IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1460

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent,

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Phillips deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. page number).

(R.) -- Record on Resentencing Direct appeal;

(Supp.R.) -- Supplemental Record on Direct Appeal.

(PCR1) -- Record of 1988 Post-Conviction Appeal

(T.) -- Transcript of 1988 Resentencing Proceedings

References to the exhibits introduced during the hearing and other citations shall be self-explanatory. All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Phillips requests oral argument on this petition.

PROCEDURAL HISTORY

Harry Franklin Phillips was originally convicted of first degree murder in the death of Bjorn Thomas Svenson and sentenced to death in 1983. Mr. Phillips was found guilty of one count of first degree murder. The jury voted in favor of death by a vote of seven (7) to five (5). The court followed the jury's recommendation and sentenced Mr. Phillips to die in the electric chair.

This Court affirmed that the conviction and sentence on direct appeal. Phillips v. State, 476 So. 2d 194 (Fla. 1985).

Under execution warrant, on November 4, 1987, Mr. Phillips filed a Petition for Extraordinary Relief, For a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari. The petition claimed that Mr. Phillips had been unconstitutionally sentenced pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court denied this state habeas claim as procedurally barred on November 19, 1987. Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987).

Mr. Phillips' postconviction motion was denied by the trial court following an evidentiary hearing in 1988. On the appeal from denial of 3.850 relief, this Court determined that Mr. Phillips had received ineffective assistance of counsel at the sentencing phase of his trial and his death sentence was vacated. Phillips v. State, 608 So. 2d 778 (Fla. 1992).

Subsequently, in 1994, a resentencing proceeding was held in the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County (now Miami-Dade County),

Florida, again before the Honorable Arthur Snyder. Mr. Phillips was resentenced to death by the trial court after the jury, again by a vote of seven (7) to five (5), recommended death. On direct appeal, this court affirmed the sentence imposing the death penalty. Phillips v. State, 705 So. 2d 1320 (Fla 1997) cert. denied 119 S.Ct. 187 (1998).

Mr. Phillips is today filing this petition simultaneously with an Initial Brief concerning the summary denial in August 2000 of his 3.850 motion by the lower court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY RESENTENCING COUNSEL AT THE 1994 RESENTENCING PROCEEDING.

A. INTRODUCTION

Mr. Phillips had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of

law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Phillips' resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Phillips'] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Phillips' behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Phillips involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490

So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

B. FAILURE TO RAISE ON APPEAL DETECTIVE SMITH'S TESTIMONY

Appellate counsel failed to raise on appeal the state calling over defense objection, Miami-Dade Detective Greg Smith to testify about what a variety of jailhouse witnesses had told him and testified about at Mr. Phillips' 1983 trial. This Court recently articulated the standard for evaluation of appellate ineffective assistance of counsel:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate

> counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, WL746764 (Fla., July 5, 2001)(No. SC00-660). Mr. Phillips' case is not a case like Thompson v. State, 759 So. 2d 650 (Fla. 2000), where this Court has made clear that habeas is not proper to argue a variant to an already decided issue.

This Court's opinion on Mr. Phillips' appeal of the denial of relief after the 1988 evidentiary hearing evaluated the guilt phase claims presented at Mr. Phillips' 1988 evidentiary hearing in some detail,

pointing out that '[m]uch of the State's evidence at trial consisted of the testimony of inmates who had been in a cell with Phillips. These inmates testified [at trial] that Phillips admitted his guilt to them, and each supplied details of the crime as Phillips portrayed it to them - details which presumably only the killer would know." Phillips v. State, 608 So. 2d 778, 780 (Fla. 1992). At the 1988 evidentiary hearing Mr. Phillips was permitted to present evidence on guilt phase claims based on violations of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) that presented a very different picture of the inmates who had testified against him at trial than what the 1994 resentencing jury heard. In denying relief on the 1988 guilt phase claims to Mr. Phillips, this Court found:

> Finally, Phillips presented the testimony of William Farley, who stated that he lied on the stand at the trial, that Phillips had never in fact confessed to him, that all the information about the crime was provided to him by the police, and that he perjured himself on the stand after being promised freedom and reward money.

> A similar claim was made as to the testimony of Larry Hunter. While Hunter himself refused to testify on grounds of self-incrimination, the parties stipulated to the consideration of his affidavit. Waksman and Smith denied these allegations. The circuit court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding. Accordingly, we reject Phillips' Brady claim.

Phillips at 780-81. And additionally;

> Phillips first alleges that William Scott was a police informant at the time Phillips confessed to him, yet he stated on the witness stand that he was not a police agent...Scott was on the federal government payroll at the time of the trial and was assigned an informant number for the federal authorities; he did not, at that time, have an informant number for the Metro-Dade Police, and therefore evidently did not believe that he was an agent for the department. Even at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro-Dade. Ambiguous testimony does not constitute false testimony for the purposes of Giglio.

Phillips at 781.

1. RECORD OF RE-SENTENCING HEARING

David Waksman's opening argument in 1994 outlined for

the jury the State's plan for rebuttal of the defense's case in mitigation:

> I then get the opportunity to go over other mental health evidence and rebuttal and we'll call in another forensic psychologists who has been doing this for 30 years who looked at the reports of the defense psychologists who read their psychological tests and who accepts the test results as valid and interviewed Mr. Phillips but more importantly wanted to know everything this man did. Looked at all the letters that he wrote. A lot of inmates write letters to the Judge. I can't reach my lawyer. People complain. Look at all the handwritten letters and will come up and say the man may have an IQ of 72 and 75. That doesn't mean you're brain dead. That doesn't mean you're insane. It means you don't read and write as well as some other people. They can usually hold a job. Many people work with their hands and books, pens and pencils and have an IQ in the 70 and 80 range. It doesn't mean they're retarded, but he said what's most important to me is how he does these things. How he writes, and he says I'll accept that his IQ was in the low 70's but that this man based upon his prior record and the history of how he does things is not the individual they're trying to make him out to be He knows what's going on. He's responsible for what he does and the fact that his father 26 years before was a miserable

> character who used to beat his wife and come home drunk did not turn him into a cold blooded murderer. It's just a sad fact of life and it does not excuse him.

(T. 264-265). Resentencing counsel Wax complained bitterly on side bar while arguing against a state objection during his opening statement about his inability to rebut before the jury the testimony imputed to the jailhouse witnesses in Mr. Phillips' case because of the court's rulings upholding the state's objections based on lingering doubt doctrine:

> THE COURT: Mr. Wax, we're not going to put into the jurors minds any questions of guilt or innocence of the defendant and that's exactly what you're doing.
>
> Mx. Wax: Judge, Mr. Waksman --
>
> THE COURT: Don't tell me what to do.
>
> MR. WAX: I know that, Judge, Mr. Waksman is going through the entire case. I'm permitted to rebut. Now, he spoke right now about a man named Mr. Watson and Mr. Smith. I'm not going to be able to give a fair rebuttal. I could say he never made the statement or go on saying that he was in jail. They were convicts. They were sentence. They gave their testimony. They got their sentence reduced.

THE COURT: That's exactly what you're not allowed to do.

MR. WAX: That's what I'm arguing. I can't get a fair rebuttal.

MR. Waksman: You can rebut.

THE COURT: What you're saying is give these people an opportunity to retry the guilt and that's --

MR. WAX: Well, Judge, I would agree with that except for the fact that Mr. Waksman is being permitted to go into the entire two year history. I can't sit back and let him do that.

THE COURT: That's not the way you're doing it. **I don't know the way you can possibly do it.** We are not going to retry the guilty phase and that's exactly what you're doing.

MR. WAX: I understand.

THE COURT: I'll sustain the objection.

(T. 269-270)(emphasis added). The court made clear that it was not going to allow him to rebut the testimony. The State had filed a Memorandum of Law regarding the admissibility of hearsay at a capital resentencing that was made part of the record. (R. 71-81). Impeachment evidence concerning the credibility of the hearsay

declarants involved in the state's case should have been heard by the jury. The State's memorandum filed on August 23, 1993 noted, Fla. Stat. 921.141(i) then stated regarding the admissibility of hearsay evidence at the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and **shall include matters relating to any of the aggravating or mitigating circumstances** enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**.

(R. 75)(emphasis added). An early example of the problem defense counsel faced occurred when the State called Detective Smith and asked him about his conversation with a person who had spoken with about Mr. Phillips' case in 1983 named Tony Smith. (T. 414). Detective Smith explained what Tony Smith had told him about Mr. Phillips:

> They were discussing probation and

> parole and things involving probation and parole and Harry was very upset and he's talking about problems that he's having with his parole officer at the time. He said that he discovered a male probation officer or parole officer and female parole officer that was somehow involved in his parole. The male officer he described as hassling his mother. He said the female who was Brochin was also hassling him and his mother. He said that he tried to shoot the female but was unsuccessful, but he said that no matter what he was going to put a stop to the hassle. At that point in time Mr. Smith was describing Harry in possession of a silver or chrome colored .38 or .357 police type of revolver.

(T. 415). After Detective Greg Smith was initially called by the State, on sidebar, resentencing counsel advised that he wanted to rebut Detective Smith's testimony as to Malcolm Watson, Will Smith and Tony Smith:

> ...I want to elaborate on matters which were testified on direct examination about the fact that these individuals were in custody and were in jail charged and Mr. Waksman brought out what happened in their case. I'm asking for a ruling because the Court is going to preclude me rather than do that in front of the jury I want to do it on the record after he finishes testifying so that I can preserve for Appellate Courts

what the testimony would have been.

(R. 447-448). The state responded that Mr. Waksman's proffer before the jury as to the criminal records and charges pending of the hearsay declarants was sufficient to establish whatever doubt it was necessary to establish before the jury. (R. 448). The court agreed to allow a proffer of the questions that resentencing counsel wanted to ask. (R. 448). Resentencing counsel asked a few more questions on cross, with Detective Smith agreeing that Mr. Phillips has continued to maintain that he was not involved in the murder. (R. 449). Then, during the proffer, Mr. Wax asked some general opening impeachment questions about Malcolm Watson, Will Smith and Tony Smith, without any real inquiry into the most relevant areas. (R. 410-415). Even this was too much for Judge Snyder who explained his ruling:

> THE COURT: Mr. Wax, I want to tell you something. Obviously that part of the record I want you to know that I feel I bent over backwards to allow you into areas which under the lingering [doubt] you're not allowed into. I did that because I thought they were fair.

> At the moment that I allowed you to do that I thought it would be helpful in that respect but you're getting -- I appreciate you making a record and all of that but that's not allowed, especially this little bit of testimony. These particular things had been taken up on appeal.
>
> MR. Wax: Judge, I agree. I understand what you're doing. I don't know how the Appellate Court is going to review the penalty phase and we did do it outside the presence of the jury because I know you feel that way it's just -- the law says hearsay and (sic.) admissible when you have a fair turn to rebut testimony.
>
> THE COURT: It opens up a whole new case.

(R. 456). Resentencing counsel was put on notice by the lower court that he was not going to be allowed to do what he knew he had to do. Over defense objection Detective Smith later testified during rebuttal testimony that William Farley, who Smith noted was referred to in the so called "Brother White" letter as James Foley, was one of the persons listed on the state's witness list at the 1983 trial of Mr. Phillips and was also mentioned in the "Brother White" letter itself. (T. 678-679). (The

Brother White letter was authored by Mr. Phillips according to the State and revealed an attempt to arrange retaliation aimed at the jailhouse witnesses the State was lining up to testify against him.) Smith testified that he had interviewed Farley, along with the others jailhouse witnesses mentioned, and that Farley and the others were "people who may know something about this offense" who were listed on the state's witness list at trial. (T. 680).

After his renewed objection was overruled, resentencing counsel did not attempt to question Detective Smith about Farley. The court had already refused to let him impeach Detective Smith during his initial hearsay testimony about what Malcolm Watson, Will Smith/Scott and Tony Smith, other jailhouse witnesses, had told him. (T. 448). Resentencing counsel Wax did not attempt to reopen the proffer when Smith was recalled by the state as a rebuttal witness and was questioned about David Scott, Will Scott, Albert Fox, Jerry Adams, William Farley, and Tony Smith. (T. 679). Therefore, the resentencing jury

never heard **anything** about the recantation by Mr. Farley that culminated in his testimony at the 1988 evidentiary hearing. During that testimony Farley frankly admitted that he had lied at Mr. Phillips 1983 capital trial and told a completely different story than the one that the jury heard at the 1994 resentencing:

> A. First of all, I never knew the reason why I was moved one cell on the wing specifically to Harry's cell.
>
> But, one day I was just moved for no reason and placed in the cell with Harry.
>
> And, then I think the next day or so I was called out by Detective Smith, and asked had Harry, you know, told me anything about what he was suspected of or charged with.
>
> And, at that time I told him no.
>
> Q. Okay. I'm sorry.
>
> Let me just stop you.
>
> Was that the first thing that Detective Smith did when the two of you met each other, ask you whether Harry had told you anything?

A. Yes.

Q. During that interview that you had with Detective Smith, did he, did Detective Smith, tell you anything about Harry?

A. He told me that Harry was suspected of murder, homicide.

. . . .

Q. Did he say to you, indicate to you in some way or another, that he wanted to know about Harry, to know what you knew about Harry?

A. Yes.

Q. Detective Smith --

Would it be fair for me to say that Detective Smith asked you to listen and to -- if you have any information, to let him know what you knew about Harry?

A. Yes.

Q. He asked you to keep your ears open

A. Yes.

Q. -- to see what you can find out?

A. Yes.

. . . .

Q. You went back in and spoke to Harry?

A. Yes.

Q. What --

Let me just put it this way, and you can explain it.

Did you try to get information from him?

A. Yes.

Q. Go ahead.

A. I did have another conversation with Harry after I was placed --

Q. What did you do, what did you say?

Tell us in your own words.

A. I told Harry at that time that detective had called me out and asked me questions about --

Q. I'm sorry?

A. -- about him.

Q. You had?

You asked him questions about that?

A. Yeah.

I told Harry that detectives had, you know, questioned me about him.

And, he told me again on that same date that he hasn't did anything, that he was being detained for something that he knew nothing about.

And, then again he showed me the photograph, I think a news article of crime that was committed, and things like that.

. . . .

Q. What did Harry tell you about the case when the two of you were talking together after you got back into the cell and you were talking to him?

A. Well, he just said that the guy, you know, it was his probation officer, and that he revoked his parole once and sent him back to prison, but he didn't, you know -- he wasn't the one that murdered him.

Q. He told you he was innocent?

A. Yes.

Q. Did he tell you anything about bullets?

A. No.

. . . .

Q. Tell us about the picture that

Harry showed you.

What was that all about?

A. Well, it was just a news article.

Above the article were a picture of this lady and her child leaving a funeral.

And, because, I guess, what Detective Smith had implied to me and because a lot of things at that time, I felt for this child.

I imagined to myself that Harry was perhaps guilty.

But, since then --

Q. Wait, wait. Let me --

We'll get to that in a minute. We're trying to go one step at a time.

You said because of what Detective Smith said to you?

A. Right.

Q. What did you mean by that?

A. Well, the indication that maybe --

You know, there were indication that maybe I could get out of prison.

Q. Did Detective Smith put that thought in your head?

A. I guess subconsciously the thought of getting out of prison was always --

Q. You wanted to get out?

A. Right.

. . . .

Q. After you found this stuff out, what did you do?

A. I had prison officials to contact Detective Smith.

. . . .

Q. What did you tell the prison official?

A. That I wanted to speak with the detective that had called me out to interview me.

Q. And, then did there come a time when you did speak to Detective Smith again?

A. Yes.

Q. Did he call you out for that interview?

A. Yes.

That was --

I had been --

I was sent to the Poe (sic) Correctional Institution.

Q. You were back at Poe (sic)?

A. Yes.

. . . .

A. Well, when he called me out he --

First of all, he told me that --

He asked me how many times did Harry say the victim was shot, and I told him I think at that time once or twice.

Then, he said no, the victim was shot numerous times.

Q. Smith said that?

A. Yes.

. . . .

Q. Before Detective Smith turned the tape on, is that when he told you that he could assist you with parole with your case?

A. Yes.

Q. Did he show you his badge at that second interview?

A. Yes.

Q. You knew he was a detective?

A. Yes.

. . . .

Q. Did you believe that he would assist you?

A. Yes.

Q. Do you remember --

Do you remember how he said he could assist you with parole, what could he do for you there?

A. Well, he said that he would write a letter and have the State Attorney in the case to try to contact Parole and Probation officials in Tallahassee.

Q. That they would write a letter to try and get you parole?

A. Yes, that they would contact --

Q. Did he say to you that they could get you parole?

A. Yes.

Q. And, that they would do that?

Right?

A. Yes.

Q. If you helped them out?

A. Yes.

Q. Now, let me just ask about one more question on this.

You weren't assuming this stuff?

He told you this stuff?

Right?

A. Yes.

Q. Did he say anything about money?

A. Yes.

He said that there were.

The family of the victim had a reward out, or something like that, and that whoever testified would be rewarded or compensated.

Q. Whoever testified would be rewarded and compensated?

A. Yes.

Q. And, when he said that he didn't -- he meant in Harry's case?

A. Right.

Q. Whoever testified in Harry's case would be rewarded and compensated?

A. Yes.

Q. Did he ever mention one thousand dollars?

A. Yes.

. . . .

Q. He instructed you specifically to state certain things.

A. Yes.

Q. Can you tell us with [sic] those things were?

A. Well, to state, I guess, most importantly that the victim was shot numerous times because before he ever turned the recorder on he stressed that.

Q. Before --

I'm sorry. I didn't hear.

Before he turned it on, what happened?

A. He stressed that I state the victim was shot numerous times.

Q. He told you that it was important to put that on the tape?

A. Yes, to state that.

. . . .

Q. Now, during these times when you met, what did you tell Mr. Waksman?

A. Well, up until --

On the occasions that I met with Mr. Waksman alone, like on the day that the trial commenced, he instructed me that -

You know, the same way that Detective Smith had.

He indicated that it was material and important that I indicate that the victim had been shot several times.

And, on that day he informed me that there were a thousand dollars reward.

And, that after the trial, if Harry was convicted, he would try to assist me in getting out of trouble.

Q. That reward money --

Did you understand that to be reward for your testimony?

A. Yes.

Q. Did they tell you that that was reward for your testimony?

A. Well --

Q. I mean, Detective Smith.

You already said he told you that?

A. Right.

Q. Mr. Waksman say that to you?

A. Yes.

Q. Did Mr. Waksman tell you things you should say on the stand at the trial?

A. No more than to state that the victim was shot numerous times, and that was --

Q. He told you that was important, that the victim was shot numerous times?

A. Yes, sir.

. . . .

Q. And, Detective Smith mentioned helping you get parole, get you parole.

Do you remember that?

A. Yes.

Q. After you came down here to Dade County, did Detective Smith mention that again?

A. Yes.

Q. Said the same thing?

A. Yes.

Q. Did he say that he could get you parole when you were down in Dade County?

A. He said that it would be sometime after the trial.

Q. That after the trial you would get parole?

A. Yes, sir.

Q. And, that he could get help you get that?

A. Yes.

Q. Did Mr. Waksman mention parole?

A. Yes.

Q. Did Mr. Waksman also say that after trial he would get you parole?

A. Yes.

(PCR1. 9709-9719). Farley's testimony confirmed that he was offered, in exchange for his testimony, early release and financial remuneration.

[Q.] Remember testifying at trial that the only reason you were testifying and the only reason you were saying the things you said about

Harry is that -- and I'll quote what you said:

"For once in my life I wanted to do something to try to serve society and help humanity."

Do you remember saying that?

A. Yes.

Q. When you said that, was that true?

A. Yes.

But, now when I reflect on that, I realized that I was trying to help humanity in the wrong way be exaggerating, and it wasn't entirely my fault.

Q. Well, explain.

What do you mean it wasn't entirely your fault?

What were you doing?

A. Well, at that time or point in my life I was confused about a lot of --

Q. Let me take it one step at a time.

Part of the reason you testified was what you expected to get in terms of parole?

A. Right.

Q. Part of the reason you testified was money?

Right?

A. Right.

Q. Was the other part --

MR. NEIMAND: What was the other part.

BY MR. NOLAS:

Q. What was the other part?

A. Because of things, because I was sad, the grief-stricken child and things, and from my exaggerations and the way I looked at things at that time, I really thought that Harry was guilty of a crime which I knew that he never verbally told me that he committed a crime.

Q. He never told you that flat out?

A. He never told me that.

Q. So, part of the thinking was parole, part was money.

And, part of it was you thought this guy is guilty anyway, I might as well get the parole and money, testify against him, and go on my way?

A. Yes.

Q. Is that fair?

A. Yes.

. . .

Q. When you testified at trial that you were just testifying to serve humanity and that

was the only reason, that wasn't true?

Right?

There were --

You said there were three reasons?

A. Well, at that time when I said that I thought that it was true.

Q. But, you were also testifying 'cause you wanted parole?

A. Right.

Q. 'Cause you'd been promised parole?

A. Yes.

Q. You expected parole?

A. Right.

Q. Same thing with the money?

A. Yes.

Q. You wanted it, it was promised to you, you expected it?

A. Yes.

Q. You remember you testified at trial that you were not testifying -- no way you would testify because you expected parole?

You remember you said that in front of the jury?

A. Yes.

Q. That wasn't true?

Right?

A. No, it wasn't.

Q. You did expect parole?

A. Yes.

(PCR1. 9742-9748). During the state's rebuttal presentation, Detective Smith also testified, over defense objection, about his conversations with another inmate, Larry Hunter, at the Dade County Jail in May of 1983. (T. 671). Smith said the following:

> A 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.

(T. 671). He went on to identify four notes that he said Hunter provided him with that documented his various meetings with Mr. Phillips:

> A Certainly. When I interviewed Mr. Hunter, actually I conducted a number of interviews with Mr. Hunter subsequent to May, 1983. 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.
>
> 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 the date, the times and location where he had to testify to show that Harry was not at the parole [office].

(T. 672-73). Smith went on to review each of the notes that he said Hunter had told him were supplied to Hunter by Mr. Phillips. (T. 672-75). Resentencing counsel objected continuously to this testimony. (T. 671, 672, 675, 676).

On cross-examination during Detective Smith's rebuttal testimony, resentencing counsel finally did ask if Mr. Hunter had recanted his trial testimony, to which Smith's answer was , "[w]ell, factually no, he didn't." (T. 685). Resentencing counsel then introduced as a defense exhibit, Larry Eugene Hunter's affidavit from November 1987, and had Detective Smith read two paragraphs of that affidavit in front of the jury:

> BY MR. WAX:
>
> Q Read paragraph four of that, please.
>
> 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 please 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

> battery and possession of cocaine. This happened right after Phillips was found guilty in December 1983. Shortly after that I got $200 from Detective Smith.

(T. 686). Detective Smith then testified that despite the affidavit he "absolutely" denied that Hunter had recanted his 1983 testimony. The State asked Detective Smith on redirect if Hunter had testified at the 1994 evidentiary hearing and he responded that he had not. (T. 687). The full affidavit reads as follows:

> 1. My name is Larry Eugene Hunter. I am presently incarcerated at Apalachee Correctional Institution, Sneads, Florida.
>
> 2. I was a witness against Harry Franklin Phillips in his murder trial in Miami, Florida.
>
> 3. At Phillips' trial in 1982, I testified that Phillips made a full confession to me about the murder of a probation officer in Miami. I said that Phillips entered the east end of the doctors building, shot a man by the gate then left the same way. I also said that Harry wanted me to help make up an alibi. I said that he had given me some notes so that I would remember what to say when I called his attorney.
>
> 4. Phillips never made a

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

5. Before Phillips' trial, I spoke with Detective Smith, three times in the Dade County Jail and across the way at the Homicide Office one time. I also spoke with the State Attorney, David Waksman.

6. Detective Smith would give me information about the case. I did not have to ask. He told me that Phillips entered from the east, that the body was found at the gate, and other things. He made clear to me that if I testified against Phillips I would get a deal. The deal was that I would get 5 years probation on my charges. He told me that if I helped him, he would help me. He told me Waksman would also help me. I also knew about the reward money. He gave me the date that the murder happened, and other information like what I talked about earlier, and made it clear that I should remember these things so that I could help them at the trial.

7. Mr. Waksman wasn't as clear about my deal as Detective Smith. He was real careful when he talked. But we both knew that we were talking about a deal. For example, Mr. Waksman made it

clear that I should help them, and he threatened me. I knew he meant a deal, and so did he. If I cooperated he would help me, and I would get probation, but if I didn't I would get life. Mr. Waksman also made clear to me what I needed to know for the trial. After talking to Mr. Waksman, I knew that if I cooperated and did what he said, I'd get probation. Mr. Waksman told me that I should say that no deals had been made.

8. The cops had asked me to make deals with them in the past. Then Detective Smith came to the jail to see me and told me that he knew that I had a note from Phillips about an alibi. I had the note. In fact, I had asked Phillips for it. I lied to Phillips and told him I was in the Winn Dixie and would testify that I saw him there. I asked him to write me a note with his attorney's phone number on it, the day and time that he was in the store, what he was wearing and things like that. I thought that I could use it later, because I had heard about other guys who the cops had come to the jail to talk to about making deals. These guys made deals on the Phillips case. I had heard that the cops had been asking a lot of people about what they knew or what they heard about the case, and that some guys were talking like they were going to walk after they talked to the police about Phillips. I knew this was true because Detective Smith and the cops were going to the jail, and trying to make deals with everybody all the time.

They were trying to get people to get Phillips to confess. They did this with me too.

9. Detective Smith took the first note. The other notes that I asked Phillips to give me I gave to my attorney Mr. Samek, who gave them to Mr. Waksman. Detective Smith and Mr. Waksman told me to try and get more notes, so I kept asking Phillips for more. I'd tell Phillips that I lost the ones he had given me before, or that I was having a hard time remembering all the details, and he'd sent me another note.

10. I tried to get out of the whole thing several times. At one point, I refused to go to a deposition that Phillips' lawyers had set up. I told Phillips' lawyer, a black guy, that I didn't know what I was doing there. Detective Smith and Mr. Waksman kept telling me that if I didn't help them and then testify, they could put a lot more charges on me. They told me I could end up doing life in prison, and I sure didn't want to do that. Detective Smith also talked about probation.

11. My attorney, Mr. Samek, Detective Smith, and Mr. Waksman all called my mother telling her that she should get me to take the plea and testify against Phillips. Between them and my mother, I just felt like I didn't really have any choice. Detective Smith told me I should take the plea and

> testify for them, and they would help me. But, if I didn't testify, Detective Smith and Mr. Waksman made it clear that I would get life. They offered me the deal and I had to take it.
>
> 12. I was taken to Detective Smith's or Mr. Waksman's offices to talk about Harry Phillips a number of time (sic). Each time they would tell me the facts over and over to make sure I said the right things and didn't mess up the story. Most of what I knew about this case I learned from Mr. Waksman and Detective Smith. I learned the rest from other inmates who were also talking to Smith and Waksman.
>
> 13. 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 5 years probation. At the time I had been charged with car theft, sexual battery and possession of cocaine. This happened right after Phillips was found guilty in December 1983. Shortly after that, I got $200.00 from Detective Smith.

(R. 163-167). So, clearly during Detective Greg Smith's rebuttal testimony, resentencing counsel did introduce into evidence a copy of Larry Hunter's November 1987 recantation affidavit during cross-examination. (T. 686-87). But resentencing counsel failed to ask Detective

Smith a single question about the sections of the affidavit concerning the "alibi notes" in which Hunter stated that he lied to Phillips and told him that he had seen Phillips at the Winn-Dixie and would testify for him and further that "I asked him to write me a note with his attorney's phone number on it, the day and time that he was in the store, what he was wearing and things like that." (R. 165-66). These were the very notes that were the feature of both Detective Smith's testimony about Hunter and a fundamental basis for the state mental health expert's opinions that Mr. Phillips did not meet the standard of statutory mental health mitigation because of his "street smarts." And nowhere in the affidavit is there any statement about whether Mr. Phillips was guilty of the murder of Mr. Svenson.

Similarly, resentencing counsel failed to ask the state mental health experts, Drs. Haber and Miller, whether they considered Hunter's affidavit or any of the other impeachment evidence involving the jailhouse witnesses and related documents in reaching their

conclusions about Mr. Phillips. Their opinions were allowed to stand unchallenged.

The State adopted the testimony of Detective Smith and Drs. Haber and Miller that Mr. Phillips was "street smart" and not brain damaged or mentally retarded and at closing argued, without objection, that Mr. Phillips' I.Q. scores were "not uncommon in people with lower society status":

> This man is very street smart, very cunning. The I.Q. test as we all know deals with your ability to read and write and do well in school. This is present of a person who reads and writes well and does fine in the outside world. He had become street smart. He knows how to deal with the cops.

(T. 751). During his opening statement, assistant state attorney David Waksman had invoked the name of Malcolm Watson, who he says had known Mr. Phillips for several years and saw him with a gun complaining about his parole officer. (T. 249). Resentencing counsel did not object during the State's opening. However, Mr. Wax did immediately raise the issue of his inability to rebut when the state objected to his opening remarks. (T. 269-70).

During Mr. Waksman's direct examination of lead investigator Detective Greg Smith, Smith testified that he had interviewed Malcolm Watson for the first time in 1982. (T. 411). Smith confirmed that Watson told him about the incident with Harry Phillips and the gun that Waksman had mentioned to the jury in opening. (T. 411). Regarding Malcolm Watson, he also testified:

> He said that he ran into Harry Phillips in September of 1982 in Dade County Jail. I believe Watson saw Harry and he was aware that the parole officer, the supervisor from the north office had been murdered, and Mr. Watson said something to the affect that Mr. Phillips finally did it, and Harry Phillips responded, "Yes, they got to prove it and they can't prove it," something to that effect.

(T. 412). Detective Smith said that Mr. Phillips denied knowing or having met Malcolm Watson when shown photographs by Smith "of some individuals which included Mr. Watson." (T. 427-28). He acknowledged that Mr. Phillips denied telling anyone he killed a parole officer. (T. 428). During later testimony, when he was called as a rebuttal witness, Detective Smith further testified over

defense objection that Mr. Watson told him that Mr. Phillips had "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 shooting at one of them. He went a little bit further and said that he shot into his parole officer's house." (T. 681). Finally, the state offered, over defense objection, the following testimony from Detective Smith, in their terms as rebuttal to Dr. Toomer's [Toomer] testimony:

> Harry Phillips explained to Mr. Watson that there were no eyewitnesses that could identify him and 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.

(T. 682). The jury never knew anything of the sweetheart deal that Malcolm Watson received in return for his testimony against Mr. Phillips. The terms of the deal were outlined in Mr. Phillips Brief to this Court following the denial of relief after his 1994 evidentiary

hearing:

> Whether or not Watson was ever administered the promised polygraph, his life sentence was vacated on May 17, 1984, five months after Mr. Phillips's trial (see Apps. 31, 32). The record of the proceedings which lead to the vacation of Mr. Watson's life sentence is conspicuously bare: a two-page Rule 3.850 motion filed on March 7, 1984 (App. 31), which states that the grounds for the motion will be presented at a hearing; a one page stipulation executed by David Waksman and filed on May 11, 1984, agreeing and jointly requesting that Mr. Watson's motion be granted and his conviction for armed robbery be reversed; a one-page, six-line order vacating Watson's conviction and life sentence; and an order granting him a five year term of probation (Id.). Nowhere does there appear a record of any hearing, or of any of the "new evidence" referred to in Mr. Waksman's stipulation. Thus, according to court documents, Mr. Watson simply walked away from a life sentence with no legal justification other than a court order.

(Initial Brief at 84, Phillips v. State, Case No. 75,598). Obviously, resentencing counsel believed that the restrictions on his cross-examination outlined supra regarding Detective Smith and the State's experts prevented him from going into this area as well.

During his opening statement, assistant state attorney Waksman told the jury that Mr. Phillips had confessed to William Smith/Will Scott, saying "I just downed the mother fucker for riding me" (T. 261). During direct examination by Waksman, Detective Smith also confirmed that he spoke with Mr. Smith. (T. 412). He also testified that he heard Mr. Smith testify in open court and had reviewed his testimony. (T. 413). He testified that Smith told him he knew Mr. Phillips:

> He knew him for a number of years. They both lived in the same neighborhood and had contacts over the years and they agreed. I guess the kind of question was like, "What are you in for?" Mr. Phillips asked Mr. Smith what he was in jail for and he explained that he had been arrested for an assault and that he had also been arrested for violation of parole. Mr. Phillips responded something to the affect, "well, I downed one of those mother fuckers," and they got into a conversation and the conversation ends.

(T. 413-14). Resentencing counsel was not allowed by the court to go into Will Smith on cross-examination. (T. 447-48). William Scott/Will Smith was mentioned briefly

during resentencing counsel's proffer, with Detective Smith acknowledging that at the time in 1982 when Scott/Smith saw Mr. Phillips in the Dade County Jail, Scott/Smith was there on violation of a parole warrant and a new assault charge, (T. 454-55). This small fact, which the jury did not know, was only the tip of the iceberg insofar as the amount of information from prior proceedings that resentencing counsel could have used to impeach the credibility of Detective Smith's recitation of the hearsay from Scott/Smith. For example, this Court recognized that Scott was a some sort of state agent when he attempted to elicit information about the murder of Svenson from Mr. Phillips family. See Phillips v. State, 608 So. 2d 778, 781 n.2. (Fla. 1992). The resentencing jury never was aware of this fact. Scott's testimony at the 1988 evidentiary hearing indicated his self-interest in providing information as a police agent:

> Q. Do you remember any law enforcement officer, any detective ever giving you any money to take to Mr. Phillips' family?

A. Yeah.

I carried $20.

Q. And, who gave you that?

A. Detective Sapp.

Q. And, why was that money given to you?

A. Well, basically he wanted me to see I can get information concerning the weapon.

Q. You went over to Mr. Phillips' family?

Right?

A. Yes, I did.

. . .

Q. Why did you go there?

A. Basically, he was trying to find the weapon, you know.

Q. Who is he?

A. Detective Sapp.

. . .

Q. Who handed you the money?

A. Sapp.

Q. What did he tell you to do with it?

A. He asked me --

You know, he said: Well, go there and tell his sister that you just got out, that you wanted to give Harry some money for the commissary.

Q. What were you supposed to do when you went and talked to the family?

What was the purpose of all of that?

You were going over there to just say hello?

A. Well, I guess to pick up the information that they needed, right.

Q. You were trying to get information out of them?

Fair?

A. Well, I didn't do too much questioning.

I just --

I asked a few questions, you know.

Q. You asked a few questions.

But, the idea was to get information out of them, wasn't it?

Q. Yeah.

A. I told her I had just gotten out and that I bought this $20 by her to give for the commissary.

. . .

Q. You were trying to find out where the gun was?

A. Well, you know, that was the motive.

You know, that was the motive.

Q. You wanted to find out where the gun was?

Right?

A. Right.

Q. And, you wanted to find out what they knew about the case?

Right?

A. Well, right.

Q. You wanted to find out what Harry had told them about the case?

Right. I'm not asking you now --

A. I guess.

Q. Hold on a minute here.

I'm not asking you how you asked the questions.

I'm asking you what you wanted to find out.

You wanted to find out where the gun was, what Harry told them about the case, what they knew about the case, that kind of stuff?

Right?

A. Right.

Q. Who told you to go find out that information?

I don't think you cared about something like that on your own.

A. Well, they was listening to what I was saying.

I had a body bug and it's on record, man, you know.

(E.H.[2] 72-80). Detective Smith himself testified at the 1988 evidentiary hearing about Scott. In that testimony he affirmed that Scott was working as a police agent or informant for him:

Q. Do you remember yourself, Detective Hough, Detective Sapp getting together and sending Scott over to Mr. Phillips' family's house?

A. No, sir.

Q. That never happened?

A. It did happen, but Hough was not involved.

Q. Hough was not involved?

A. No.

Q. You and Sapp did that?

A. Correct.

Q. Do you remember giving him twenty dollars as a way to sort of get a foot in the door?

A. Certainly.

Q. And to elicit information?

A. Yes, sir.

Q. If Scott's trial testimony denied that activity, would you characterize that as inaccurate?

A. I would have to say he was mistaken, true.

Q. If he denied it, would you agree with me that he lied?

A. I can't say that he lied.

He may have forgotten.

I don't know what's in his mind. He's obviously mistaken because that did occur.

Q. You sent him over to the family?

A. Yes, sir.

Q. With $20?

A. Yes, sir.

Q. What did you tell him to do with the $20?

A. Mr. Scott indicated to me he might be able to find out where the gun was.

. . .

We did give him $20, and we did ask him to go there and find out where the gun was that was used.

Q. When he was undertaking that activity, would it be fair for me to say that he was working as an agent of yours?

A. <u>At that time, definitely</u>.

Q. <u>As an informant of yours</u>?

A. <u>As an agent, yes</u>.

. . .

> Q. Assuming that he was an agent, for the sake of argument, and that on the stand at trial that he knew what the word was, and on the stand at trial he said I was never an agent for Metro-Dade, only for the federal government; I never worked as an informant for Metro-Dade, only for the federal government --
>
> A. If he understood what those words were, yes.
>
> Q. Is that the kind of statement which you would have asked Mr. Waksman to correct if he made that on the stand?
>
> A. I don't recall.
>
> Q. You never did ask Mr. Waksman to correct that statement?
>
> A. I don't recall.

(PCR1. 1293-1297) (emphasis added). The implication that the jury in 1994 had was that Scott was just another prisoner providing information that Mr. Phillips had provided to him. They were never made aware that Scott was a police agent.

2. ARGUMENT

The evidence introduced by the State through the hearsay statements and documents of the jailhouse

witnesses was used to support the State's expert testimony concerning Mr. Phillips' "street smarts," i.e. his alleged ability to plan, calculate, etc., and was also used as non-statutory aggravation. The State's position was that if Mr. Phillips had the ability to attempt to fabricate an alibi by providing written notes to Mr. Hunter to memorize, he was too sophisticated to possibly be mentally retarded, or to meet the requirements for statutory mental health mitigation. This alleged ability to plan also added to the State's argument that there had been heightened premeditation sufficient for a finding of the CCP aggravating factor. But the very witnesses whose testimony from the 1983 trial that the State used Detective Smith to get into the 1994 proceeding had either recanted at the 1988 evidentiary hearing or been seriously impeached. The trial court simply failed to allow a complete defense rebuttal of the hearsay that came in through Detective Smith from the snitch witnesses.

There can be no argument that this issue was not properly preserved for appellate review. There was a

motion in limine on concerning the introduction of non-statutory mitigation which was denied, and resentencing counsel updated and renewed his objection prior to the introduction of Detective Smith's testimony, and referred back to his pre-trial motion. (R. 110, T. 670). No more is needed to preserve the issue. Correll v. State, 523 So. 2d 562, 566 (Fla. 1988).

The testimony of Detective was clearly inadmissible, irrelevant, and unduly prejudicial to Mr. Phillips' case under the United States and Florida Constitutions, where Mr. Phillips'counsel was helpless to rebut. If Detective Smith's testimony was not *per se* inadmissible evidence, it was evidence whose probative value was substantially outweighed by the unfair prejudice to Ms. Phillips. See § 90.403, Florida Statutes (1995); Steverson v. State, 695 So. 2d 687 (Fla. 1997).

By calling on Detective Smith as a state witness in its case-in-chief and as a rebuttal witness, it could not have been clearer to the jury that Smith's purpose was to bolster the credibility of the jailhouse witnesses who

painted the state's picture of Mr. Phillips as a calculating, clever, crafty, street smart person who was according to the State "not a vegetable." (T. 745, 752, 753). [I]t is error to admit testimony from a witness who is offered to vouch for the credibility of another. Norris v. State, 525 So. 2d 998, 999 (Fla. 5th DCA 1988). Improper vouching occurs when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness' testimony.

As a result, irrelevant and prejudicial evidence was presented to the jury, and Mr. Phillips's right to confrontation was denied. "There are few subjects, perhaps, on which [the Supreme] Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-05 (1965). Accord Douglas v. Alabama, 380 U.S. 415, 418-19 (1965).

The jury should have known that Larry Hunter said in 1987 that the four alibi notes were prepared by Mr. Phillips at his request because Hunter told Phillips he had seen him at the Winn-Dixie and Hunter recognized that Phillips was easy to manipulate (R. 163-67); or that the jobs of dishwasher and garbage man can be performed by a mildly mentally retarded person and were the best Mr. Phillips could do; that going three blocks across the county line to a Publix store might not be perceived as a parole violation by a mentally retarded man; or that wanting a kiss from your female parole officer is not intelligent and clever behavior; or that losing one's shoe during an armed robbery and having it used to identify you is not an example of masterful planning; or that telling the investigative detective the number of shots fired or the fact that the murder weapon was missing when neither of those facts were known except to the police is not a sign of intelligence, or, that the jailhouse witnesses were not good citizens doing their duty. (T. 282, 291, 292, 418, 435). The picture of Mr. Phillips painted by

Detective Smith's testimony was unfair, inaccurate, and prejudicial to Mr. Phillips.

By introducing the hearsay through Detective Smith, the State violated its duty to produce available witnesses whose statements are introduced through the testimony of other witnesses, Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable"), and the Sixth Amendment. Pointer, 380 U.S. at 406-07 ("A major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."). The purpose of the Sixth Amendment is "to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." Berger v. California, 393 U.S. 314, 315 (1969). Although an "adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation," Douglas, 380 U.S. at 418, the Sixth Amendment contemplates that, absent

compelling reasons to the contrary, "the `evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). The introduction of these statements was not harmless, and appellate counsel's failure to raise on appeal this preserved and meritorious issue warrants habeas relief at this time.

CLAIM II -- FAILURE BY APPELLATE COUNSEL TO RAISE MR. PHILLIPS MENTAL RETARDATION

Appellate counsel was aware that evidence of the possible mental retardation of Mr. Phillips had been presented at the resentencing. On page 44 in the Statement of the Case and the Facts in appellate counsel's initial brief, he recites the findings of Dr. Carbonell as follows:

> 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 those spheres. He's not able to cope with any

> adversities. He can't cope with any problems in 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 an 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").

Here, appellate counsel failed to raise the constitutionality of executing the mentally retarded where Penry v. Lynaugh, 492 U.S. 304 (1989) had indicated in 1989 that persons with mental retardation as a class were not exempt from the death penalty at that time but that a societal consensus might emerge from the states in the future such that mental retardation would be considered a violation of the Eighth Amendment.

Many of the issues related to Mr. Phillips' volitional

acts were couched only in terms of competency throughout all the proceedings. When these issues are listed and considered in the terms of a diagnosis of mental retardation, the problem noted with the court's failure to allow live rebuttal testimony from the recanting snitches becomes more evident. The story they had to tell about the true nature of their interactions with Mr. Phillips in the jail was as relevant for purposes of understanding Mr. Phillips' mental abilities. Some of the best evidence of Mr. Phillips' organic brain damage and mental retardation are the events themselves.

The Supreme Court has held punishments to be violative of the Eighth Amendment based, in part, on evidence of a legislative consensus rejecting the type of punishment at issue. See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 826-30 (1988)(invalidating capital punishment for offender under age 16 where 19 of 37 state legislatures rejected the practice); Enmund v. Florida, 458 U.S. 782, 788-796 (982)(holding death penalty unconstitutional for certain type of felony-murder where, of 36 death penalty

jurisdictions, "only" eight, a "small minority," allowed capital punishment for such offense); Coker v. Georgia, 433 U.S. 584, 593-97 (1977)(invalidating capital punishment for rape where only one state imposed death for rape of adult victim and only three imposed it for any rape). The Supreme Court has accepted on certiorari a case, McCarver v. North Carolina, 121 S. Ct. 1401 (2001), in which briefing and oral argument will take place in the Fall Term on the issue of the Federal Constitutionality of the execution of the mentally retarded last reached in Penry v. Lynaugh, 492 U.S. 302 (1989). Mr. Phillips' 3.850 motion cited Penry for the proposition that the jury in his resentencing was not aware that he suffered from organic brain damage and mental retardation, a violation of his constitutional rights. (PCR. 64). The prejudice to Mr. Phillips that resulted from appellate counsel failing to raise the issue of the constitutionality of execution of the mentally retarded is self-evident.

CLAIM III -- FAILURE TO RAISE ON APPEAL THE TESTIMONY OF DR. MILLER

Failure by appellate counsel to carry forward the defense objection at resentencing to Dr. Miller's testimony relative to his competency evaluation in 1994 was deficient performance. (T. 488). Request for a standing objection was also denied.

Mr. Wax, the resentencing counsel, filed a motion for a competency evaluation on October 18, 1993, in which he advised the trial court that "[s]ince the time of the [evidentiary] hearing on the Defendant's Rule 3.850 motion, he has been incarcerated on 'Death Row.' Counsel believes that the Defendant's condition has further deteriorated as a consequence of that incarceration." (R. 86). Of course since Mr. Phillips' competency had been an issue at the 1988 hearing and the appeal from the denial of relief, with Drs. Carbonell and Toomer opining that Mr. Phillips was not competent, this was a reasonable concern. See Phillips v. State, 608 So.2d 778, 782 (Fla. 1992).

Following the hearing on January 11, the trial court signed an order appointing Drs. Toomer, Miller and Leonard Haber as "disinterested qualified experts" to determine

the competency of Mr. Phillips! (R. 96). This was done without defense objection despite the fact that all three had opined in 1988 on competency with credibility findings to the detriment of Mr. Phillips made by Judge Snyder that were affirmed by this Court on appeal. Id.

Mr. Phillips refused to see Dr. Miller without counsel present after Miller was appointed for competency purposes in January 1994, but did see him after a second order was entered appointing Miller on March 24, 1994. (T. 30-31). At a pre-trial hearing the State indicated that since Dr. Toomer had found Mr. Phillips to be competent, there was no need for another competency evaluation, so instead the State desired an appointed for Dr. Miller to evaluate Mr. Phillips for purposes of rebutting the defense case in mitigation. (T. 30-31). This the lower court did over defense objection. (T. 31, 39). Resentencing counsel renewed that objection at the resentencing and asked for a standing objection to any testimony by Dr. Miller based on his 1994 evaluation. (T. 488). The State expressed considerable concern after Dr. Carbonell's 1988 testimony

was read into the 1994 record because of her absence from the proceeding. Much of her testimony concerned her opinion that Mr. Phillips was not competent, which the State was concerned would raise residual doubt of guilt in the minds of the jury. (T. 585). Dr. Miller then testified, over defense objection, that he had seen Mr. Phillips again six days before, for about an hour, on March 31, 1994. (T. 491).

Mr. Phillips refused to see Dr. Miller without counsel present after Miller was appointed for competency purposes in January 1994, but did see him after a second order was entered appointing Miller on March 24, 1994. Dr. Miller testified that based on the recent contact he did not believe that Mr. Phillips was suffering from any mental illness but indicated he was uncertain as to any finding regarding his intelligence. ("His mind was even. His intelligence was -- I didn't know it from testing. If it was less than average I would inquire about it. He was aware of what was going on in general, the world around him, some news and events.") (T. 493). Dr. Miller's

ultimate conclusion was that Mr. Phillips did have the ability to know right from wrong. (T. 499). This was a concept that might have been relevant in the context of a sanity determination or a competency evaluation. Miller was allowed to testify over defense objection to what amounted to his finding of competency in 1994, directly rebutting the testimony of the two defense experts, Dr. Toomer and Dr. Carbonell, who had opined that Mr. Phillips was not competent in 1988. Dr. Carbonell's 1988 testimony was read into the record in 1994, including her competency findings. Dr. Toomer was re-appointed for competency purposes in 1993-94, and submitted a report finding Mr. Phillips competent. (T. 30). Resentencing counsel failed to ask for a competency hearing but did object to Dr. Miller testifying about his 1994 findings. At the time of this proceeding Fla. R. Crim. P. 3.211(e) was in effect.[1]

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[1] **(e) Limited Use of Competency Evidence**

(1) The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited

Defense counsel should have insisted on independent experts to be appointed to do the competency evaluation, and not the experts who had done competency evaluations in 1988 and were preparing to opine about the presence or absence of statutory and non-statutory mitigation in 1994. Perhaps that was one of the rationales for his objection to Dr. Miller testifying. While Dr. Toomer did not testify as to his 1994 finding during the resentencing hearing but did testify that he had found Mr. Phillips to be incompetent in 1988. (T. 38). At the State's urging, and without objection by resentencing counsel, the court specially instructed the jury after Dr. Carbonell's

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during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.

(2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

testimony and before Dr. Toomer's testimony that they were not to consider competency issues. (T. 593). Resentencing counsel's only reaction was to say that he had no intention of arguing the question of competency to the jury. (T. 586). If doubt exists as to a defendant's competency, the court must hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F. 2d 1562 (11th Cir. 1992).

CLAIM IV -- FAILURE TO RAISE ON ORIGINAL DIRECT APPEAL OTHER RULINGS

Appellate counsel also failed to raise on direct appeal other rulings which, alone or in combination, particularly with the other errors described in this petition, established that a new trial and/or a resentencing is warranted. These include but are not limited to: denial of resentencing counsel's request for a standing objection to the use of autopsy photos was denied (R. 239).

Additionally, in Mr. Phillips' twenty page 1984 direct appeal brief, appellate counsel Eric Hendon failed to

raise a preserved guilt phase claim in that trial counsel properly moved for judgement of acquital after resting at the guilt phase of his trial. (1983 trial transcript at 1070-73). No guilt phase claims were addressed in Mr. Phillips' 1987 state habeas pleading filed under death warrant.

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Phillips was denied the effective assistance of appellate counsel.

I HEREBY CERTIFY that a true copy of the foregoing Amended Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 19, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(1), Fla. R. App. P.

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