he believed would constitute extreme emotional disturbance:

> An extreme emotional disturbance would be something along the order of a psychosis which means a person who suffers a blank in contact with reality or could be a paranoid disorder in which a person perhaps begins to lose a lot of weight because they're afraid to drink water. Somebody might be possessing this condition where there's usually evidence. They start to lose contact with people and believe things that an average person wouldn't believe. They might take the form of what we call a major depression. That's a severe emotional disturbance where a person might lose up to 10 percent of their body weight in a short period of time being unable to work, concentrate and the inability [to] perform on the job or maybe unable to work.

> Those are emotional disturbances involving either depression or confusion and begins to have lack of context with reality or be paranoid or such an extreme suspicion as to being unable to function normally (R. 708-09).[12]

Dr. Haber also testified that "passive aggressive means that you do your aggressive stuff but you don't do it, but you do it to where it's obvious" (R. 710).

The prosecutor asked and Dr. Haber testified that there was a **case** where he was retained by the Phillips resentencing prosecutor

> to look into it and my opinion was not in accord with what you were doing. You did not call me to testify but you understood that and accepted the opinion that I gave you and you changed direction in regard to that prosecution (R. 7 13).

Before this statement, defense counsel objected (R. 713). The prosecutor said it goes to "[l]ack of my [the prosecutor's] bias and motive" (R. 7 13).

On cross-examination, Dr. Haber said that Dr. Miller was present with Dr. Haber when he saw Mr. Phillips (R. 717). Dr. Haber did not talk to Mr. Phillips' family and was not provided with their affidavits (R. 717-18). He does not question the testing procedures or data of Drs. Toomer and Carbonell (R. 714), but disagreed with their conclusions (R. 714-15).

He did not do intelligence testing himself and characterized the testing of Drs. Toomer and Carbonell as very good procedures (R. 718-19), which he has no reason to question (R. 719).

Dr. Haber is aware of the "gunshot wound to his [Harry's] head at a young age" (R. 7 19). It "could possibly" result in brain damage (R. 7 19). Mr. Phillips could also be learning disabled (R. 719). Several of the writings of Harry's used by the prosecutor and

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[12] C.f. Statev. Dixon, 283 So.2d 1, 10 (Fla. 1973) ('Extreme. . . emotional disturbance . . . is easily interpreted as less than insanity but more than the emotions of an average man. . .") What Dr. Haber was actually describing was insanity.

Harry on direct (a 3.850 motion; motion to dismiss original counsel) are just fill-in-the-blank writings (R. 7 19-21) and "[n]ot very difficult to do . . . no, not at all, very easy" (R. 722). Harry's writings (such as a pro se habeas) are consistent with a jailhouse lawyer's help and just filling in the blanks on a form (R. 723-24). Given his I.Q. level, it is possible that the writing was simply copied (R. 724). One of the documents for example, has language in Latin, and Harry obviously does not know Latin (R. 725). The next document was also a preprinted fill-in-the-blank motion to dismiss counsel (R. 725), as were several of the documents (R. 725-26).

Dr. Haber stated: "I would say much of it could be copied" (R. 726). He also said as to another letter: "He did that on his own from the Reader's Digest from World [Word] Power" (R. 727).

> Q. [I]n Harry's case he was beaten by his father and so was his brother who obviously has the motivation to get himself out of the situation and enlisted in the Navy. Harry doesn't. That's not unusual that two brothers would be separate like that, correct?
>
> A. That is correct (R. 728).

Dr. Haber does not think Mr. Phillips is passive but thinks Mr. Phillips is quiet and "possibly a loner" ("likes to be by himself") (R. 73 1).

SUMMARY OF ARGUMENT

I. Harry Phillips was not afforded meaningful and independent judicial weighing and consideration of punishment. The resentencing judge did not follow the procedures mandated by this Court's decisions in Spencer v. State and its progeny. Moreover, the order entered by the judge was no more than a word-for-word transcription of the State's written submission, typographical errors included. The order,

and the procedure by which it was entered, demonstrates that no reliable and independent judicial consideration of sentence occurred. Relief is appropriate.

II. The resentencing judge mishandled the jury and unduly influenced the jury to return a verdict. The judge told the jurors that a different jury convicted Mr. Phillips but "for legal technicalities we have to retry the penalty phase". Bizarre, inconsistent and confusing instructions about the verdict were then provided to the jury. The jury ultimately indicated that on impasse had been reached. Two jurors were declining to vote. The judge did not provide the jury with a single word from the approved standard jury instruction or settled case law. Rather, he told the jurors to take a vote immediately, even if all the jurors were not voting, and to "[p]ut on the vote as it stands". Six minutes later, the jury returned at 7-5 death vote. Such mishandling of a capital jury does not comport with Florida law or the sixth, eighth and fourteenth amendments to the United States Constitution,

III. The hindering governmental function aggravator was improperly and overbroadly provided to the jury and found by the court. In the original sentencing, the same judge found that the aggravator had not been proven because the crime was committed for "revenge" and "hindering" therefore was not the sole or dominant motive. At resentencing, on the basis of the same original trial evidence, the court did not apply the limiting construction and adopted the aggravator. The prosecution did not prove beyond a reasonable doubt that "hindering" was the dominant motive here. In light of the significant mitigation introduced, and the 7-5 jury vote, relief is appropriate.

Iv, The prosecutor introduced, used and argued non-statutory aggravation, unrebuttable hearsay, other crimes, bad acts, uncharged acts, speculative allegations and scores of other types of inflammatory and prejudicial matters. Such misconduct

repeatedly has been held to render a death sentence unreliable by this and other courts. Relief is appropriate.

V. The prosecutor was improperly allowed to strike an African-American juror. The judge found the prosecutor's stated reasons inadequate and indicated that the juror was on the panel. Without further comment from the prosecutor, the judge then said the juror would be stricken. Such a process cannot be squared with Batson, Neil and their progeny.

VI. It is not possible to narrow the inherently overbroad and vague "cold, calculated, premeditated" aggravator, no matter what definitions one can muster. It therefore has been overbroadly applied here and in other Florida capital cases. The Court should declare it no longer applicable in Florida.

ARGUMENT

(I)

HARRY PHILLIPS' TRIAL COURT SENTENCING VIOLATED FLORIDA LAW, THIS COURTS STANDARDS AND THE CONSTITUTIONAL REQUIREMENTS OF A MEANINGFUL, INDEPENDENT JUDICIAL DETERMINATION OF SENTENCE

Harry Phillips was not afforded meaningful and independent judicial consideration of sentence and was not afforded reliable judicial evaluation and weighing of aggravation and mitigation. Well before Mr. Phillips' sentencing, this Court held that the mandatory procedure in Florida capital cases requires that after a jury's capital sentencing verdict:

> [T]he trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument,

> the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.14 1, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer v. State, 615 So.2d 688, 690-9 1 (Fla. 1993) (emphasis added). The purpose of these requirements is to ensure that the judge's sentencing decision be independently and carefully thought-out; that it involve meaningful findings on, and a meaningful weighing of, aggravating and mitigating factors; and that the parties are afforded a full opportunity to be heard. Spencer; cf. Gibson v. State, 661 So.2d 288, 293 (Fla. 1995) (the procedural requirements are mandated in order to assure that the trial court properly thinks-through its life-or-death decision); Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995) (same); Perez v. State, 648 So.2d 715, 720 (Fla. 1995) (same); Layman v. State, 652 So.2d 373, 375-76 (Fla. 1995) (same). The failure to follow this procedure mandates reversal of the death sentence. Spencer.

Just as these requirements were "not followed" in Spencer, 6 15 So.2d at 690, they were not followed in Mr. Phillips' case. The jurors reached a 7-5 death vote -- after improper interference by the trial judge, see Argument II, infra -- on April 8, 1994 (R. 808, 812). The case next appeared on the calendar on August 20, 1994 (R. 817). Without first having heard "evidence and argument" at a judge-sentencing, "recess[ing] the proceeding to consider the appropriate sentence" and then setting "a hearing to impose sentence and contemporaneously file a sentencing order" independently prepared after the parties have been heard, Spencer, 615 So.2d at 690-9 1, the judge showed up on that day -- August 20 -- with a sentencing order in hand (See R. 826-46). As discussed below,

this order was a word-for-word (typos and grammatical errors included) lifting of the findings submitted by the State.

After the lawyers spoke,[13] there was no recess to consider the appropriate sentence, meaningfully weigh aggravation and mitigation and prepare a proper order. Rather, the judge simply read the pre-prepared order into the record. Even the way that the findings are typed into the transcript reflects that the order was handed to the court reporter in advance -- it is typed in the transcript identically to the written order (with the same paragraph breaks, capitalization, headings, punctuation, etc.), but without the handwritten corrections made on the written order at the prosecutor's request (Compare R. 826-46, with S.R. 174-89).

As the judge stated: "I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment" (R. 825). This judge predetermined that he would sentence this defendant to death; did not comply with the mandatory requirements of Spencer; and did not engage in a meaningful weighing.

Neither was the order an independent judicial weighing. To the contrary, the order is no more than a verbatim (word-for-word, grammatical errors and typos included) reproduction of the findings the State wanted. The State's "memorandum" appears at R. 126, et seq. The judge's order appears at S.R. 174, et seq. A comparison of the two reveals: [14]

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[13]It is obvious that defense counsel and the prosecutor knew that the judge had the order in hand. Defense counsel, knowing that the judge already had an order, made some general religious comments and sat down.

[14]The judge's order is at the left margin and the State's writing is at the right margin. Each paragraph in the reproduction includes a record citation, Any differences are highlighted in bold. Corresponding typographical errors which were lifted verbatim by the judge are underlined.

JUDGE

On December 13, 1983, after a trial by jury, the defendant was convicted and adjudicated guilty of the First Degree Murder of Bjorn Thomas Svenson. The conviction stemmed from acts committed by the defendant on August 3 1, 1982. The conviction was affirmed by the Florida Supreme Court, Phillips v. State, 476 So.2d 194 (Fla. 1985), but the prior death sentence **was vacated** and the case **was** remanded for resentencing. Phillips v. State, 608 So.2d 778 (Fla. 1992). (S.R. 174).

On April 4, 1994, the new penalty proceeding commenced before a new sentencing jury and this Court. This Court tried the original case in 1983, On April 8, 1994, the jury after receiving evidence and testimony and argument from both the State and the defense on the applicable aggravating and mitigating factors under section **92 1.14 1, Florida** Statutes, and case law, i.e., Lockett v. Ohio, 438 U.S. 586 (1978), deliberated, and by a vote of 7 to 5, returned an advisory sentence recommending imposition of the death penalty. **It should be noted that the composition of the jury included 8 black persons, and that the Defendant is black.** (S.R. 174).

II.

AGGRAVATING CIRCUMSTANCES

a. The capital felony **was** committed by a person under sentence of imprisonment Section 92 1.14 1(5)(a), Florida Statutes,

The uncontradicted evidence presented **was** that at the time of the homicide, the defendant was on parole from a life sentence for the crime of Armed Robbery, case number 73-2480B, recorded in the

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II

AGGRAVATING CIRCUMSTANCES

a. The capital felony **was** committed by a person under sentence of imprisonment Section 92 1.14 1(5)(a), **Florida** Statutes.

The uncontradicted evidence presented was that at the time of the homicide, the defendant **was** on parole from a life sentence for the crime of Armed Robbery, **case** number 73-2480B, recorded in the

Circuit Court of the Eleventh Judicial Circuit of Florida. Pursuant to Jackson v. State, 530 So.26 269 (Fla. 1988), Jones v. State, 4 11 So.2d 165, 168 (Fla. 1982), the Court finds that at the time of the capital felony, the defendant was under a sentence of imprisonment, as he was on life parole. See also Straiaht v. State, 397 So.2d 903 (Fla. 1981). (S.R. 175).

b. The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person Section 92 1.14 l(5)(d), Florida Statutes.

The uncontradicted evidence established that the defendant was convicted of Armed Robbery in case number 73-2480-B, recorded in the Circuit Court of the Eleventh Judicial Circuit of Florida. Lieutenant Gory Hancock of the Metro-Dade Police Department, who was the lead detective in the armed robbery case, testified that on March 2, 1973, the defendant and an accomplice, both armed with firearms, went into a liquor store warehouse, and after an initial diversion, were able to tie up the manager of the warehouse, and steal the receipts. (S.R. 176).

Furthermore, evidence was also presented that the defendant was covicted [sic] of the felony of Assault With Intent To Commit First Degree Murder, under case number 62-6 140C, in the Circuit Court of the Eleventh Judicial Circuit. The certified copies of the judgment, sentence, and other supporting court documents, as well as testimony of the defendant's mother and sister which corroborated those documents, established beyond a reasonable doubt that the defendant was convicted under case number 62-6140C. (S.R. 176).

Circuit Court of the Eleventh Judicial Circuit of Florida. Pursuant to Jackson v. State, 530 So.2d 269 (Fla. 1988), Jones v. State, 4 11 So.2d 165, 168 (Fla. 1982), this Court should find that at the time of the capital felony, the defendant **was** under a sentence of imprisonment, as he was on parole. See also Straiaht v. State, 397 So.2d 903 (Fla. 1981). The State submits that this aggravating factor should be given great weight. (R. 127).

b. The defendant was previously convicted of another capital felony or **a** felony involving the use or threat of violence to the person. Section 92 1.14 l(5)(d), Florida Statutes.

The uncontradicted evidence established that the defendant was convicted of Armed Robbery in case number 73-2480B, recorded in the Circuit Court of the Eleventh Judicial Circuit of Florida. Lieutenant Gary Hancock of the Metro-Dade Police Department, who was the lead detective in the armed robbery **case,** testified that on March 2, 1973, the defendant and an accomplice, both armed with firearms, went into a liquor store warehouse, and after an initial diversion, were able to tie up the manager of the warehouse, and steal the receipts. (R. 127).

Furthermore, evidence **was** also presented that the defendant **was** convicted of the felony of Assault With Intent to Commit First Degree Murder, under case number 62-6 140C, in the Circuit Court of the Eleventh Judicial Circuit. The State submits that the certified copies of the judgment, sentence, and other supporting court documents, as well as testimony of the defendant's mother and sister which corroborated those documents, established beyond a reasonable doubt that the defendant was convicted under case number 62-6140C. (S.R. 176).

c. The capital felony **was** committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Under Section 921.141(5)(g), Florida Statutes (1987).

During the original trial, which this Court presided over, and at the present resentencing, substantially the same testimony was presented. Evidence was presented that showed the **defendant** was paroled in June of 1980 and assigned to Florida Parole and Probation Officer Nanette Brochin. After six months of non-eventful supervision, the Defendant drove from Dade County to Broward County, without permission, and asked his Parole Officer Nanette Brochin, for a kiss in the parking lot of **a grocery** store. She reported this incident to her supervisor, the victim in this case, Bjorn Thomas Svenson. Some months later, both Brochin and Svenson testified at the defendant's parole revocation hearing. The defendant was returned to prison for approximately twenty (20) months. Upon his release on August 10, 1982, the defendant **was** assigned to a different parole officer and was instructed several times by Mr. Svenson to stay away from Nanette Brochin and her fiance, Florida Parole and Probation Officer Michael Russell. The defendant **was** unable to follow these instructions and was warned on numerous occasions by Mr. Svenson that he would be returned to prison for violating these instructions. The last time the defendant **was** so instructed was on August 31 1982, the same day Mr. Svenson **was** killed. Thus, twenty-one (21) days after his subsequent release from prison, the defendant killed Mr. Svenson. (S.R. 176-77).

Additional evidence at trial showed that the defendant told **a** cellmate during a conversation about parole officers, approximately three days after the

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Additional evidence at trial showed that the defendant told **a** cellmate during a conversation about parole officers, approximately three days after the

homicide, that he had "just downed one of these mother fuckers," and he had done it "because the parole officers were giving him problems." The defendont also told a subsequent cellmate that he had killed a parole officer for "unjustly violating him." (S.R. 177).

At the trial, that cellmate testified that the defendant said that he had purchased a gun upon his release from prison "to kill a parole officer." At trial, evidence showed that the defendant told **a** third person, shortly after the incident in Broward County, that he was tired of being harassed by his parole officer and that "somebody would have to pay because of the harassment" and that he was going to "put a stop to it for good." With that comment, the defendant exhibited a .38 caliber revolver. After the homicide, the defendant told yet another cellmate, that the homicide was committed "for revenge" specifically because the victim and Nanette Brochin "testified" against him at a parole hearing. A fifth witness testified that shortly after the Broward incident, the defendant told him "She is trying to get me on technicals," cmd he would "get them" if they violated him. (S.R. 178).

The Court finds that these facts prove beyond a reasonable doubt that the killing of Mr. Svenson was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. This Court previously found this factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits, that although revenge may hove been one motive, it was part of the overall motive of killing a parole official who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole revoked, for continuing to violate the terms

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The State submits that these facts prove beyond a reasonable doubt that the killing of Mr. Svenson **was** committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. The State recognizes that this Court previously found this factor inapplicable because the court believed that the homicide was committed for revenge. However, the State submits, that although revenge may have been one motive, it was part of the overall motive of killing a parole official who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole

of his parole and for shooting a gun which occurred a few days before the homicide. This would clearly hinder a governmental function. Mr. Svenson's only connection with the defendant was as parole officer and parolee. Mr. Svenson's homicide was beyond a reasonable doubt committed to disrupt or hinder governmental function. See Jones v. State, 440 So.2d 570 (Fla. 1983). (S.R. 178-79).

d. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Section 921.141 (5)(i), Florida Statutes.

The evidence at the trial and sentencing hearing established that on August 3 1, 1982, Mr. Svenson was the last person to leave the parole office, shortly after 8:30 P.M. The last person who left before Mr. Svenson had left at 8:30 P.M. There was only one car in the parking lot at the time of the homicide and large piles of sand. At the time he was killed, Mr. Svenson was carrying old phone books and depositing them in a dempsey dumpster garbage bin, located in the rear parking lot. The evidence showed that Mr. Svenson was shot three times by the dempsey dumpster; twice in the left side of the chest, and once, a graze wound to the head. This evidence indicates that the defendant hid and waited for Mr. Svenson before he shot him. Mr. Svenson then ran approximately one hundred (100) feet and was then shot four times in the head, and once in the spine. The evidence indicated that because eight shots were fired, from a six-shot revolver, and witnesses heard two volleys of shots, that the defendant had reloaded between the two volleys. In addition, the murder weapon was taken from the scene and never recovered, nor were at least seven of

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the spent casings. Furthermore, there was evidence at the trial, that prior to the homicide, the defendant told an acquaintance that "I'm not going to joil again" and that he wanted to put an end to his problems with his parole officer. The defendant had threatened to "get them" if he was violated, and he bragged about the killing shortly thereafter and said it was because they were harassing him. (S.R. 179-80).

This evidence clearly establishes beyond a reasonable doubt, a homicide was committed after calm and cool reflection; that was a careful or prearranged plan; and that reflected a heightened premeditation. Furthermore, there was absolutely no moral or legal justification for this killing. The previous finding by this Court of this aggravating factor was upheld by the Florida Supreme Court. Phillips v. State, supra. Nine years later, the case law continues to support the finding. See, e.g., Cruse v. State, 588 So.2d 983 (Fla. 1991); Swaffordv. State, 533 So.2d 270 (Fla. 1988). (S.R. 180).

The testimony of Drs. Carbonnell and Toomer, that the defendant did not have the intellectual capacity to calculate and plan the homicide is not only contradicted by Dr. Haber, but by the statements and actions by the defendant before and at the time of the homicide. Furthermore, the evidence of the letters from the defendant to his cellmates concerning threats to witnesses and falsifying an alibi, indicate a person who is capable of planning and calculating his actions. The Court finds that the murder of Bjorn Thomas Svenson was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (S.R. 180).

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In addition, the State submits that the testimony of Drs. Carbonnell and Toomer, that the defendant did not have the intellectual capacity to calculate and plan the homicide is not only contradicted by Dr. Haber, but by the statements and actions by the defendant before and at the time of the homicide. Furthermore, the evidence of the letters from the defendant to his cellmates concerning threats to witnesses and falsifying an alibi, indicate a person who is capable of planning and calculating his actions. The Court should find as it **did before,** that the murder of Bjorn Thomas Svenson was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, **and** give such factor great

weight in determining the appropriate sentence. (R. 13 1).

e. **The** remaining aggravating circumstances under section 92 1.14 1(5), Florida Statutes.

As to the remaining aggravating circumstances enumerated by section 921.141(5), to wit:

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony **was** committed while the defendant **was engaged,** or **was** an accomplice, in the commission of, or on attempt to commit, any robbery, sexual battery, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or **bombs;**

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony **was** especially heinous, atrocious, or cruel; (S.R. 181).

The aggravating factors under section 92 1.14 1 (S)(j) and (k) involving the homicide of law enforcement officials and elected or appointed public officials was enacted after the homicide in this case occurred and do not apply to this case as under § 943.10(1), Fla. Stat., a parole officer or a **probation** officer is neither a law enforcement officer nor an elected or appointed public official. (S.R. 181 n.1).

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(g) The capital felony was especially heinous, attrocious, or cruel; (R. 131-32).

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The Court in its prior order found that the homicide was heinous, atrocious or cruel, and such finding was upheld by the Florida Supreme Court. See Phillips v. State, supra. However, in the nine years since that opinion, factual situations similar to this case have not been upheld as heinous, atrocious, or cruel. See e.g., Clark v. State, 609 So.2d 5 13 (Fla. 1992); Wickham v. State, 593 So.2d 19 1 (Fla. 199 1); Shere v. State, 579 So.2d 86 (Fla. 199 1); Rivera v. State, 545 So.2d 864 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988.) Therefore, this Court did not consider this aggravating factor. ["or C, D, E and F' was handwritten into the order at the prosecutor's oral request, see R. 8151 (S.R. 181).

III.

MITIGATING CIRCUMSTANCES

The law requires this Court to consider any mitigating circumstances and evidence presented by the defendant to determine if they reasonably exist, and if they are outweighed by the aggravating circumstances. In this case, the defense alleged that various statutory and nonstatutory mitigating circumstances were applicable. (S.R. 182).

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Section 92 1.14 1(6)(b), Florida Statutes.

To support this mitigating circumstance, the defendant presented the testimony on Dr. Joyce Carbonnell and Dr. Jethro Toomer. Both psychologists testified that the defendant's intelligence level was low to borderline, and that such a level was indicative of deficits in intellectual functioning. Both doctors testified about the defendant's poor background, that he came

The State recognizes that this Court in its prior order found that the homicide was heinous, atrocious or cruel, and such finding was upheld by the Florida Supreme Court. See Phillips v. State, supra. However, in the nine years since that opinion, factual situations similar to this case have not been upheld as heinous, atrocious, or cruel, See e.g., Clark v. State, 609 So.2d 5 13 (Fla. 1992); Wickham v. State, 593 So.2d 191 (Fla. 1991); Shere v. State, 579 So.2d 86 (Fla. 1991); Rivera v. State, 545 So.2d 864 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988.) Thus, this Court should not consider this aggravating factor. (R. 132).

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1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Section 92 1.14 1(6)(b), Florida Statutes.

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from a migrant family in Belle Glade, and that the family remained poor when they moved to Miami, that his father was an alcoholic, who did not support the family as he should, and that he beat the defendant, as well as his siblings, and mother. They also testified that the defendant did poorly in school and that the defendant had been shot (grazed) in the head by a bullet as a young teenager. Although psychological tests indicated the possibility of some organicity or brain damage, neither doctor could state that the defendant was brain damaged. Based on the totality of the circumstances, both doctors opined that the defendant was under the influence of an extreme mental or emotional disturbance at the time he murdered Mr. Svenson. (S.R. 182).

In rebuttal, the State presented the testimony of Dr. Lloyd Miller, a board certified forensic psychiatrist, and Dr. Leonard Haber, a **psychiatrist ["a psychologist" was handwritten on the order at the prosecutor's oral request, R. 8151.** Dr. Miller testified that although the defendant was of low or borderline intelligence, his ability to learn was better than what the intelligence tests suggested. Dr. Miller found no psychosis, schizophrenia, or evidence of brain damage. He considered the defendant's background, and concluded that he did not suffer from any significant degree of mental illness or impairment. **He found no significant or extreme or any mental disturbance.** (S.R. 183).

Dr. Haber did not challenge the defendant's tested IQ score in the 72-76 range, but noted that he had once tested at 83. After reviewing the defendant's actions after the homicide, i.e., alibi notes, threats to witnesses, and pro se motions to the Court, Dr. Haber concluded that the defendant's mental abilities exceeded that which one

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would expect from someone with an IQ in the 72-76 range. Dr. Haber opined that there was no evidence of brain damage or mental illness. He did not find any evidence to support a finding that the defendant was under the influence of an extreme mental or emotional disturbance when the homicide was committed. (S.R. 183).

The Court finds that this statutory mitigating circumstance does not reasonably exist, There is no evidence that the defendant suffered from a mental disturbance that "interfere(d) with but (did) not obviate the defendant's knowledge of right and wrong." Duncan v. State, 619 So.2d 279 (Fla. 1993); State v. Dixon, 283 So.2d 1 (Fla. 1973). There is simply no basis to support either Dr. Carbonnell's or Dr. Toomer's testimony that this mitigating factor exists. Dr. Miller and Dr. Haber's testimony were inherently more credible. Thus, the Court finds that this mitigating circumstance has not been reasonably established by the greater weight of the evidence, see Campbell v. State, 571 So.2d 4 15 (Fla. 1990); and therefore it does not exist or apply. (S.R. 183-84).

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform this conduct to the requirements of the law was substantially impaired. Section 92 1.14 l(6)(f), Florida Statutes.

For the same reasons that they based their opinion on the mitigating circumstances under section 921.141(6)(b), Drs. Carbonnell and Toomer likewise opined that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Miller opined that despite the defendant's intelligence level, he could understand and conform his

would expect from someone with on IQ in the 72-76 range. Dr. Haber opined that there was no evidence of brain damage or mental illness. He did not find any evidence to support a finding that the defendant was under the influence of an extreme mental or emotional disturbance when the homicide was committed. (R. 133).

The State submits that this statutory mitigating circumstance does not reasonably exist. There is no evidence that the defendant suffered from a mental disturbance that "interfere(d) with but [did] not obviate the defendant's knowledge of right and wrong." Duncan v. State, 6 19 So.2d 279 (Fla. 1993); State v. Dixon, 283 So.2d 1 (Fla. 1973). There is simply no basis to support either Dr. Carbonnell's or Dr. Toomer's testimony that this mitigating factor exists. Dr. Miller and Dr. Haber's testimony were inherently more credible. Thus, the State submits that this mitigating circumstance has not been reasonably established by the greater weight of the evidence see Campbell v. State, 571 So.2d 4 15 (Fla.' 1990); and therefore it does not exist or apply, (R. 133-34).

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conduct to the requirements of the law, that there was nothing in his mental condition that prevented him from following the law, and that the defendant was able to do what he does according to his own wishes. Dr. Haber likewise opined that the defendant had the capacity to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law. He stated that the defendant was capable of making choices that are his. (S.R. 184).

There was no evidence to indicate that the defendant suffered from a mental disturbance which interfered with, but did not obviate his knowledge of right or wrong. State v. Dixon, 283 So.2d 1 (Fla. 1973). Again, the Court submits that Dr. Miller's and Dr. Haber's testimony was more credible than Dr. Carbonnell's or Dr. Toomer's. There was no credible evidence to show that the Defendant was impaired in any mcmner. Thus, the Court finds that this mitigating circumstance does not exist or apply. (S.R. 185).

3. Any other aspect of the defendant's character or record and circumstances of the offense which warrant mitigating.

The defendant presented the testimony of the defendant's mother, Laura Phillips, his brother, Julius Phillips; his sister, Ida Phillips Stanley; his junior high school science teacher: Samuel Ford; a family neighbor, Mary Williams; and the Reverend C.E. Jenkins. Phillips testified that the defendant was born in 1945 in Belle Glade, Florida. The defendant lived with his mother, father, older brother and younger sister. Both parents were migrant workers. The defendant's father, did not help to support the family. She testified they moved to Dade County in 1953. His father worked as a truck driver, and she worked as a domestic. Neither parent was home for the

conduct to the requirements of the law, that there was nothing in his mental condition that prevented him from following the law, and that the defendant was able to do what he does according to his own wishes. Dr. Haber likewise opined that the defendant had the capacity to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law. He stated that the defendant was capable of making choices that are his. (R. 134).

There was no evidence to indicate that the defendant suffered from a mental disturbance which interfered with, but did not obviate his knowledge of right or wrong. State v. Dixon, 283 So.2d 1 (Fla. 1973). Again, the State submits that Dr. Miller's and Dr, Haber's testimony was more credible than Dr. Carbonnell's or Dr. Toomer's. There was no credible evidence to show that the Defendant was impaired in any manner. Thus, the State submits that this mitigating circumstance does not exist or apply. (R. 134).

3. Any other aspect of the defendant's character or record and circumstances of the offense which warrant mitigating.

The defendant presented the testimony of the defendant's mother, Laura Phillips, his brother, Julius Phillips; his sister, Ida Phillips Stanley; his junior high school science teacher, Samuel Ford; a family neighbor, Mary Williams; and the Reverend C.E. Jenkins. Phillips testified that the defendant was born in 1945 in Belle Glade, Florida. The defendant lived with his mother, father, older brother and younger sister. Both parents were migrant workers. The defendant's father, did not help to support the family. She testified they moved to Dade County in 1953. His father worked as a truck driver, and she worked as a domestic. Neither parent was home for the

children. Mrs. Phillips testified that the defendant's father would drink, and he would become violent, and beat her and all the children with his fists or an ironing cord. She testified that at one point, Mr. Phillips' daughter by another woman came to live with them. When the defendant was a young teenager, his father lost his job and left the family. Mrs, Phillips testified that this had an effect on the defendant and the other children, She testified that the defendant got shot (grazed) in the head, that he was bleeding, taken to the hospital, treated and sent home. She stated that the defendant stayed in his room and was quiet, didn't date or have many friends. (S.R. 185).

Julius Phillips, a retired honorable discharged navy veteran, who works at the VA Medical Center, testified similarly to his mother. He testified that his father would drink and became very violent, hitting his mother, and the children. He stated that the defendant was quiet, stayed to himself, and did not have many friends. Mr. Phillips testified that when his father left, twenty-six years before the homicide, it affected the defendant, (his **brother)** as it made him more lonely. (S.R. 186).

Ida Phillips Stanley, **a** librarian, also testified similarly to her mother and brother. In addition, she testified that after the defendant first got out of prison, he lived with her and their mother, worked for the City of Miami Sanitation Department, helped pay bills and bought her her first typewriter. She testified that the defendant was close to her and her children. She testified that when the defendant was initially paroled in 1980, he worked as a bus boy at Neighbor's Restaurant. (S.R. 186).

Samuel Ford testified that the defendant was very quiet and withdrawn in school. He stated that the defendant was a below

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Samuel Ford testified that the defendant **was very** quiet and withdrawn in school. He stated that the defendant was a below

average student, that he did not have ambition, that he was a follower, and not a leader. He did not know if the defendant had a learning disability, but that something was wrong. (S.R. 186).

Mary Williams, a family friend testified that she used to watch the defendant and his siblings while their mother was at work. The defendant was initially outgoing and got along well with her children. As he got older, the defendant didn't talk much, but he was nice and respectful of her, The Reverend Jenkins testified that in the early 1980's, he had talked to the defendant two or three times while the defendant was in jail. He found the defendant to be quiet and reserved, "in and out of it." (S.R. 186).

Drs. Corbonnell and Toomer reiterated the defendant's background as testified to by the defendant's family and friends. They opined that the defendant had low to borderline intelligence, was a loner, had low self-esteem and poor self-image. They also opined that the defendant had deficiencies in his intellectual functioning, and did not have the capacity for long-range planning and consideration of the consequences. (S.R. 187).

The Court recognizes that the defendant came from a poor family, that the father was an alcoholic who was not around very much, and who when drunk would become violent and beat the defendant and his family. The Court would note however, that the defendant's brother and sister who were raised in the same family and circumstances were able to overcome their background and became law abiding, productive citizens. The Court also recognizes that the defendant had a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a false alibi

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and indirectly threaten witnesses. The Court finds that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they simply do not extenuate or reduce the degree or moral culpability of the defendant's actions in committing this homicide. See Roaers v. State, 511 So.2d 526 (Fla. 1987). (S.R. 187).

4. The remaining mitigating circumstances under section 92 1.14 1(6), Florida Statutes.

As to the remaining mitigating circumstances enumerated in section 921.141 (6), to wit:

(a) The defendant has no significant history of prior criminal activity;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

. . .

(g) The age of the defendant at the time of the crime.

The defendant did not argue that any of these statutory mitigating circumstances were applicable, and they clearly are not. The defendant has a significant history of prior criminal activity. Bjorn Thomas Svenson did not participate in or consent to the defendant's actions. The defendant was not an accomplice. There was no evidence that the defendant acted under extreme

alibi and indirectly threaten witnesses. The State submits that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they simply do not extenuate or reduce the degree or moral culpability of the defendant's actions in committing this homicide. See Roaers v. State,511 So.2d 526 (Fla. 1987). (R. 136).

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duress or under domination of another person. Finally, the defendant was 37 years old at the time of the crime. Although the defendant has a low IQ, he is street smart. Thus, the defendant's age, plus his experience, eliminates this as a mitigating factor. See Peek v. State, 396 So.2d 492 (Flu. 1981); Sonaer v. State, 322 So.2d 481 (Flu. 1975). (S.R. 187-88).

Iv.

CONCLUSION

The jury recommended to this Court that it impose the death penalty upon the defendant for the First Degree Murder of Bjorn Thomas Svenson. There are four aggravating factors present, and no statutory mitigating circumstances. There are however, some nonstatutory mitigating circumstances, in particular, the defendant's low intelligence, his poor family background, his abusive childhood, including his lack of proper guidance from his father. The Court finds that after having independently reviewed and weighed the evidence, that the results are overwhelmingly aggravating rather than mitigating. More than sufficient aggravating circumstances were proven beyond and to the exclusion of every reasonable doubt to justify the imposition of the sentence of death. The mitigating circumstances which exist do not apply in this case to a degree which would cause them to mitigate the crime or the sentence. There are sufficient aggravating circumstances that exist to justify a sentence of death, which outweigh any mitigating circumstances that are present. This Court independently finds and concurs with the advisory sentence and recommendation entered by the jury. (S.R. 188-89).

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WHEREFORE, based on the foregoing, this Court sentences the defendant, HARRY FRANKLIN PHILLIPS, to death for the First Degree Murder of Bjorn Thomas Svenson. (S.R. 189).

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Immediately after the judge read the order into the record, the prosecutor said:

> Judge, before you sign it you want to make those two typos that you read over.
>
> THE COURT: Where are they?
>
> [PROSECUTOR]: You called Dr. Haber a psychiatrist on page 10. You may want to delineate that to psychologist.
>
> THE COURT: You always do this.
>
> [PROSECUTOR]: And on page 8 where you listed all of the remaining circumstances on the very bottom you said therefore this Court.
>
> THE COURT: What page?
>
> [PROSECUTOR] : Page 8 on the bottom. The last sentence says, "Therefore the Court does not consider this aggravating factor." You're only talking about G. You might want to pencil in C. B. G. and E. as well which is what you read and you didn't write.
>
> And one last thing you didn't speak to -- should in their infinite wisdom change to life imprisonment, I would ask you to change that too (R. 814-15) (emphasis added).

The judge responded: "[s]ubmit a special order to that effect with case law" (R. 815).

The judge's purported independent findings in this case are, word-for-word, the State's writing. The paragraphs are identical. The sentences within each paragraph are identical. The capitalization, grammar, punctuation, numbering and the placement of commas are identical. "The State submits" (R. 129, 134) is even typed into the order as "The Court submits" (S.R. 178, 185). The cases in the State's writing and the judge's order

are the same and appear in the exact same place. The one footnote included is the same and it appears in the same exact place in each writing.

Even the typographical errors are identical. [15]

This case is for removed from the independent and meaningful judicial evaluation of aggravation and mitigation and consideration of a proper sentence that this Court has held a fundamental constitutional right in capital cases. This record is devoid of reliable and independent findings from the judge -- the findings are the prosecutor's, word-for-word.

"It is", however, not the prosecution but "the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge ploys an extremely critical role." Spencer, 615 So.2d at 69 1. Where, as here, the judge abdicates that critical responsibility to the prosecutor, the entire sentencing process is skewed and the resulting death sentence is not valid. See Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987) (the judge is duty-bound to make "independent" findings and not to abdicate that duty to the prosecutor); Layman v. State, 652 So.2d 373, 376 **(Fla.** 1995) (resentencing

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[15] Dr. Carbonell's name (S.R. 3) is misspelled in the State's writing ("Carbonnell", see R. 131, 132, 134) -- the same exact misspelling, in the same exact places, is included in the order ("Carbonnell", S.R. 180, 182, 184). The State's writing says, "He found no significant or extreme or any mental disturbance" (R. 133) and this is typed into the judge's order in the some way (S.R. 183). The State's writing misquotes section (d) of the sentencing statute ("bombs" instead of "bomb") (R. 131) and the order misquotes it in the same way (S.R. 181). "The capacity of the defendant to . . . conform this conduct" (misquoting the statutory language "his") (R. 134) is typed into the order in the same way ("this conduct", S.R. 184). Reverend Jenkins' name (R. 480, 539, 540) is misspelled in the State's writing as "Jenkins" (R. 135) -- the same typo appears in the judge's order (S.R. 185). Ida Phillips Styley's name (R. 560) is misspelled in the State's writing as "Stanley" (R. 135) -- the same typo appears in the order (S.R. 186). And so on.

is required where the record "evidence[s] a willingness [by the judge] to abdicate [the] key judicial function" of independently making the findings and weighing),

Where, as here, a capital defendant is not afforded a meaningful and independent judge determination of sentence, the reviewing court cannot say with confidence that the judge fully considered mitigation and properly evaluated aggravation. Where, as here, the judge so abdicates his sentencing function to the State, the resulting death sentence is not. constitutionally relioble. This Court's precedents so hold. Mr. Phillips' capital sentencing proceeding violated the eighth and fourteenth amendments to the United States Constitution; Florida's Constitution, statutes and rules; and the mandatory standards established by this Court's precedents in capital cases.

(II)

THIS JURY WAS MISHANDLED BY THE JUDGE AND IMPROPERLY INFLUENCED TO RETURN A VERDICT IN CONTRAVENTION OFFLORIDALAWAND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

During voir dire, the judge told the jury things like:

> This is a little unusual case in that we are on the penalty phase of a First Degree Murder case, that means that the defendant has already been found guilty of First Degree Murder by a different jury and for legal technicalities we have to retry the penalty phase That means that you people would be given testimony during the week. . . (R. 82-83) (emphasis added).
>
> * * *
>
> Now about 6 years ago there was a police officer that was tried and when the jury came back -- they picked up a jury that was so one sided and came back with another decision. Doing what they did I don't believe that. I tried too many cases, but that's what they said. We went to Tallahassee and went to the legislature and said change the rule. They have not changed it. The reason we go sidebar and we whisper is that if I ever told you what they said about you individually . . . it's incredible. . . If you want to know what they said about you personally if you'll just give me a call. I'm in the phone book or you can mail me a postcard. . . (R. 213- 14).

The "technicality" instruction was grossly prejudicial fundamental constitutional error and warrants relief, as does the rest of the judge's commentary. The mishandling of this jury, however, did not stop there, In his final instructions to the jury, the judge indicated:

> Now, please don't do like most of my jurys (sic) did. When you have a question don't stop talking. . .
>
> Now this part of the jury instruction I know I read to you but I'm not sure you understood that portion. It's very important that you understand it. I will explain it to you in detail.
>
> Let's assume this is a regular First Degree Murder trial. It doesn't make any difference but you're going to go back and you're going to decide the guilt or the innocence of the defendant. Well, the foreperson after he gets selected, asks how many believe Joe Blow is guilty of burglary? Well everyone raises their hands and you sign the guilty form and you go home. Or maybe everyone raises their hands and says not guilty and you sign it and then you go home, but that only happens in 20 percent of the cases. In 80 percent there's a division of votes and what happens in this case of votes and what happens you go around the table and you argue with each other and give your reasons why you voted the way you did.
>
> There are no lawyers or judges back there so you get into some very, very heated discussions back there that turns into a fist fight. There is nothing wrong with it. It can get heated. There is nothing wrong with getting into a heated discussion until you finally vote. The vote must be unanimous in a regular trial.
>
> In this case in a death penalty it's not the case. You only take one vote and that vote is the vote. You don't after the vote argue with the people. You don't say stupid, why did you vote that way and argue with the people. The vote has been taken and that's it.
>
> You have to take your time, that's why I didn't rush this trial and that's why I had you come in at 8:00 this morning. It's only 12:35 and I want you people to have as much time as you need to deliberate and I don't care how long it takes. If you're not finished by tonight I'll send you to a very nice hotel. I don't care how long you take, but all your decisions have to be before you take the vote because once you take the vote that's it and you sign whatever form and come back out and there is not further discussion after that.
>
> It's exactly opposite of **a** regular trial. You take a vote and then you have a discussion. In this you're discussing it and I recommend this but I can't

order you to do this. I recommend that all of you get involved in the discussion. You spent four days listening, Now it's your turn to be able to talk. Do you all understand what I'm saying?

Now I'm going to discharge the two alternates. If you will come over here I'll give you a certificate. The rest of you retire to the jury room. By the way, the alternate jurors ore entitled to lunch and we'll have it sent up here. It's okay with me.

(Thereupon, the jury left the courtroom at 12:40 p.m. to deliberate)

[DEFENSE COUNSEL]: . . . [I] also want to object to the jury instruction about the jury only taking one vote. That might leave (sic) them to believe they shouldn't try to influence one or another and talk about their impressions.

[PROSECUTOR]: I agree with the last thought.

[DEFENSE COUNSEL]: If someone absolutely says I'm going to vote for death than (sic) someone else should not try to say to them maybe you're not looking at it the right way.

I think the Court's instruction about taking one vote may have mislead them.

THE COURT: How many votes do they take back there?

[PROSECUTOR]: That's not for me to decide, They can take as many votes as --

THE COURT: I disagree with you.

Do you have any case law?

[PROSECUTOR]: There was a case, Rob Pat (phonetic), where the initial vote was 6 to 6 and then it went back to 7 to 5 which upheld (sic) because the Court says the 6 to 6 vote varies until the initial vote was polled and signed by the jury foreperson. That is the case that they can I guess take appropriate votes. You may say it doesn't become so --

THE COURT: You have to show me that case because that's contrary to anything that I ever heard. I can't believe that if that is so then my jury instructions should be completely different. Then they should take a vote right away and then argue like in a normal case. That's not what it is in a California case. (R. 797-80 1).

The jurors began deliberating. They sent questions to the court (R. 801). The prosecutor reiterated that "the jury can take more than one vote" (R. 80 1). Although the questions posed by the jury (regarding evidence) had nothing to do with the vote the judge said:

> I am not going to confuse the jury. They have not taken a vote because they followed my instruction, Now, I don't see how we can hurt the situation or the defense in anyway. Let's bring the jury in.
>
> (Thereupon, the jury entered the courtroom at 3:30 p.m.)
>
> THE COURT: Who is the foreperson? That would be you Mr. Goldburgh? Mr. Goldburgh, in these two questions that you asked, in the first question about ore we within the right to except (sic) that guilt was found beyond a reasonable doubt? Yes, it's the only way you can find guilt.
>
> Number two. Can we hove an order of events? I don't understand the question.
>
> [JURY FOREPERSON]: The chart that **was** used,
>
> THE COURT: Well, the chart is not in evidence, therefore I can't send it back. Try your best to recollect. If you still can't maybe you can look at something specific on the chart and ask questions to that. I can do that.
>
> [JURY FOREPERSON]: We were speculating as to the exact date of release in 1982.
>
> THE COURT: June of 1982.
>
> [PROSECUTOR]: June 8th, August 10, 1982. (R. 802-03).
>
> THE COURT: Another matter has come up. I also charged the jury in a way that I charged you today, but it appears to that question whether that is the law or not as to just taking one vote. The law seems to be it's not quite clear. It appears to me now that you can take a vote and that doesn't necessarily have to be your last vote. It could be if you all decide that is what you want, you con vote and discuss the vote and determine from that and as soon as you decide your final vote let me know. Okay?
>
> [JURY FOREPERSON]: Yes, sir.

THE COURT: Are there any questions as far as that? There is no question in your mind as to what I'm saying is different than what I said before you can take a vote?

You can take as many votes as you want. If you want to take it and if nobody wants to change their minds then that's the vote.

[JURY FOREPERSON]: That's a big help.

(Thereupon, the jury left the courtroom to continue to deliberate at 3:35 p.m.)

[DEFENSE COUNSEL]: Judge, I want to renew my objection to the jury being reinstructed by your Honor without any vote from them. They were not deadlocked or having --

THE COURT: Well, they weren't because they were following my instructions. I don't know how they could hove a question if they were first following the instruction. My instructions were wrong then There is no harm done by reinstructing them. I don't think any Appellate Court is going to take it --

The reason that I called you together is that I really didn't think the jury is going to be out this long and it's getting near the time where I have to make arrangements for sequestering. So, I'm going to bring them in and ask them if they think they can come to a decision in **a** short period of time, if they want to quit for the night or I'll do whatever they want. Any objections?

[DEFENSE COUNSEL]: Judge, my only objection and my only concern would be they might view it as misinterpreting them. I know you wouldn't deliberately do that.

THE COURT: I can tell them I have to make arrangements for sequestering them if they think they are going to be much longer, then I'll go ahead with the arrangements.

Bring them in tell them they can sit wherever they want.

(Thereupon, the jury entered the courtroom at 4:35 p.m.)

Ladies and gentlemen of the jury, Mr. Goldburgh, it is now 4:35 p.m. and if you people think you're going to be much longer I have to make arrangements for sequestering the jury tonight. What is your opinion?

[JURY FOREPERSON]: I don't think we're going to be much longer.

THE COURT: Okay. Go back. I don't have to make arrangements right now so I'll call you back out again when I feel we have to make a decision.

(Thereupon, the jury left the courtroom to continue with their deliberations until 4:40 p.m.)

THE COURT: I have been advised that I should make arrangements to sequester you, is that correct?

[JURY FOREPERSON]: That is correct.

THE COURT: All right. I'm going to let everybody go. It's been a long day and I can understand your situation. Just remember that you are not to discuss this case with individual members of the jury. The only time you are to discuss this case is when all 12 of you are together.

Come back to this courtroom to[m]orrow.

It will take a while for the people to get ready to take you which should be about 5:30. If you want to go back and deliberate for another half an hour you can, however, it's your decision. There's going to be no one here to take your verdict.

[JURY FOREPERSON]: We would like another 30 minutes.

THE COURT: Do you think you can come to a decision?

[JURY FOREPERSON]: It's entirely possible.

THE COURT: How do the rest of you feel about it? Do you think it's not possible in 30 minutes?

[JURY FOREPERSON]: We're not sure.

THE COURT: Fine, we'll meet at 5:30 p.m.

(Thereupon the jury left the courtroom to continue to deliberate.)

THE COURT: Bring the jury in.

(Thereupon the jury returned to the courtroom at 5:30 p.m.>

Ladies and gentlemen, let me ask you one question. I have no problem. I already arranged for everything to lapse over until tomorrow. Do you believe that the decision has to be unanimous?

[JURY FOREPERSON]: No.

THE COURT: Fine. Okay, I'll see you all in the morning at 9:00 a.m. (R. 803-06).

The next day, the jurors returned to continue their deliberations. They sent a note to the judge indicating that two jurors were declining to vote, i.e., that a verdict could not be reached (R. 8 10). The judge brought the jury in and told them to take a vote, even if from only ten of the jurors, and to "[p]ut on the vote as it stands" (R. 8 11). Six minutes later (R. 8 11) the jury returned **a** 7-5 death verdict (R. 8 12).

The process by which this jury's death recommendation was obtained was constitutionally wrong and incompatible with Florida law. The standard instruction this Court has long-a-pproved for situations where a jury cannot reach **a** verdict is:

> I know that all of you hove worked hard to try to find a verdict in this case. It apparently has been impossible for you so far. Sometimes an early vote before discussion can make it hard to reach an agreement about the case later. The vote, not the discussion, might make it hard to see all sides of the **case.**
>
> We are all aware that it is legally permissible for a jury to disagree. There are two things a jury can lawfully do: agree on a verdict or disagree on what the facts of the case may truly be.
>
> There is nothing to disagree about on the law. The low is as I told you. If you have any disagreements about the low, I should clear them for you now. That should be my problem, not yours.
>
> If you disagree over what you believe the evidence showed, then only you can resolve that conflict, if it is to be resolved.
>
> I have only one request of you, By law, I cannot demand this of you, but I wont you to go back into the jury room, Then, taking turns, tell each of the other jurors about any weakness of your own position. You should not interrupt each other or comment on each other's views until each of you has had a chance to talk. After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services,
>
> You may now retire to continue with your deliberations.

Fla. Standard Jury Instruction 3.06. Not even a semblance of this instruction was given to this jury. When the jurors said that they had difficulty returning a verdict, i.e., that there was an impasse -- they were not given a suggestion to talk further although the court "cannot demand this of you" and that "[a]fter you have done that, if you simply cannot reach a verdict, then return to the courtroom and . . . I will discharge you with my sincere appreciation for your services." Fla. Standard Instruction 3.06. Rather, the jury was expressly told that it had to return a verdict -- "[p]ut on the vote as it stands" (R. 811) (emphasis added).

This kind of judicial involvement in the deliberations and interference with the voting process has been condemned by every court that has considered the issue. (See precedents cited below). Such a procedure violates the sixth amendment's fair jury trial standards, the eighth amendment's requirements of fundamentally fair and reliable capital sentencing verdicts and the fourteenth amendment's requirements of due process of law.

Under the United States and Florida Constitutions, a criminal defendant is protected from actions by a judge which may force or coerce the jury into returning a verdict that the jury may not otherwise return, even where there is one hold-out juror. See e.g., Jimenez v. Myers, 40 F.3d 976, 980-81 (9th Cir. 1994) (granting habeas corpus relief under the United States Constitution). It is the jury's duty to deliberate and try to reach a verdict. It is not the jury's duty to return a verdict. This jury was forced to return a verdict although two jurors were not prepared to vote.

Florida law also uniformly holds that reversible error occurs in jury deliberation circumstances whenever the judge "deviates from" Standard Instructions (i.e., 3.06) or otherwise pressures the jury to reach a verdict. Dixon v. State, 603 So.2d 86, 88 (Fla.

1992) (collecting precedent); Warren v. State, 498 So.2d 472, 477 (Fla. 3d DCA 1986) ("[W]e have no difficulty in concluding that the trial court committed fundamental error in deviating from the standard charge on a deadlocked jury. . ."); Nelson v. State, 438 So.2d 1060, 1062-63 (Fla. 4th DCA 1983) (it is fundamental error to give a charge other than the standard or to "lead the jury to believe that they were required to reach a verdict"); Rodriauez v. State, 462 So.2d 1175, 1177-78 (Fla. 3d DCA 1985) (holding that it is fundamental error to lead "the jurors to believe that they were required to return a verdict, thereby prejudicing the defendant's right to **a** hung jury" and that the defendant has a right to a determination "by each individual juror"); Durano v. State, 262 So.2d 733, 734 (Fla. 3d DCA 1972) (granting relief in similar circumstances and noting that "[t]he right of a defendant to have a jury deliberating . . . free from , . . outside or improper influences is a paramount right which must be closely guarded").

For over twenty-five years, Florida's courts consistently have condemned giving the jury the

> impression that the court is directing that a verdict be brought in and that the minority view in the jury room should simply acquiesce in the judgment of the majority...because they are under the mistaken belief that it is part of their duty to try and comply with the wishes of the court . . . [This] prejudice[s] the defendant's right to a hung jury. Nothing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientiousness to the correctness of his position.

Lee v. State, 239 So.2d 136, 139 (Fla. 1st DCA 1970). Cf. Livinastonv. State, 458 So.2d 235, 238 (Fla. 1984) (jurors are especially sensitive to judicial influence in their deliberations).

This fundamental error warrants relief. The strange way this jury was treated, moreover, is highlighted by what happened after the verdict, as is the judge's attitude towards Mr. Phillips After the verdict, the judge said:

> I received a letter from a young lady who is a member of the jury panel. She was also one of the two that didn't want to vote . . . I've always pride[d] myself that I said that no guilty person I've ever or not guilty person that I have ever been the trial judge of went to jail . . . In this case there is absolutely no question as to the guilt of Mr. Phillips. . . I tried the case. I would not even consider it, and after I spoke to this young lady on the phone for about an hour and I explained to her and she's thanking me very much and she said, well, I'm sorry I didn't know that . , . so she's satisfied now that Mr. Phillips was guilty. I explained to her all the witnesses and who they were and what they said and she at least is satisfied. . . It's interesting in this case that the jury verdict **was** 7[-]5 in both cases. I don't know why that is. I don't know. I guess although sympathy is not suppose[d] to enter into the deliberations. I guess they do. I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment . . . there are certain crimes that you must send a message to the community. . . (R. 824-25).

(III)

THE DISRUPT OR HINDER GOVERNMENTAL FUNCTION AGGRAVATOR WAS IMPROPERLY AND OVERBROADLY SUBMITTED TO THE JURY AND FOUND BY THE COURT

This Court has held that an intent to hinder enforcement of the law must be expressly proven and cannot be presumed. Foster v. State, 436 So.2d 56, 58 (Fla. 1983). Moreover, for these types of aggravators to apply, it must be established beyond a reasonable doubt that the dominant or sole motive was to disrupt/hinder governmental function or enforcement of laws. See e.g., Perry v. State, 522 So.2d 8 17, 820 (Fla. 1988) (discussing the similar "avoid arrest" aggravator); Lawrence v. State, 6 14 So.2d 1092, 1096 (Fla. 1983) (same); Hansbrouah v. State, 509 So.2d 1081, 1086 (Fla. 1986) (same); Robertson v. State, 611 So.2d 1228, 1232 (Flu. 1993) (same). Without such limiting constructions, the aggravator is subject to overbroad application and fails to genuinely narrow the class of persons eligible for death, in violation of the eighth and fourteenth amendments. Zant v. Stephens, 462 U.S. 862,876 (1983); Strinaer v. Black, 112 S.Ct. 1130

(1992) (death sentence invalidated when the state employs an aggravator that fails to properly guide the sentencer(s) as to what must be found).

No new evidence about this aggravator was introduced at the resentencing. Indeed, the sentencing order refers strictly to evidence from the "original trial" or "the trial" (SR 1776, 177, 178) including the testimony of witnesses (the jailhouse informants) who did not testify at the resentencing.

At the original trial and sentencing, the same judge who presided at the resentencing rejected the "hindering" aggravator and found it "inapplicable", The judge originally found "that the homicide was committed for revenge" (SR 178) and, accordingly, that the necessary sole or dominant motive of hindering governmental function ~~was not~~ At the resentencing, and on the basis of nothing more than that same original trial evidence, however, the judge copied, verbatim, the prosecutor's writing: "However, this Court submits, that although revenge may have been one motive, it was part of the overall motive killing a parole official who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole revoked..." (SR 178).

There was no evidence in this case that Mr. Phillips was going to have his parole revoked by the decedent, Mr. Svenson. Mr. Svenson was not Mr. Phillips' parole officer, Even the original trial evidence cited in the resentencing order -- e.g. "for revenge", SR 178, the killing was due to "unjustly violating him", SR 177 -- does not establish that the killing was based on a sole or dominant motive/intent to hinder governmental function. The judge made no such finding. This aggravator **was** not established beyond a reasonable doubt.

Defense counsel objected to the "hindering" aggravator being provided to the jury (R 736). He explained to the court: "I object... Mr. Svenson was a parole supervisor. He was not Mr. Phillips' parole officer. There is no showing that the killing in this case was done to hinder..." (R 736; see also id. [arguing that there was no evidence establishing the aggravator "beyond a reasonable doubt"]). The Court overruled the objection (R 736). The aggrovator was then provided to the jury in the barest of terms, with no limiting construction: "The crime for which the defendant is to be sentenced was committed to disrupt or hinder the law (sic) exercise of any governmental function or the enforcement of laws" (R 788). The jury was never informed about the sole or dominant motive limitation or the fact that a specific intent to "hinder" must be expressly proved and cannot be presumed. The judge then did not apply these limiting constructions himself.

In a case involving significant mitigation (see Statement of the Case, supra), and a 7-5 jury death vote, this error is not harmless beyond a reasonable doubt.

(IV)

THE PROSECUTOR MADE BAD ACTS, INCLUDING UNCHARGED MATTERS, A FOCUS OF THIS RESENTENCING AND INTRODUCED PREJUDICIAL AND UNNECESSARY OVERKILL EVIDENCE ABOUT GUILT, INCLUDING EXTENSIVE HEARSAY AND OTHERWISE UNRELIABLE EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S STANDARDS

This was a case of unnecessary and prejudicial prosecutorial overkill. See Statement of the **Case,** supra. From his opening statement (see R. 242, et **seq.);** throughout the State's direct evidentiary presentation; on cross-examination of defense witnesses and State rebuttal (see Statement of the Case); and in his closing argument (R. 736, et seq.), the prosecutor's presentation and argument were classic examples of fundamental constitutional error. Defense counsel's several objections were overruled.

Throughout the proceedings, the prosecutor used a remarkably prejudicial "guilt" chart. [16] He introduced loads of irrelevant, prejudicial and unrebuttable hearsay (See e.g., inter alia, testimony of Det. Smith, Statement of the Case, supra). He introduced facts about Mr. Phillips' prior convictions (See testimony of Lt. Handcock, Statement of the Case, supra). He introduced parole officer after parole officer in a wholly improper case-in-chief attack on Mr. Phillips' character (See Statement of the Case, supra). He relied on uncharged, unproven allegations (Id.). He then used the improper evidence to argue that fifteen years in prison did not mean fifteen years (R. 743); that "if life meant life" the defendant would not have been paroled (R. 744); that the mitigation offered was a "slander" to people with difficult backgrounds who have not committed crimes (R. 749); that the defendant threatened people involved in the case (R. 752-53, 761); that the decedent yelled out at the time of the homicide (R. 755) (there was no record testimony to this effect); that (regarding the mitigation) he, the prosecutor, did not care what one's schooling was (R. 760); and that death is the only appropriate penalty and if it is not voted for "[w]e diminish the value of human life, We say Svenson didn't count . . . You tell the people protecting us we don't care about you, . ." (R. 764-65).

During the proceedings, the prosecutor also introduced against Mr. Phillips motions and petitions Mr. Phillips had filed years ago (such as a motion for different counsel and a habeas corpus petition) and argued in closing: "The judge gave him a good lawyer. He [Phillips] said, 'I don't want that lawyer, I want **a** different lawyer'. . ." (R. 761). He asserted that Mr. Phillips was competent and suggested that this should be held against him.

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[16] The chart has not been included in the record on appeal and, when undersigned counsel checked with the Circuit Court's Clerks office, counsel was informed that the Clerk does not have it.

The resentencing, from beginning to end, was filled with nonstatutory aggravation. Such prosecutorial improprieties are not tolerable in a system that seeks to avoid the arbitrary, capricious and unreliable imposition of capital punishment.

This Court has condemned similar prosecutorial conduct in capital sentencing proceedings and has held that death sentences resulting from such proceedings cannot be upheld as reliable. See Hitchcock v. State, No. 82, 350 (Fla. March 21, 1996) (relief required because of the introduction of non-statutory aggravation that prejudiced the defendant); Castro v. State, 547 So.2d 111, 115-16 (Fla. 1989) (other crimes); Keen v. State, 504 So.2d 396, 401-02 (Fla. 1987) (improper prosecutorial argument and other crimes); Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) (same); Cave v. State, 660 So.2d 705, 709 (Fla. 1995) ("This was solely a resentencing proceeding, so the issue of guilt was unquestioned. The facts of the murder, kidnapping, and robbery were previously established.... Under these circumstances...[the detailed depiction of the crime in a video] was irrelevant, cumulative, and unduly prejudicial..."); Taylor v. State, 583 So.2d 323, 329-30 (Fla. 1991) (improper and inflammatory argument); Hayes v. State, 660 So.2d 257, 265-66 (Fla. 1995) (argument on the basis of improper hearsay).[17]

Prosecutorial misconduct has also been held to render the death sentence improper under the United States Constitution. Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989); Ant-wine v. Delo, 54 F.3d 1357 (8th Cir. 1995); Lesko v. Lehman, 925 F.2d 1527, 1545-47 (3d Cir. 1991); Wilson v. Kemp, 777 F.2d 621 (1 lth Cir. 1985); Drake v. Kemp, 762 F.2d 1449, 1458-60 (1 lth Cir. 1985).

Relief is appropriate when prosecutorial misconduct might have affected the jury's decision to vote for death. Caldwell v. Mississippi, 472 U.S. 320 (1995). The misconduct

[17]In Phillips, as in Haves, the jury heard a great deal of improper hearsay.

here affected this death sentence. It involved unnecessary and prejudicial non-statutory aggravation and remarkably prejudicial overkill. The misconduct here violated the sixth, eighth and fourteenth amendments; is inconsistent with this Court's capital sentencing jurisprudence; and warrants the granting of relief.

(V)

THE PROSECUTOR WAS UNCONSTITUTIONALLY ALLOWED TO STRIKE AN AFRICAN-AMERICAN JUROR FROM THE PANEL

During voir dire, the following happened with regard to an African-American female juror who had worked for the Metro-Dade Police Department:

> [PROSECUTOR]: We'll excuse Ms. Ralph. . .
>
> [DEFENSE COUNSEL]: I'm going to make a Batson and Neil challenge on Ms. Ralph.
>
> [PROSECUTOR]: Our reason is she said she is against the death penalty and even though she rehabilitated herself her feelings about the death penalty were not very strong at all, and there's case low which says even though there's not a cause [challenge] if somebody is not strong on the death penalty it's a race neutral reason for challenge.
>
> [DEFENSE COUNSEL1 Objection. Do I need to respond?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL] Judge, basically --
>
> THE COURT: I'm going to allow her on the panel (R. 2 19-20) (emphasis added).

The very next words in the transcript reflect defense counsel's further explanation of his objection:

> [DEFENSE COUNSEL]: Our position is that individual indicated she served on a prior First Degree Murder with a verdict [and] that she lived in a neighborhood where this incident took place, that she worked for the Metro-Dade Police Department as a record specialist, that she writes police reports for 9 11, and she was questioned about her ability to follow the law and the mitigating and aggravating circumstances she indicated

> that she could and under her early statement that she could follow. Recognize that she's a black female (R. 220).

Without any further comment from the prosecutor or any further articulation of reasons why the prosecutor wanted the juror stricken, and without regard to the ruling he had just made, the judge said: "I think it's a proper challenge" (R. 220). The juror was stricken.

When defense counsel later moved to strike a Cuban-American juror, the prosecutor objected (R. 233). Defense counsel stated his reasons, including the juror's being "on a prior criminal drug trafficking federal trial doing work. I can state that 99.9 percent that it was a guilty verdict and that's race neutral with respect to [the juror]" (R. 223). The court denied defense counsel's exercise of the peremptory -- "He's back on the panel" (R. 224). This juror was later removed from the panel because the prosecutor changed his mind and withdrew his objection,

The trial court's Batson/Neil decisions made very little sense and cannot be squared with the relevant law. As to the African-American juror the prosecutor wished to strike, the judge denied the prosecutor's peremptory challenge, apparently finding the grounds stated insufficient. Without providing any reason -- and without even a further proffer from the prosecutor -- the judge then unilaterally allowed the juror to be removed.

As to defense counsel's peremptory challenge, although reasons were stated, the judge disallowed the peremptory. This juror sat only because the prosecutor later changed his mind and withdrew his objection.

If the reasons stated by defense counsel with respect to the Cuban-American juror were inadequate, the reasons stated by the prosecutor regarding the African-American juror were inadequate, as the judge originally found. If the reasons stated by the

prosecutor regarding the African-American juror were inadequate, as the judge found originally, then there was no reason to then allow the juror to be removed -- especially where the prosecutor gave no further reason at all and did not even speak another word about this juror.

This proceeding does not comport with the sixth, eighth and fourteenth amendments to the United States Constitution and violated Batson v. Kentucky, 476 U.S. 79 (1986), Statev. Neil, 457 So.2d 481 (Fla. 1984), Statev. Slappy, 522 So.2d 18 (Fla. 1988), and State v. Alen, 616 So.2d 452 (Fla. 1993). Relief is appropriate.

(VI)

THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR CANNOT BE CONSTITUTIONALLY NARROWED AND WAS IMPROPERLY EMPLOYED

Defense counsel objected to the "cold, calculated, premeditated" aggravator, argued that it should not be provided to the jury and argued that it could not properly be applied in capital **cases.** The judge provided it to the jury, with definitions for its terms, and then found it himself.

Appellant respectfully submits that this aggravator -- which has had quite a history of litigation in Florida -- is inherently vague and subject to overbroad, unconstitutional application, irrespective of any definitions for its terms one can muster. It cannot be squared with the sixth, eighth and fourteenth amendments. It was overbroadly applied here and in other Florida cases. This Court should hold that it can no longer be used and should grant relief.

CONCLUSION

Appellant's death sentence should be vacated,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by United States Mail, postage prepaid, to Fariba Komeily, Assistant Attorney General, 40 1 NW Second Avenue, Suite 92 1 N, Miami, FL 33 128 this 22 day of April, 1996.

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