IN THE SUPREME COURT OF FLORIDA

GALANTE ROMAR PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC08-1882

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Phillips." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

"XII 381": p. 381 of volume XII of the 21-volume record on appeal;

"Suppl 5": p. 5 of the supplemental record on appeal;

"SE": a Sate's Exhibit, followed by the exhibit number;

"DE": a Defendant's Exhibit, followed by the exhibit number;

"Exh-II 174-84": pp. 174-84 of volume II of the Exhibits;

"IB 27": p.27 of the Initial Brief dated as served April 21, 2009.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

DATE	NATURE OF PLEADING OR COURT EVENT
10/18/2005	Phillips robbed Wilbur Sweet of $3100 and shot Christopher Aligada, resulting in his death (See "The Armed Robbery and Murder" section infra);
11/29/2006	Two-count indictment charging Phillips with First Degree Murder of victim Christopher Aligada and Armed Robbery of Wilbur Sweet (I 25-26);
4/7/2008	Jury selection began (X 6);

4/8/2008	Jury trial began with opening statements (XII 361);
4/9/2008	Jury found Phillips guilty as charged of First Degree Murder, specifically finding guilt on premeditated and felony-murder, and found Phillips guilty as charged of armed robbery (XIV 830-33; VI 1111-13);
4/17/2008	Motions and penalty jury instructions hearing (XVI);
4/21/2008	Additional discussion of motions and jury instructions (XVII);
4/22/2008	Jury penalty phase began (XVIII);
4/23/2008	Jury recommended the death sentence by a vote of seven to five (VII 1352; XIX 1303-1306);
6/26/2008	State filed its Memorandum in Support of the Imposition of the Death Penalty (Exh-II 174-84); Defendant's Sentencing Memorandum (Exh-II 185-219);
6/26/2008	Spencer Hearing[1] (Suppl);
7/7/2008, 7/14/2008	Additional Defendant's sentencing memoranda (VII 1381-1405)
8/1/2008	Additional sentencing hearing in which parties argued applicability of avoid-arrest aggravator (XX);
9/19/2008	Circuit Judge Mallory D. Cooper sentenced Phillips to death on Count 1 (First Degree Murder) and to life on Count 2 (Armed Robbery) (XXI 1335-54; VIII 1406-1422)

The Armed Robbery and Murder.

Robbery victim Wilbur Sweet (XII 374), as well as forty-year-old murder victim Christopher Aligada (XII 379, 395) worked at the Builder's First Source lumberyard (XII 375) on Roosevelt Boulevard in Jacksonville (XII 407, 420; XIII 636-37).

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

At about 8:30, 8:45 p.m., on October 18, 2005, (See XII 376, 408-409) Defendant Phiilips, armed with a loaded .357 handgun (See XII 381-82), waited in the darkness and shadows (XII 389; XIII 689-90) near Wilbur Sweet's SUV (XIII 688-90; see XII 380). The SUV was parked inside the fenced-in parking lot behind the warehouse of Builder's First Source (XII 378-79).

Near Mr. Sweet's SUV, Phillips took Mr. Sweet's money at gunpoint and then Phillips shot Christopher Aligada, Sweet's co-worker, as Mr. Aligada approached, then Phillips fired at Sweet as Sweet ran away. The State now elaborates on these facts and additional details of the robbery-murder.

Timothy Long worked at the Builder's First Source lumberyard. On October 18, 2005, when Long got off work and walked to his car around 8 or 8:30pm, he saw Phillips inside the fenced parking lot. Phillips asked Long if the shift is getting off, and Long responded by asking Phillips who he is waiting for. Phillips seemed aggravated and irritated and asked Long again if the shift is getting off. Long told Phillips that, yes, the shift is getting off, and Long left. (XII 410-12) Mark Walton, another lumberyard employee, also noticed Phillips "by the fence," which was unusual. (XII 419-22)

Shortly after Long encountered Phillips in the parking lot and Walton first noticed Phillips, Wilbur Sweet, having also gotten off of work at the lumberyard, walked to his burgundy SUV (XII 380, 398) in the parking lot. There, Phillips emerged from hiding in the shadows (See XIII 689-90) and robbed Sweet at gunpoint of about $3100 (XII 382), which Sweet had brought

to work to buy a used car for his son (XII 377; see also XII 439-40). Phillips, almost face-to-face with Sweet (XII 399-400 and pointing a .357 magnum at Sweet (XII 381), told Sweet: "Give me the damn money" (XII 382). Sweet handed Phillips the money from his pocket and handed Phillips his wallet. (XII 382)

After Phillips took Sweet's money and wallet, Sweet saw Phillips turn and fire two shots. (XII 382-83) After the shooting, Sweet discovered that Phillips had shot co-worker Christopher Aligada. (XII 383)

Christopher Aligada, had also just gotten off work at the lumberyard and had gotten into his SUV[2], when he saw the robbery. Aligada exited his vehicle and approached Phillips and Sweet. Aligada had previously met Phillips when Phillips had inquired about a job at the lumberyard, so they knew each other. (See XIII 684-85, 701) Sweet did not previously know Phillips. (XII 381, 385)

As unarmed (XII 426) Aligada approached with his hands up (XII 428), Phillips, without saying anything, aimed his .357 handgun at Aligada and shot at Aligada twice (See XII 382, 402-403, 422, 427). At least one of the shots struck Aligada, who fell to the ground. (XII 424, 425, 436-37) According to witness Mark Walton, when Christopher Aligada was shot, Aligada was about 10 feet away from Phillips. (XII 428-29)

When Phillips fired at Aligada, Sweet took off running. (XII 383-84)

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[2] A photograph showed that the keys to his vehicle were in the ignition. (XII 467-68; SE 13)

Phillips already had Sweet's money and chased after Sweet, shooting at Sweet as Sweet ran and jumped across another car (XII 383-84, 382, 402, 425, 431-32). Phillips fired about three times at Sweet (XII 427), and two bullet fragments were recovered from a vehicle along the path (XII 470-72, 480-81; SE 19, 20). Phillips' shots at Sweet missed and so Sweet survived to testify against Phillips (See XII 374-406).

Phillips drove away in Sweet's SUV (XII 384, 391, 425-26, 433, 437), and Sweet returned to Aligada and to render aid, Sweet attempted to call 911, and asked someone else to call 911. (XII 384-85) Rescue came, and Aligada was taken to the hospital, (XII 384-85) where he died the next day from the gunshot wound to the abdomen (XII 495-97, 504, 506; XIII 637).

Sweet "clear[ly]" identified Phillips in the courtroom as the person who robbed him, shot Aligada,[3] and fired at him as he ran away. (XII 380-81, 398) Sweet also picked Philips out of a police photospread, which was introduced into evidence. (XII 393-94, 404; XIII 643-44; SE 10)

Long also picked Phillips out of a photospread (XII 413-14; XIII 641-43; SE 11), but at the trial he said that, due to the passage of time, he could not identify him a "hundred percent" in the courtroom (XII 416, 417-18).

Walton could not identify the shooter at the trial, but described the person who he saw prior to the shooting, saw shooting at Sweet, and driving

[3] Sweet did not actually see who Phillips was firing at the instant when Phillips turned, aimed, and fired at Mr. Aligada. At that time, Sweet was looking at Phillips.

off in Sweet's vehicle. (XII 421-22, 426-25)

The medical examiner, Dr. Eugene Hunt Scheuerman, testified that he found two gunshot wounds on Aligada's body: one through the victim's upper left arm and the fatal wound to the victim's "left side or flank." (XII 497-98) Characteristics of the second wound were consistent with a bullet passing through the victim's arm and then entering his body. (XII 500-501) Based on the wounds' characteristics and the trajectories of the wounds, the doctor acknowledged the prosecutor's demonstration that the victim's "arm would not have been raised." (XII 502)[4]

The doctor found no sign of smoke or stippling on the victim's body, but, because determining distance from firearm to victim depends upon several variables that were undetermined in this case, especially ones dependent upon recovering the gun, the doctor could not provide an estimate of the firearm-to-victim distance. (XII 507-510) The doctor refused to estimate the specific stippling effect of a victim wearing heavier clothing. (XII 510-11) The doctor explained the dynamics of stippling in detail. (XII 508-509; see also FDLE expert's general discussion of factors affecting stippling at XIII 554, 561-62)

Abrasions and scrapes on the victim Aligada's knees were consistent

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[4] As the doctor explained on cross-examination (See XII 506-507), the doctor's opinion is not necessarily inconsistent with the testimony of eyewitness Mark Walton who indicated that the victim had his hands up (XII 428). The arm wound was to the upper arm and hands can be raised up without raising the upper arm. Thus, the wounds would have been inconsistent with the victim's arms being extended over the top of his head when he was shot. (XII 507)

with having fallen to the ground on a rough surface like a parking lot. (XII 503)

A toxicology examination on victim Aligada was done, and there was no evidence of alcohol, marijuana, cocaine, or any other kind of drug. (XII 505-506)

Dr. Scheuerman recovered projectile fragments from the victim's body. (XII 503-504; SE 29)

The doctor used several photographs in his testimony. (See XII 498-503; SE 24 to 28)

Additional photographs were introduced into evidence. They showed the crime scene, the locations of where Sweet had parked his SUV, Aligada's vehicle, where Aligada was shot, where Sweet ran away, Aligada's vehicle and Sweet's vehicle, and the blue vehicle that Sweet jumped behind when Phillips was shooting at him. (See XII 387-93, 394, 410, 421, 430-33, 435, 461-67; XIII 637-38; SE 1 to 10, 12, 22) Detective Anderson described photographs showing the trajectory of bullets in the blue vehicle, which Sweet had jumped behind, and its shattered window. (XII 468-69; SE 15, 17) A diagram also depicted the location of the blue car and Mr. Aligada's Blazer. (XII 568-69; SE 8)

FDLE firearms-identification expert Maysaa Farhat testified that bullet fragments from the victim's body (XII 503-504; SE 29) and from the vehicle that Mr. Sweet jumped behind (XII 471-72; SE 19; see also XII 469-70; SE

17, 18, 28) were fired from the same gun. (XIII 554-56, 557, 558-61)[5] They were both .38/.357 caliber class bullet[s]." They were both "revolver bullet[s]." (See XIII 552-53, 553)

Phillips abandoned Sweet's vehicle in the middle of the road about a block from the lumberyard. (XIII 637, 638; XII 450-51, 455) FDLE expert Leigh Clark testified that Phillips' DNA (XIII 582-83; SE 34) was identified on gear shift of the vehicle (XII 477-78; SE 36) at about one in 9.5 trillion probability among African-Americans. (XIII 597, 598-99; 630)

Katrina Joyce was Phillips' girlfriend (XIII 529). Sometime before Joyce's birthday, October 29th (XIII 529), Phillips left town (XIII 531) and when he returned to Jacksonville, Phillips told Joyce that "he had robbed somebody and shot them *** [b]because he tried to stop the robbery"; "he tried to be a hero." She testified that he told her that the shooting occurred "[o]utside in the parking lot." (XIII 532)

Ms. Joyce contacted the Jacksonville Sheriff's Office, and, on July 25th, the police recorded a subsequent conversation she had with Phillips. (XIII 534-36, 639-41) Parts of the recording (SE 32) were played for the jury. (XIII 536-43) Phillips refused to "explain it" to her "because other people involved." (XIII 539) However, Phillips reiterated that the victim was shot because he "interfered" and "tried to play hero." (XIII 540) Phillips also stated:

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[5] Ms. Farhat testified that SE 20, also recovered from the vehicle, contained only part of the interior core of a bullet, so it was of "no value" for her analysis. (XIII 551-52, 556)

> If I don't shoot him, the possibility that me and the other dude got shot up or guaranteed to go to prison the rest of our life. But I wasn't the only one that shot. He got shot twice. He tried -- he got hit the first time (inaudible) trying to play hero, you ready to go. You ready to go.

(XIII 540; see also transcript of tape played at XIX 1242) Phillips also told Ms. Joyce that the victim "could have … stayed where he was in his spot … [a]nd live to tell the story." (XIII 541) He related being "worried because" of some people leaving the job site and identifying someone. (See XIII 542; SE 32 at ~6:18 to ~6:35)[6] He said "[w]e had got some money out of it," but he lost a lot of the money running away from the crime scene "because he played hero." He continued: "A lot of it got kept. It got bust out between three people, what was left." (XIII 541)

On October 4, 2006, Detective Scott Dingee informed Phillips of his Miranda rights (XIII 645-49, 653-54), and a videotape was played of parts of the resulting interview (XIII 650 et seq.; SE 40). Detective Dingee told Phillip, "I got you cold" (XIII 651) and "two people from the business … identified you out of a photospread" (XIII 654; see also XIII 705). Phillips confirmed that one guy came out and asked him whether this is the end of the shift. (XIII 705)

Dingee explained to Phillips the significance of the DNA analysis that will be done. (XIII 655-57) Later in the interview, Phillips said that he could have explained away the DNA with "any kind of story." (XIII 704-705)

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[6] Undersigned listened to SE 32 and correlated it with the transcription at XIII 542 and admittedly it is difficult to discern precisely what is being said at this juncture.

Dingee told Phillips about tape recording Phillips' conversation with Joyce. (XIII 657, 659) Phillips told Dingee to "skip the bullshit. Get straight down to the point … I know what's best for me. … I know about all that [DNA] process." (XIII 657-58)

Phillips said he "needed the money" (XIII 700), and "it was an accident. He forced me." (XIII 661; see also XIII 699) Phillips acknowledged that a man did die. (XIII 661) Dingee played for Phillips parts of the recording of Phillips' conversation with Joyce. (XIII 662-63, 677-78) Phillips said that the victim was "trying to play hero" and put himself and "put me and other people that was with me in danger." (XIII 664 L6-10) A little later, Phillips said, "you got me." (XIII 664 L23-25) At one point, Phillips also said, "I know my handprints was on that steering wheel. This is the only way possible that you could get me …." (XIII 679-80) He said, "I ain't going to never come into society again … My life is over." (XIII 681-82) "… I'm going to spend the rest of my life in the penitentiary" over an "accident" because "he grabbed for the firearm." He said, "my intention was never to shoot him." (XIII 699)

When Detective Dingee asked "who was the inside guy?," Phillips responded, "How this is going to benefit me?" Dingee then indicated that he would pass along what Phillips says to the State Attorney. (XIII 667-68) Then Phillips asked, "What makes you figure there's an inside man?" Dingee said that this "was not a crime of opportunity" like when "you happen to see a man walking up to an ATM." (XIII 668) After several parts of the interview court-reported as "inaudible," Phillips said, "It wasn't. Just

me." He said that no one from that business said anything to him "before it happened." (XIII 668-69; see also XIII 672) Phillips claimed that Sweet was "a drug dealer" who he expected to have more money in his pocket, "supposed to be five grand, five or six thousand." (XIII 670-71)

Phillips jumped the fence "by the dude's truck." He thought it "was red, burgundy." (XIII 688) Phillips said he only got "17 to 28 hundred." (XIII 671-72) Later in the interview, he indicated "Exactly 27 hundred." (XIII 708)

Phillips said that he had previously spoken with Aligada about getting a job:

> MALE: I was fixing to get a job there.
>
> MALE: Who is that?
>
> MALE: (Inaudible) because I wanted to know (inaudible) he seen me out there. That's the only reason I (inaudible) know several people who work there. Several. (Inaudible) this like (inaudible) this dude was the only dude at that (inaudible) that actually try to help the black guy, the black employees move up to try to get hired. I was going to go through this dude and get hired and he put me in a situation where I was going to come out on top and I wouldn't come out if I let (inaudible) so I couldn't let him stop me.
>
> MALE: Um-hum.
>
> MALE: He put me in a situation.
>
> MALE: Or did you put him in a situation?
>
> MALE: He put me in a situation. He didn't have to get out his truck and run over there.
>
> MALE: And what if you hadn't been there?
>
> MALE: If I hadn't been there, neither one of us would have been in a situation.
>
> MALE: So did you put him in a situation or he put you in a situation?
>
> MALE: All of us in a situation.

MALE: That's why we have felony (inaudible) because when you go rob somebody with a gun, there's a possibility somebody could get killed.

MALE: (Inaudible).

MALE: (Inaudible).

MALE: Because I'm (inaudible) going to help me get a job there. I done told you (inaudible) job, to help the black employee.

MALE: You actually went and talked to him?

MALE: Yeah, I went and talked to this guy before, man. (Inaudible) and he (inaudible) and tried to grab the fucking gun so he put me and him in a situation.

(XIII 684-85; see a more complete transcript of video played at XIX 1243-44) Later in the interview, Phillips said he had talked with Aligada about a job about a week or two before the incident, but he had not "get around" to filling out an application. (XIII 701)

Phillips contrasted Aligada with the employees who did not get a good look at him:

MALE: What time of day was this?

MALE: It's nighttime.

MALE: Okay. What happens?

MALE: I'm waiting by the truck, man, he comes out, everybody leave the job, everybody leave between the fence and his vehicle and (inaudible) came out there and see me. After the parking lot clear, two, maybe four, five people see me, but can't get a good look at me because I'm standing in the shadows. This one guy in the fucking truck, he know who I am, he seen (inaudible) when I come (inaudible) hey (inaudible) so and so and so and so and so. (Inaudible).

(XIII 689-90) Phillips said he shot Aligada ("victim No. 2) as "he approaches." (XIII 690-91) Later, he said that he fired twice, "one at the man and one through the window." (XIII 710)

Phillips said that someone was waiting for him in a truck, but when Phillips fled the murder scene, the "truck had pulled away, he wasn't

there." "I was down to the Winn-Dixie. He picked me up, (inaudible) man, shit went wrong." (XIII 691) Phillips explained further:

> He stopped (inaudible) mother-fucker, he left me, so he started waiting to see where the fuck I'm going to go. I guess he was going to turn around and come back and see was I all right. He left. I didn't give him no details, he left, he dropped me off (inaudible).

(XIII 692) Phillips "went home." (XIII 695) The next day or so, Phillips went out of town on a trip he had already planned. (XIII 695-96)

Phillips told Detective Dingee that he will "never find" the gun because he took it apart and "spread [it] out all over the state." (XIII 696)

Phillips repeated that "there's no inside man." He continued: I'm going to accept full responsibility for everything." (XIII 682) He said that "the money didn't get bust out between three people." (XIII 679)

Phillips discussed with Dingee interview techniques, and Phillips said, "you ain't done nothing to me." (XIII 697-98)

Phillips said he "was getting a worker's comp check from the railroad." (XIII 678)

After the videotape of the interview was played for the jury, Detective Dingee testified that he found "[a]bsolutely" no evidence that Mr. Sweet was a drug dealer. (XIV 729) Dingee had verified that Mr. Sweet had worked at the lumberyard since 1999 and corroborated Sweet by pulling bank records and interviewing managers at the business. (XIV 729)

Mr. Sweet's money and the murder weapon were never recovered (XIV 729-30), and the police were unable to find Phillips' getaway driver (XIV 731).

The State rested. (XIV 735)

Through a colloquy with the Defendant, the trial court confirmed that Phillips did not wish to testify and had no witnesses he wished for his counsel to call. (XIV 738-40)

The jury found Phillips guilty as charged on April 9, 2008, (XIV 830-33).

The Jury Penalty Phase.

Because Phillips' issues concern the death penalty, the State provides a detailed recitation of penalty-phase facts.

After conducting hearings concerning motions and penalty-phase jury instructions (XVI; XVII), the trial court reconvened for the jury penalty phase on April 22, 2008 (XVIII).

The State called, as penalty phase witnesses, Sandra Tatum (XVII 943-60), Phillips' aunt (XVIII 944), who testified about a 1996 incident in which Phillips shot her in the leg with a shotgun (XVIII 947). Her sister, Phillips mother, had called her when the mother was having a dispute, an argument, with Phillips (XVIII 946, 950) and, as a result, Tatum went to the mother's home, where Phillips had a shotgun in his hands and she was shot (XVIII 950). The aunt has forgiven Phillips (XVIII 952-53) and testified that it was an accident (XVIII 947). She said that she went to the "ER just for a short period." (XVIII 955)

The State called Joanna Farns, Phillips' mother, as a witness. (XVIII 961-73) She testified about the 1996 incident in which she got into an argument with Phillips about Phillips having a "little sawed-off shotgun," and she left the house, and her sister came to the house. (XVIII 963-65)

Before she left the house, Phillips pointed the shotgun at her and said, "Now what you got to say?" (XVIII 965-66) She looked at Phillips. Phillips was loading the gun. She walked out the door. (XVIII 966-69) After her sister was shot with buckshot in one or both of her legs, Ms. Farns went to the hospital, where doctors treated the wound(s). (XVIII 971-72)

Both parties agreed that the testimony of Dewanda Powe could be presented through a videoed deposition. (XVIII 991-94) The video was played for the jury. (XVIII 995-1004) She testified concerning the 1996 shotgun incident. Ms. Powe denied that Phillips pointed the shotgun at the aunt. Instead, she said it went off accidentally after her aunt threatened him. (XVIII 997-98)

Officer S.J. Amos testified as the officer who responded to the 1996 shotgun incident and obtained an arrest warrant for it. (XVIII 975-90) Ms. Farns, Phillips' mother, told the officer that she was arguing with Phillips about having a shotgun while on probation, and the argument escalated to the point that "he went and got the shotgun, he loaded it, pointed it at her chest, and said he'd kill her," resulting in the mother fleeing. (XVIII 983-84) Ms. Tatum told the officer that she went "over there to confront him [Phillips] for threatening his mother … in reference to killing her." (XVIII 982) Ms. Tatum said that Phillips actually shot her during an argument with her in which he armed himself with the shotgun, loaded it, and fired at her about five to seven feet away from her. The officer saw that she was shot on both sides of her calves, with multiple pellet wounds to both of her legs. (XVIII 977-78, 982-83) "The wounds to

her legs were substantial." (XVIII 987) The gunshot wounds did not appear to have been inflicted through a ricochet. (XVIII 986, 988; see also XVIII 990) The officer also interviewed Phillips' sister, Dewanda Powe, who said that she saw Phillips point the shotgun at Ms. Tatum and fire. (XVIII 978-79, 989) Neither Ms. Tatum nor Ms. Powe said that the gun went off accidentally. (XVIII 989) The officer arrested Phillips. (XVIII 984)

Concerning the 1996 shotgun incident, the State introduced the conviction for Aggravated Battery for which Phillips was sentenced to five years in prison with a three-year minimum mandatory for using a firearm. (XVIII 1004-1005; Exh-II 142-47)

Detective Cayenne testified concerning a January 6, 2006, (XVIII 1014) robbery of Frank Johnson (XVIII 1008). An audio recording of Phillips' statement to the police was introduced and played for the jury. (XVIII 1012-27) Phillips told a detective that on January 6, 2006 (XVII 1008, 1014), Phillips and an accomplice planned to rob a victim. Phillips said that they heard that the intended victim had a large sum of money. They waited in a parking lot for the victim to exit the building (XII 1017). When the intended victim came out of the building, he was with several other people. Phillips, displaying a gun, approached the crowd and ordered them to lay on the ground. (XVIII 1018-19) A "white guy kept reaching to his side," and Phillips said he "knew he had a weapon," so Phillips said he pointed his weapon at the "white guy" and "kept telling him to lay down." Phillips statement continued:

> The white guy with the gun, he kept trying to put distance between me and him. Once he got a couple cars between us, that's when he started discharging it.

(XVIII 1020) Phillips shot back, firing a total of 13 times as the "white guy" was chasing him. (XVIII 1021-22) Phillips took some property from the intended robbery victim (cell phone, watch, some money) and ran off. (XVIII 1021) For this incident, Phillips was allowed to plead to Grand Theft on February 27, 2006. A judgment and sentence for this incident was introduced into evidence. (XVIII 1028; Exh II 148-52)

After some victim impact testimony was taken (XVIII 1029-44), Phillips called as witnesses his mother, Joanna Farns (XVIII 1044-77); a custodian of Phillips' school records, Zelena Duggins (XVIII 1079-84); and Phillips' sister, Dewanda Powe (like before, through a videoed deposition) (XVIII 1088-1109; XIX 1114-22); a psychiatrist/lawyer, Dr. Miguel Mandoki (XIX 1123-84); and, another psychiatrist, Dr. Ernest Miller (XIX 1187-1206). The trial court conducted a colloquy with Phillips on his decision not to testify in the jury penalty phase. (XIX 1206-1209)

Ms. Farns testified that she has been taking pills for depression since the time that she shot herself shortly before Phillips was born. (XVIII 1045) She denied using alcohol or drugs while she was pregnant with Phillips, but she admitted to using crack at other times. (XVIII 1049)

She acknowledged that she has had a "rough life" and been in government housing and on food assistance. She has also moved several times. These were "mostly" drug and crime infested neighborhoods. (XVIII 1054-55, 1066)

When Phillips was born, he was coming out foot first so "they had to

turn him" and use forceps to pull him out. She said that, at first, he was not breathing. (XVIII 1048-49)

She raised Phillips part of his life and, because of the mother's depression, her mother also raised him. (XVIII 1047) Phillips stayed with her mother until after he started school. (XVIII 1056) The grandmother raised him until he was about eight years old. (XVIII 1070)

Dewanda's father was "more like a father figure to" Phillips. Phillips would listen to him. (XVIII 1055-56) Phillips' biological father died when Phillips was five or six years old. The father liked to drink, and she thought he went to prison for drug selling. (XVIII 1056-57) The father never lived in the house with the mother. (XVIII 1060-61)

Phillips was placed in special ed class. (XVIII 1050, 1061) He was hyperactive, and they gave him Ritalin, but she learned one day that he was not taking those pills every day. Instead, Phillips would hold the pills in his mouth and then throw them out when "they" were not looking. (XVIII 1051-54)

Phillips was a "handful at times." (XVIII 1048) Phillips associated with the wrong group. They were supposed to be playing, but "the next thing you know they done got into something … arguing or fighting, wanting to jump on him and stuff." (XVIII 1055) She said that Phillips is "easily misled" and, other than that, he is the "sweetest person you want to know" and respectful. (XVIII 1063) Phillips was not a violent child until "you push him, when he click, he click." (XVIII 1055) "He gets upset when you go to trying to talk to him about his friends." (XVIII 1063)

Phillips was kind to animals (XVIII 1064), and he helped his grandmother after she had a stroke (XVIII 1065).

She said that Phillips believed in God and sang in the choir. (XVIII 1062)

After Phillips was released from prison, he "was getting depressed because he couldn't find a job." (XVIII 1066-67) He got a job with the railroad, but he was injured when a truck knocked him into a wall. (XVIII 1067-68)

Phillips, she guessed, had a couple of girlfriends, but after the railroad accident, they lived on opposite sides of town, and "we wasn't coming around each other." (XVIII 1069)

She again discussed the incident in which Phillips shot her sister. She said that Phillips "had gotten angry" and the shotgun went off when he was swinging it back and forth. (XVIII 1058-59)

After Phillips, through counsel, introduced school records (XVIII 1079-86), he played the videotaped testimony of his sister, Dewanda Powe (XVIII 1088-1109; XIX 1114-22). She was three years younger than Phillips. (XIX 1115) She said that Phillips "had no father figure in his life." (XVIII 1089) In terms of providing for Phillips, her father, Fred Powe, "did whatever he could when he can." (XVIII 1091)

Phillips mostly wore hand-me-downs from other family members. (XVIII 1091) Phillips "would be hungry." He stole from the 7-11 store, but then the people at the store started giving him food. (XVIII 1094)

Her father, Fred Powe, occasionally gave Phillips money, and she would

pass along to Phillips some of the money that her father gave to her. (XIX 1121-22)

Her mother, Ms. Farns, would beat her and Phillips. (XVIII 1095-96) She would "whoop him if she got upset," and she said, "to me, I felt as if she went to the extreme," using, for example, fan belts. (XVIII 1096; XIX 1119) She saw the mother hit "him" in the head with frying pans. (XVIII 1096)

The mother told Ms. Powe and Phillips that she "can't wait" until they die so she could collect the insurance money. Phillips told Ms. Powe not to worry about it, "She don't know what she talking about." (XVIII 1097) The mother called Phillips a "dumb-ass, said he wouldn't amount to shit." (XVIII 1098)

Phillips loved his grandmother and she loved him, and although the grandmother was disabled, "she took very good care of him." (XVIII 1099-1100) When the grandmother died, it had a "real bad effect" on Phillips. (XVIII 1100) Around age twelve, Phillips started running away. (XVIII 1100)

Ms. Powe testified that Phillips was affectionate towards pets (XVIII 1103) and "loved elderly people" (XVIII 1104). He has cared for her while she has been ill. (XVIII 1105, 1108) He fears God, and wanted to be a preacher. Regarding the Bible, he "knew his stuff," and he knew about the Ten Commandments (XVIII 1106), which his grandnmother taught him (XIX 1116). He knew right from wrong. Ms. Powe was raised the same way as Phillips. (XIX 1117)

Phillips kept her secrets. (XVIII 1107)

Phillips played football, and once he "busted his head open," but he "cried and screamed like a baby because he didn't want to go to the hospital because he wanted to finish playing football." (XVIII 1102)

Once they saw a shadow "go through the house," and Phillips responded; she heard a "boom, boom, boom" and Phillips, with a bat, chased the intruder away. (XVIII 1109)

Phillips told Ms. Powe about the books he read in prison:

> Q … What did he say about that?
>
> A Oh, he would just tell me the nature of books that he'd read, and we'd just compare books back and forth, because he found out that I liked to read, and we'd just compare books. And he used to always tell me in his mind that was his way of escaping into books.

(XIX 1120) These were not "baby books," but instead "Donald Goines books," "James Patterson." (XIX 1121)

Phillips' counsel called Dr. Miguel Mandoki, a child psychiatrist, as a penalty-phase witness. (XIX 1123 et seq.) He first came into contact with Phillips in 1986 (XIX 1125), when Phillips was seven years old (XIX 1149; see also DOB 7/11/1979 at I 1; VIII 1412; Exh II 165, 166, 167). There was no indication that Phillips had any defects at birth. (XIX 1154-55) The doctor's "primary diagnosis was attention deficit as well as he had a learning disability." (XIX 1127) Probably 25% of the doctor's patients are diagnosed with attention deficit disorder (XIX 1165-66), and reports indicate that 20 percent of children are taking Ritalin. (XIX 1165)

The doctor said that it was "very difficult for [Phillips] to process information." (XIX 1129) On cross-examination, when asked about Phillips' learning disability, the doctor responded: "Not being able to read well and

perceive and interpret it." (XIX 1168) When confronted with Phillips' sister's statement that Phillips was reading and discussing books while in prison, the doctor concluded that "when somebody gets to be an adult, they tend to learn what works and what doesn't work." (XIX 1168-69) Mandoki also testified that "hyperactivity disappears with age. It goes away." (XIX 1171) [As noted above, Phillips' DOB is 7/11/1979 (I 1; VIII 1412; Exh II 165, 166, 167), and this murder occurred on 10/18/2005, which calculates to Phillips age at 26 years old at the time of the murder.]

The doctor discussed Phillips' upbringing and development. (See XIX 1130-37, 1156-57) He said that Phillips "didn't have people that cared for him." (XIX 1171)

The doctor opined that Phillips had depression, (XIX 1139) which makes people feel helpless and hopeless (XIX 1138). Men who are depressed usually become violent. (XIX 1139-40) Depression can produce overeating or loss of appetite (XIX 1172) and can produce problems sleeping or sleeping all the time (XIX 1173).

On cross examination, Dr. Mandoki was asked to interrelate depression to some of the facts of this case:

> Q Now, you said that he has a mental illness and that is that he's depressed?
>
> A Yeah.
>
> ***
>
> Q Okay. So a person such as that wouldn't be able to plan, like, a robbery in terms of being able to figure out where the person would be with money and all that, or would a person be able to do that?

> A They cannot -- they cannot plan it well. You know, they cannot have, like -- you know, most depressed people cannot really make sound decisions.
>
> Q All right. So in other words, they would have problems making sure that whenever they plan to do a robbery, they would have a getaway driver and they would find out where the person was that had the money, right?
>
> A You know, I can't answer that, but I don't want to say even how does that happen. But we're speaking about not because he cannot plan, but his lack of motivation --

(XIX 1172-74)

On cross-examination, Dr. Mandoki was referred to records that, for example, showed Phillips hitting his sister (XIX 1150); "He hits others and takes items from the teacher's desk" (XIX 1151); he "fights constantly with his peers" (XIX 1158); "He is extremely untruthful. He blames others when items he has taken are found in his desk" (XIX 1151); the main concern is Phillips' temper (XIX 1158); and "He … causes great disturbance in the cafeteria" (XIX 1152). There was a reference in the records concerning Phillips mother that–

> sometimes he will get so mad at her that he will physically attack her and even drag her around the apartment by her hair.

(XIX 1153)

The defense called Dr. Ernest Miller, a psychiatrist, as a witness. (XIX 1187-1206) Dr. Miller reviewed materials, interviewed family, and interviewed Phillips. (XIX 1187-89) Dr. Miller opined concerning Phillips' genetic history and family experiences shaping him. (XIX 1190 et seq.) He related what Phillips told him about being beaten to the point "he would absent himself from the home and go in the woods and stay by himself." (XIX 1192) When the loving figure of his grandmother died, "nobody really took

her place." (XIX 1192) Miller said that Phillips' experiences resulted in a low self-image. (XIX 1192-93) "They can't form attachments. They can't trust … so they act out. *** You want pleasure, go grab it. *** Nobody wants them." (XIX 1193)

Phillips was arrested 14 times before he was age 17, "before his brain is matured." (XIX 1193)

He agreed with Dr. Mandoki that Phillips as a kid had "chronic depression." (XIX 1194) He said about 10% of people are depressed, and very few of them commit violent crimes. (XIX 1197-98)

Miller said that given Phillips' background of "deprivation and aggravation both, where you have punitive behavior, abusive behavior, coupled with no support systems of any consequence when growing up," there is a probability of "turn[ing] out bad." (XIX 1195-96) On cross-examination, he indicated that a lot of children who grow up poor and without a parent do not commit crimes. (XIX 1202)

Miller pointed to records showing a variety of labels attached to Phillips. (XIX 1195) At the jail when Miller saw Phillips, "he wasn't labeled with anything – a major psychological problem except character disorder." (XIX 1195)

On cross-examination, Miller explained what he meant by "character disorder" and concluded that "he has characteristics of" antisocial personality disorder. (XIX 1198-1200) Dr. Miller opined how Phillips developed a lack of empathy. (XIX 1201-1202) And, on re-direct examination, Miller discussed the "antisocial features" and "narcissistic features" that

Phillips has and his opinion on how they developed. (XIX 1203-1206)

During the trial court's colloquy with Phillips on his decision not to testify in the jury penalty phase (XIX 1206-1209), Phillips initiated this comment:

> THE DEFENDANT: I had asked Mr. Shea to bring to the Court's attention that my indictment did not endorse a true bill, nor was it notarized or the court stamp saying it was filed in open court. And he failed to do so and I would just like to have it on record.

(XIX 1208)

During the prosecutor's jury penalty phase closing argument, he re-played portions of the recordings of Phillips' statements to Ms. Joyce and to Detective Dingee in support of his argument for the avoid-arrest aggravator [**ISSUE I**]; since it appears that the court reporter was more fully able to discern these recordings (with less inaudible notations) than when they were played in the guilt phase, the State quotes from the transcription of these penalty-phase playbacks:

> (From tape:)
>
> GALANTE PHILLIPS: He interfered. He interfered in something that didn't concern him. He tried to play hero and prevent what was going on.
>
> KATRINA JOYCE: So?
>
> MR. PHILLIPS: So he put his-self in danger. And not only did he put his-self in danger, he put me and the other people that was with me in danger.
>
> KATRINA JOYCE: So you felt like if you did whatever at …
>
> MR. PHILLIPS: He -- what happened to him had to happen. He got hit. He got shot –
>
> KATRINA JOYCE: So he --
>
> MR. PHILLIPS: -- and he wasn't strong enough to survive.

KATRINA JOYCE: So you feel like cause you shot him, you made everything better?

MR. PHILLIPS: If I don't shoot him, the possibility that me and the other dude got shot up or guaranteed to go to prison the rest of my life.

KATRINA JOYCE: It's --

MR. PHILLIPS: But I wasn't the only one that shot. He got shot twice. He tried -- he got hit the first time -- when you get shot the first time and still trying to play a hero, you're ready to go. You ready to go.

But he didn't have to play hero. That was a decision he had to make within his-self.

KATRINA JOYCE: So he could have just walked away and --

MR. PHILLIPS: He could have laid his ass down or stayed where he was in his spot and lived to tell the story.

(Tape stopped.)

***

(From tape:)

GALANTE PHILLIPS: But he put me in a situation to where I wanted to come out on top, that I wouldn't come out if I let him prevent me from getting away. I'm on foot so I couldn't let him stop me. He put me in a situation.

DETECTIVE DINGEE: Or did you put him in a situation?

GALANTE PHILLIPS: He put me in a situation. He didn't have to get out of his truck and run over there … 20 years working at that business, 22 years of working at that business, that man ain't never parked back there in the back of that goddamned parking lot.

DETECTIVE DINGEE: How do you know?

GALANTE PHILLIPS: Because I know the man. He was going to help me get a job there. I just told you he the only white dude at that job that help the black employees.

DETECTIVE DINGEE: You actually been and talked with him?

GALANTE PHILLIPS: Yeah, I done talked with this guy before, man. Man, and he rushed up on me and tried to grab the fucking gun. So he put me and him in a situation.

I was waiting by the guy's truck, man. He come out. Everybody leave their job. When everybody leaving, I'm between the fence and his vehicle where people cannot even see me. After the parking lot clear, two, four -- maybe four or five people see me but they couldn't get a good look at me because I'm standing in the shadows.

This one guy in this fucking truck, he know who I am. He seen me when I come from around the guy's vehicle. Hey, so and so and so and so and so. Now the guy aware that I was stalking, that I'm on him.

He worked at that business 22 years, didn't he?

DETECTIVE DINGEE: Uh-huh.

GALANTE PHILLIPS: 22 years, never parked back there in the back of that parking lot. Always parked up front. 22 fucking years he parked --

DETECTIVE DINGEE: How do you know that?

GALANTE PHILLIPS: I told you I know the man.

(End of DVD)

(XIX 1241-44)

The jury recommended the death sentence by a vote of seven to five. (VII 1352; XIX 1303-1306)

Spencer Hearing.

On June 26, 2008, the trial court conducted a Spencer Hearing.

The trial judge referenced the sentencing memoranda from both parties. (Suppl 5)

The defense called as a witness "Mr. Fred Powe, the defendant's father figure." (Suppl 5) Mr. Powe referred to Phillips as "my son, my son, my stepson. I raised him *** [f]rom about 12 or 15 on …." (Suppl 7) "{H]e's my kid." (Suppl 16) Phillips is as "close" to him as "any child" of his. (Suppl 12-13) Phillips knows that Powe loves him. (Suppl 22) Powe treated Phillips the same as his daughter. (Suppl 8) Phillips "always" made Powe

proud to be his father. (Suppl 15)

Phillips "had a good life with his grandmother," but she died when Phillips was eight or nine (Suppl 26) and Phillips' "mother took him over" and things went "downhill." (Suppl 9) When Phillips' mother "took him over," Powe "began to take care of all of them." (Suppl 23) He "moved in watching over them." (Suppl 26)

Powe discussed Phillips' mother and a step-father locking Phillips in his room. (Suppl 8-9) Powe related an incident in which he saw Phillips "jaws swole up," the mother hit Phillips in the head, and Powe told Phillips' mother not to "do that," to which she responded that she knows what she is doing. (Suppl 27-28) The incident started with Phillips fighting with his sister, with Phillips "hit[ing] her or something." (Suppl 28)

Powe never beat Phillips, but instead, talked to him. (Suppl 27)

Phillips also "had an uncle who loved him." (Suppl 11)

Powe testified that Phillips' mother was a hooker. "She lived with other men with the kids." (Suppl 10)

Mr. Powe said Phillips' mother "lots of times" would not give Phillips money to buy clothes, but Phillips "like[d] to wear good clothes and things," so Phillips would "hustle" and Powe would "give him a little money" he had. (Suppl 8, 11) Powe paid Phillips' rent and bought him beds. (Suppl 8) He also bought food and clothes for Phillips. (Suppl 9)

Phillips' build was "kind of stout all the while he's been a heavy boy." Powe "kept food in the house." (Suppl 23) He made sure there was

plenty of food. (Suppl 25)

When Phillips was working, Phillips' mother wanted Phillips' money, but he would not give it to her. (Suppl 11)

Powe taught Phillips the difference between right and wrong. (Suppl 18)

Powe heard about Phillips shooting his aunt, and Phillips told Powe it concerned "[s]omething about his mama was arguing about money or something, wouldn't give her none." (Suppl 19) Powe heard that the aunt was shot when "she jumped at it." Powe did not think that Phillips "was real violent." (Suppl 20) After Phillips served prison time, Phillips "come straight to" Powe. (Suppl 21) Powe said that Phillips went back to prison two or three times. (Suppl 21) "I know he my son, and he gets in trouble." (Suppl 22)

Powe said: "he mind me … he didn't ever talk back to me." (Suppl 10; see also Suppl 15) "Always like a father, he always listen to me, … he respected me, he minded me." (Suppl 12) Powe did "hear about things" in terms of Phillips breaking the law. (Suppl 13)

Powe testified that if Phillips "said he going to do something[,] he going to do it." "[H]e just don't fool with people that don't keep their word. He's just straight up." (Suppl 15)

When asked if Phillips could read and write, Powe responded that "he fill out papers for me." (Suppl 25) Phillips was a hard worker. (Suppl 25)

Powe testified, "I don't drink." (Suppl 10)

After Phillips had grown up, he came to see Powe "practically every week. That [is] when he got a house we used to sit, go and watch the boxing games and different things." (Suppl 12)

After Mr. Powe testified, defense counsel referenced a "psi report" (Suppl 37; see also Suppl 52)) and defense counsel and the prosecutor orally argued the applicability of the death penalty (Suppl 37-58). Defense counsel argued against the applicability of the witness elimination aggravator (Suppl 38-39, 43-44) and the prosecutor argued for its application (Suppl 53-54).

Defense counsel referenced Phillips criminal history as including five burglaries, a 1990 assault, "another felony," and two grand thefts. (See Suppl 56)

On August 1, 2008, the trial court conducted an additional sentencing hearing in which parties argued applicability of avoid-arrest aggravator. (XX)

Sentencing and Attendant Trial Court Findings.

On September 19, 2008, Circuit Judge Mallory D. Cooper sentenced Phillips to death on First Degree Murder and life on Armed Robbery. (XXI 1335-54; VIII 1406-1422)

The trial court found the following aggravating circumstances and supported each with findings of fact:

> 1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (great weight)
>
> 2. The crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of the crime of armed robbery. (great weight)
>
> 3. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody. (great weight) [**ISSUE I**]

(VIII 1415-16) ISSUE I attacks the avoid-arrest aggravator; the State will

discuss it in detail infra. ISSUE III argues proportionality, so the State will discuss all of the aggravation and mitigation in greater detail there.

The trial court's finding of no statutory-mitigating-circumstance is not challenged on appeal. The trial court wrote:

> The Defendant did not request that the jury be instructed on any statutory mitigating factor, nor did he present any evidence or argument before this Court at the separate sentencing hearing to suggest a statutory mitigating factor. This Court has reviewed each statutory mitigating factor and now finds that no evidence has been presented to support any statutory mitigating factor, and none is found to exist.

(VIII 1416; see also Exh II 195-207)

The trial court **rejected** the following mitigation and gave each **no weight**:

3 adult mental illness;

18 trustworthy with family;

19 supportive of family;

20 protective of family;

25 remorseful.

The trial court found the following non-statutory mitigation and gave each **slight weight**:

1 childhood frequent moves and changes in homes and schools;

2 childhood mental illness;

4 childhood learning disabilities;

5 Ritalin was not taken as prescribed because Defendant spit it out;

6 difficult childbirth;

7 raised in drug and crime-infested neighborhoods;

9 no stable father figure;

10 disfavored as a child;

15 raised in poverty;

16 on-the-job injury;

17 reverent;

21 respects and helps the elderly;

22 kind to animals;

23 respects judicial system;

24 friendly.

The trial court found the following and gave them the indicated weights:

little weight: 11 deprived of food and clothing as a child;

some weight: 8 mentally ill mother; 12 physical abuse as a child;

moderate weight: 13 mental abuse as a child; 14 suffered the loss of his loving grandmother.

The trial court concluded:

> This Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. Understanding that this is not an arithmetic comparison, but one which requires qualitative analysis, this Court has assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance as mentioned in this Order. On balance, the aggravating circumstances in this case far outweigh the mitigating circumstances. The jury was fully justified in its 7 to 5 recommendation that the death penalty be imposed upon the Defendant for his murder of Christopher Aligada. This Court is required to give great weight to the jury's recommendations[fn2] [**ISSUE II**] and fully agrees with the jury's assessment of the aggravating and mitigating circumstances presented before them. After also considering the additional mitigating circumstances presented, this Court finds that the ultimate penalty which this Court can impose in this ease, should be imposed. This Court further finds that any of the considered aggravating circumstances found in this case, singularly applied to the victim

and standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murder of Christopher Aligada.

Galante Romar Phillips, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all. The scales of life versus death for the murder of Christopher Aligada tilt unquestionably to the side of death.

[fn2] 2 §921.141, Fla. Stat. (2006); ***Blackwood v. State***, 946 So. 2d 960 (Fla. 2006); ***Tedder v. State***, 322 So.2d 908, 910 (Fla. 1975) (stating that under Florida's death penalty statute, the jury recommendation should be given great weight).

SUMMARY OF ARGUMENT

Phillips went to Wilbur Sweet's work site armed with a .357 handgun and a getaway car at-the-ready to flee from the scene. Phillips intended to rob Mr. Sweet of a bundle of cash, which Sweet carried in his pocket to buy a used car for his son. In the darkness, Phillips lurked near Mr. Sweet's vehicle at the work site parking lot awaiting Mr. Sweet's departure from work.

That night, when Sweet approached his vehicle to leave work, Phillips brandished the .357 and robbed Sweet of his cash. However, Christopher Aligada, Mr. Sweet's co-worker, was also leaving work at that time and spotted the robbery. As Mr. Aligada approached Sweet and Phillips and while Aligada was still a number of feet away, Phillips fired two shots at Aligada, dropping Aligada to the ground. Sweet took off running, and Phillips, with Sweet's cash already in-hand, fired a number of shots at Sweet, but Sweet literally "dodged the bullets" by jumping behind a car. Phillips drove off in Sweet's vehicle, abandoned it, and then finished his getaway in the vehicle waiting for that purpose. Phillips dismantled the

gun and scattered its parts so it could not be recovered.

Mr. Aligada died from Phillips' gunfire, but other witnesses identified Phillips. Phillips' DNA recovered in Mr. Sweet's vehicle also identified Phillips at one in 9.5 trillion odds. A bullet fragment recovered from a car Sweet jumped behind and the bullet recovered from Mr. Aligada's body were fired from the same gun.

Ultimately, Phillips confessed to his girlfriend and the police. Phillips said that Mr. Aligada knew him from Phillips previously looking for a job at the lumberyard. Phillips lamented Mr. Aligada being such a "hero" and said, among other things, that he had to shoot the victim because otherwise he would be "guaranteed" to go to prison. Phillips compared Aligada's ability to identify him with others at the scene who he did not think got a good look at him in the shadows of the parking lot. Phillips' statements and the other evidence demonstrated that Phillips killed Mr. Aligada to avoid arrest. [**ISSUE I**]

In the penalty phase, evidence showed that a few months after this robbery-murder, Phillips, again with a firearm, waited for another robbery prey to exit a business, and, again, another citizen came forward. In this other incident, the citizen was armed, resulting in a gunfight with Phillips, who fired 13 rounds at the citizen but missed. Yet another prior violent felony showed that in 1996 Phillips shot his aunt in the legs with a sawed-off shotgun, resulting in Phillips' conviction for Aggravated Battery and a prison sentence.

This and other evidence proved the aggravating circumstances of avoid-

arrest, during an armed robbery, and prior violent felony, and, especially given the relatively weak mitigation, render the death penalty proportionate. [**ISSUE III**]

Phillips also complains on appeal that the trial judge's sentencing order indicates that she must give the jury's death recommendation great weight. [**ISSUE II**] However, the trial judge made it abundantly clear that she performed her proper function of independently evaluating the aggravating and mitigating circumstances.

Phillips' claim [**ISSUE IV**] that he is entitled to relief because three jurors inadvertently saw him in the hallway in his jail uniform is meritless, and Phillips' claim that he is now entitled to relief because the jury recommendation was seven-to-five was not presented to the trial court, rendering it unpreserved; moreover, this new appellate claim is based on speculation that Phillips was prejudiced, where the record of the judge's inquiry shows that none of the jurors were affected by their brief glimpse at Phillips in uniform.

Finally, the Ring claim [**ISSUE V**] has been rejected many times by this Court, and it should be rejected here.

None of the appellate issues merit any relief.

ARGUMENT

ISSUE I: DOES COMPETENT SUBSTANTIAL EVIDENCE SUPPORT THE AVOID ARREST AGGRAVATOR? (IB 27-31, RESTATED)

ISSUE I claims that the evidence was insufficient to prove the aggravating circumstance of avoid arrest/witness elimination. In the trial court, Phillips through counsel attacked the sufficiency of the evidence

supporting this aggravator (See VII 1381-1405; XX; see also State sentencing memorandum at Exh II 179-80)

A. The Standard of Appellate Review.

"When evaluating claims alleging error in the application of aggravating factors, this Court does not reweigh the evidence to determine whether the State proved each factor beyond a reasonable doubt." "Rather," this Court "must 'determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Diaz v. State, 860 So.2d 960, 965 (Fla. 2003)(HAC), citing Alston v. State, 723 So.2d 148, 160 (Fla. 1998), quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). See also, e.g., Douglas v. State, 878 So.2d 1246, 1260-61 (Fla. 2004), quoting Willacy.

"When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court...." Carter v. State, 980 So.2d 473, 481 (Fla. 2008), quoting Occhicone v. State, 570 So.2d 902, 905 (Fla.1990).

Conflicting evidence does not render a trial court's ruling unreasonable. Bates v. State, 750 So.2d 6, 13 (Fla. 1999)("conflicting expert testimony").

While the ability of a victim to identify the defendant "may not alone be sufficient to support a finding that the dominant motive was to avoid arrest, the factor is significant," Hoskins v. State, 965 So.2d 1, 19 (Fla. 2007)(burglary, sexual battery, movement of victim).

B. The Trial Judge's Order.

The State contends that competent substantial evidence supports the trial court's finding of this aggravator. The trial court found:

> **3. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody.**
>
> The Court is well aware of the Florida Supreme Court's admonition that where the victim is not a law enforcement officer, the supporting evidence must be very strong to show that the sole or dominant motive for the murder was the elimination of the witness, *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992). However, the Florida Supreme Court has upheld this circumstance when either the Defendant said it was his motive or when the circumstances surrounding the crime clearly show it was the motive. There are several things which suggest this was indeed the Defendant's motive.
>
> The facts of the case showed that the Defendant arrived at the Builder's First Source parking lot on the night of October 18, 2005, with a getaway driver, a loaded weapon, and the intent to rob Wilbur Sweet. While the Defendant was robbing Mr. Sweet at gunpoint, Mr. Sweet heard Mr. Ailgada yelling from behind him for the Defendant to stop. Then Mr. Sweet heard the Defendant shoot two times. Mr. Sweet proceeded to run for safety as the Defendant shot at Mr. Sweet two or three times, but missed him. The Defendant then took Mr. Sweet's vehicle and drove away to meet his getaway driver. Soon thereafter, the Defendant left the jurisdiction and went to Georgia. During that trip, the Defendant said that the 'gun was spread out all over the state.'
>
> At trial, the State's ballistic expert testified that Mr. Aligada was shot at a range of 3-6 feet. The Defendant's former girlfriend, Katrina Joyce, testified that the Defendant said he shot the person who tried to stop the robbery. The Defendant told Ms. Joyce that the person should not have tried to 'play hero.' This conversation was tape-recorded and played for the jury. The Defendant also told JSO Detective Scott Dingee that Mr. Aligada should not have tried to be a hero.
>
> Notably, the evidence showed that the Defendant and Mr. Aligada had met each other before the night of October 18, 2005. The Defendant had recently sought employment at Builder's First Source [interlineated] and Mr. Aligada, who was a supervisor, was trying to help the Defendant get a job. The facts also showed that the Defendant was not wearing a mask or gloves or anything to conceal his identity. Thus, when the Defendant heard and saw Mr. Aligada yelling for him to stop at a distance of 3-6 feet, it is not unreasonable to

> believe that the Defendant recognized Mr. Aiigada or that Mr. Aligada recognized the Defendant. Even if they did not recognize each other, the Defendant's reaction was to shoot the person trying [to] stop him from robbing Mr. Sweet. The totality of these matters shows that the Defendant's motive for the murder was to eliminate the witness to the armed robbery. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

C. Competent Substantial Evidence Supporting the Trial Court's Finding of This Aggravator.

Core facts the trial court cited as support for its finding of the aggravator include the following. As discussed under each of these facts, competent substantial evidence supports them.

1. Aligada and Phillips knew each other prior to the night of the murder, and Phillips wore no mask to hide his identity.

Aligada had previously met Phillips when Phillips had inquired about a job at the lumberyard, so they knew each other. (XIII 684-85) The last time Phillips talked with Mr. Aligada about a job was about a week or two prior to this robbery-murder. (XIII 701) Phillips even knew where Mr. Aligada usually parked his vehicle at the business. (XIX 1243-44) During the robbery, Phillips was "right in front of" Sweet "[a]lmost face-to-face" (XII 399-400); Sweet and Long saw Phillips' face clearly enough so that Sweet indentified Phillips in a photospread (XII 393-94, 404; XIII 643-44; SE 10) and in the courtroom (XII 380-81, 398), and Long identified Phillips in a photospread (XII 413-14; XIII 641-43; SE 11); thus, Phillips knew his identity was exposed when he came out of the "shadows" and Mr. Aligada could identify him.

2. Phillips aimed, fired at, and shot unarmed Aligada when they were several feet apart, not in the midst of a struggle, for example, not in the midst of a struggle for possession of the gun.

Christopher Aligada was unarmed (XII 426), and as he approached Phillips and Wilbur Sweet, he had his hands up (XII 428). Mark Walton testified that Phillips and Mr. Aligada were about 10 feet apart when Phillips gunned Aligada down. (XII 428-29) Aligada was not in Sweet's view when Phillips turned, aimed at, and shot Aligada. (See XII 382-83)

Consistent with Walton's and Sweet's testimony, the medical examiner saw no signs of stippling on the victim (XII 507-510), and the firearms expert acknowledged that "typically" a "person could be as close as three feet and … a stippling would not appear" and "[t]ypically there wouldn't be stippling if it was ten feet away," but it depends on the ammunition and the type of firearm (XIII 561-562).

Thus, the gun did not discharge during a struggle for it. Instead, Phillips saw Aligada, Phillips aimed at him, and Phillips intentionally shot him before Aligada reached Phillips and Sweet.

3. After robbing Mr. Sweet, Phillips shot Mr. Aligada.

After Phillips took Mr. Sweet's money and wallet,[7] Sweet saw Phillips turn and fire two shots (XII 382-83; see also XIII 540), which he later determined were aimed at and hit his co-worker, Mr. Aligada (XII 382-83,

[7] The money was never recovered (XIV 729), and Phillips said that he got "17 to 28 hundred" from Sweet (XIII 671-72) and later in the interview, Phillips indicated that the robbery booty was "[e]xactly 27 hundred. That's exactly what I got from him, 27." (XIII 708).

402-403, 422, 427). Therefore, when Phillips shot Mr. Aligada, Phillips' robbery of Sweet was already completed, and Phillips could have run away with the money, but, instead, Phillips stood his ground and gunned witness Aligada to the ground. He kept Mr. Aligada from "stop[ping]" (XIII 684; XIX 1243) Phillips escape. The shooting was not done merely to complete the robbery.

4. After robbing Sweet, shooting Aligada, who dropped to the ground, then Phillips shot at Sweet as Sweet ran away.

At least one of the two bullets Phillips fired at Mr. Aligada struck him (See XII 497-98) and caused him to fall to the ground (XII 424, 425, 436-37).[8] When Phillips fired at Aligada, Sweet ran away. (XII 383-84) Phillips already had Sweet's money and still shot at Sweet as Sweet ran and jumped across another car (XII 383-84, 382, 402, 425, 431-32). Phillips fired about three times[9] at Sweet (XII 427), and two bullet fragments were recovered from a vehicle along the path (XII 470-72, 480-81; SE 19, 20); they were fired from the same gun that fired the bullet that killed Mr. Aligada (XIII 554-56, 557, 558-61).

In addition to the foregoing compelling evidence referenced by the trial court, --

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[8] Also, abrasions and scrapes on the victim Aligada's knees were consistent with having fallen to the ground on a rough surface like a parking lot. (XII 503)

Christopher Aligada died the next day from the gunshot wound to his abdomen. (XII 495-97, 504, 506; XIII 637)

[9] Phillips told the detective that he "[o]nly fired twice, one at the man and one through the [car] window." (XIII 710-11)

5. Phillips' statements directly support the trial court's finding of avoid arrest.

Phillips told Katrina Joyce, as a recording was played and transcribed in open court in the guilt phase:

> If I don't shoot him, the possibility that me and the other dude got shot up **or guaranteed to go to prison the rest of our life**. But I wasn't the only one that shot. He got shot twice. He tried -- he got hit the first time (inaudible) trying to play hero, you ready to go. You ready to go.

(XIII 540, additional emphasis supplied)[10] This part of the same recording was transcribed in open court during the penalty phase:

> If I don't shoot him, the possibility that me and the other dude got shot up **or guaranteed to go to prison the rest of my life**. ***

(XIX 1242, additional emphasis supplied)

Phillips repeated to the police his concern about Mr. Aligada, through whom Phillips said he was "going … to get hired" (XIII 684), being able to identify him:

> [Transcript of recording of Phillips' statement played in guilt phase:] … he put me in a situation **where I was going to come out on top** and I wouldn't come out if I let (inaudible) so I couldn't let him stop me. *** He put me in a situation. ((XIII 684-85)

> [Transcript of recording of Phillips' statement played in penalty phase:] … he put me in a situation to where **I wanted to come out on top**, that **I wouldn't come out if I let him prevent me from getting away**. I'm on foot so I couldn't let him stop me. He put me in a situation. (XIX 1243, additional emphasis supplied)

Thus, in his statement to the police, Phillips compared Mr. Aligada, who could identify him, to others who saw him in the parking lot but who could

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[10] Phillips also related being "worried because" and said something about people leaving the job site and identifying someone. (See XIII 542; SE 32 at ~6:18 to ~6:35)

not identify him:

> [Transcript from playback in guilt phase:] I'm waiting by the truck, man, he comes out, everybody leave the job, everybody leave between the fence and his vehicle and (inaudible) came out there and see me. After the parking lot clear, two, maybe four, five people see me, **but can't get a good look at me because I'm standing in the shadows. This one guy in the fucking truck, he know who I am, he seen (inaudible) when I come (inaudible)** hey (inaudible) so and so and so and so and so. (Inaudible). (XIII 689-90, additional emphasis supplied)

> [Transcript from playback in penalty phase:] I was waiting by the guy's truck, man. He come out. Everybody leave their job. When everybody leaving, I'm between the fence and his vehicle where people cannot even see me. After the parking lot clear, two, four -- maybe four or five people see me **but they couldn't get a good look at me because I'm standing in the shadows**.
>
> This one guy in this fucking truck, **he know who I am. He seen me** when I come from around the guy's vehicle. Hey, so and so and so and so and so. **Now the guy aware that I was stalking, that I'm on him**. (XIX 1244, additional emphasis supplied)

Phillips even thought that but-for Mr. Aligada seeing him, he could have concealed his identity in spite of his DNA being identified in Mr. Sweet's vehicle, as he stated that he could have explained away the DNA with "any kind of story." (XIII 704-705)

The common thread that runs through the incident is that, after Phillips arrived at the robbery scene, he was preoccupied with not getting caught: He hid, albeit ineffectively, in the shadows near the victim's vehicle; he gunned down Mr. Aligada who approached after the robbery was complete; he tried to kill Mr. Sweet after the robbery was complete as Sweet ran away; he drove away in Sweet's SUV (XII 384, 391, 425-26, 433, 437; see also Phillips' DNA identified in Sweet's vehicle at XIII 597, 598-99; 630), then Phillips changed to the getaway vehicle (See XIII 691-92); and he disposed of the gun, scattering its parts, as he left town (XIII

695-96). See also facts sub-section "The Armed Robbery and Murder."

D. Case Law Supporting the Trial Court's Finding.

As discussed in the forgoing two sections (IB and IC), the trial court's findings, as supported by competent substantial evidence, merits affirmance. In addition, case law supports affirmance.

"A confession is direct evidence in Florida." Walls v. State, 641 So.2d 381, 390 (Fla. 1994), citing Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Michael v. State, 437 So.2d 138 (Fla. 1983). Accord Philmore v. State, 820 So.2d 919, 935 (Fla. 2002)("confession [is direct evidence] that witness elimination was the reason for the murder satisfies this aggravating circumstance"). Phillips confessed to this aggravator and thereby provided direct evidence of this aggravating circumstance.

Here and in Walls, the attack on the avoid arrest aggravator "is directly refuted by the record and Walls' own words." Walls said that he killed the victim "because he wanted no witnesses." Phillips stated he killed Mr. Aligada because if he did not, he was "guaranteed to go to prison" (XIII 540; XIX 1242); by itself, this statement is sufficient to uphold this aggravator. However, as detailed supra, Phillips also said that "I wouldn't come out if I let him prevent me from getting away …." (XIX 1243) And he also expressed his concern that, although others had seen him in the parking lot, Mr. Aligada knew him and could identify him. (See XIII 689-90; XIX 1244)

Like Walls, Nelson v. State, 850 So.2d 514, 526 (Fla. 2003), held that "Nelson's admissions to police alone support his intentional elimination of

Brace as a witness." There, Nelson "agreed with the police when they asked him if he killed Brace because he felt like she could identify him. In fact, when Nelson was asked how Brace could identify him in the dark, he replied, 'From the bathroom light.'" Here, Phillips said that the victim was approaching him, thereby indicating as that distance closed, the victim's identification of Phillips and Phillips' incarceration was assured, unless Phillips killed him.

Also, in Nelson, "Later on in the interview, Sergeant Robinson asked Nelson, 'So what made you kill Ms. Brace?' Nelson answered, 'I got scared.'" The addition of another emotion or peripheral reason, such as bemoaning scenarios in which "only if" the victim had behaved differently, does not negate the aggravator. Thus, motives in addition to avoid arrest "does not preclude the application of this aggravator." Howell v. State, 707 So.2d 674, 682 (Fla. 1998), citing Fotopoulos v. State, 608 So.2d 784, 792 (Fla. 1992).

Reynolds v. State, 934 So.2d 1128, 1156-58 (Fla. 2006), rejected a claim that "the trial court erred in finding that the murders were committed for the purpose of avoiding a lawful arrest." There and here, "competent, substantial evidence" supported the aggravator where the victim knew the defendant and where the defendant essentially stated that the murder was motivated by avoid arrest or witnesses elimination. In Reynolds, the defendant said: "[L]ook, with my record, I can't leave any witnesses.... [B]ut I do regret doing the little girl." Here, Phillips knew that Mr. Aligada knew him, knew that Aligada got a good look at him, and

believed that he was "guaranteed" prison if he did not shoot Aligada. Reynolds highlighted the significance of a defendant's statement like here:

> We have upheld the finding of this aggravator in cases in which the defendant has expressed apprehension regarding arrest. *See Looney v. State*, 803 So.2d 656, 676-78 (Fla. 2001); *see also Trease v. State*, 768 So.2d 1050, 1056 (Fla.2000); *Sliney v. State*, 699 So.2d 662 (Fla.1997). The statements made by Reynolds to Courtney regarding his apprehension of arrest given his previous record 'appear[] to be exactly the type of apprehension ... this Court finds determinative of establishing the avoid arrest aggravator.' *Looney*, 803 So.2d at 677.

Moreover, Reynolds reiterated and applied the principle that the trial judge, as fact finder, is entitled to deference on factual determinations:

> Although Courtney's testimony was somewhat impeached by Robert Scionti's testimony at trial, this does not preclude the trial court from considering Courtney's testimony in its analysis of the aggravators present. It is clear from the trial court's sentencing order that it found Courtney's testimony credible because the trial court relied on this testimony as support for this statutory aggravating circumstance. The trial court is in the best position to assess the credibility of a witness, and we are mindful to accord the appropriate deference to the trial court's assessment of this witness's testimony in our review of whether competent, substantial evidence exists to support this statutory aggravator. *See Stephens v. State*, 748 So.2d 1028, 1034 (Fla.1999) ('We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.... In many instances, the trial court is in a superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses."') (*quoting Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976)).

Here, Phillips also attempted to blame the shooting on the victim. However, these self-serving statements do not nullify, and are even consistent with, the probative value of Phillips' admissions that he killed Aligada to minimize the chance he could be identified. The trial judge properly performed her fact-finding role, and there is competent substantial evidence supporting her finding.

In Sliney v. State, 699 So.2d 662, 671 (Fla. 1997), like here, the defendant admitted to prior interactions with the victim. In Sliney, the defendant also confessed that an accomplice told Sliney "that Sliney would have to kill the victim because '[s]omebody will find out or something'" and then Sliney killed the victim. Here, Phillips confessed that he himself came to the conclusion that he had to kill the victim to avoid being identified and going to prison.

Trease v. State, 768 So.2d 1050, 1056 (Fla. 2000), upheld this aggravator where, like here, there was evidence that the victim knew the defendant and where the defendant told someone that "the victim had to be killed because he could identify them." As in Trease, here the "evidence strongly shows that [defendant's] intention in killing the victim was solely or dominantly to avoid arrest via witness elimination."

Indeed, the evidence in this case supporting avoid arrest is stronger than in Sliney and Trease because Phillips also tried to kill Mr. Sweet as Sweet ran away even though Phillips had just shot and disabled Mr. Aligada, who had fallen to the ground, and even though Phillips already had the money for which he robbed Sweet.

Even without Phillips' statements providing direct evidence of his motive to avoid arrest, the evidence was sufficient.

Farina v. State, 801 So.2d 44, 54-55 (Fla. 2001), discussed several factors to consider in determining whether sufficient evidence supports the "avoid arrest/witness elimination aggravating circumstance." While "alone is insufficient to prove the avoid arrest aggravator," "it significant that

the victims knew and could identify their killer." Here, it is "significant" that Phillips knew that Mr. Aligada knew him, and here, additional factors enumerated by Farina apply: Phillips wore no mask and so he knew that his appearance was not masked from Mr. Aligada as the murder victim approached him. Phillips shot and disabled Aligada several feet away so Mr. Aligada was no threat to Phillips when he shot Aligada; thus, Aligada was not shot during a struggle with Aligada. When he shot Aligada, he already had Sweet's money, so the robbery was complete; instead of shooting Aligada, Phillips could have run away with the money; instead, he eliminated a witness.

In addition to its enumeration of several pertinent factors, Farina's holding also provides guidance. Farina, 801 So.2d at 55, upheld the avoid arrest/witness elimination aggravating circumstance. There, as here, the defendant had previously been seen on the premises, the defendant brought deadly force to the scene, and the killings were not during a struggle with a victim. Here, the killing was not execution-style, but Phillips not only shot Mr. Aligada, Phillips shot Aligada several feet away and confirmed his witness-elimination intent by shooting at Sweet after he (Phillips) had already obtained Sweet's property and after Phillips had already disabled Aligada with gunfire. In Farina, the perpetrators discussed witness elimination prior to the killings, here Phillips explicitly stated that, in fact, witness elimination and avoiding prison was his actual motive for shooting Mr. Aligada.

Consalvo v. State, 697 So.2d 805, 819-20 (Fla. 1996), upheld the trial

court's finding of the avoid arrest aggravator. There, the defendant told someone that he thought that the victim was passed out inside and so he broke into her home. Although the incident started as a burglary, circumstances developed that supported the avoid arrest aggravator. The defendant told someone in jail:

> While he was in there, she woke up and started yelling she was going to call the cops and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from calling the cops; and she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.

Here, akin to the burglary in Consalvo, this incident appears to have started as an armed robbery, and like the victim awakening in Consalvo and interjecting herself in the middle of the burglary, here someone interjected himself into this robbery. In Consalvo and here, the defendant and the victim knew each other. In Consalvo, the victim indicated her intent "to call the cops" and reached for the phone prior to the defendant killing her, providing the basis for inferring that the defendant's motive was to prevent the call, which **might result** in the police believing the victim and arresting the defendant. Here, Phillips expressly stated that he shot the victim because the victim knew him and he was concerned about going to prison as a result.

In Hoskins v. State, 965 So.2d 1, 20 (Fla. 2007), when the defendant opened the trunk of a car where he put the victim, he "could have fled in her car without killing her, but instead killed her and buried her in a shallow grave." Here, Phillips, knowing Aligada and even believing Aligada to be a decent person, "could have" simply told Aligada to halt or "could

have" simply run away with the robbery booty; instead, Phillips turned towards Aligada, aimed and gunned him down. Here, even after shooting Mr. Aligada to the ground, he could have simply exited the scene with the booty; instead, he attempted to gundown the fleeing robbery victim, which further confirmed his dominant intent.

Hoskins cited Knight v. State, 746 So.2d 423, 435 (Fla. 1998), as supportive authority. In Knight and here, "Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money."

Thus, Nelson, 850 So.2d at 526, in addition to Nelson's statement, which alone was sufficient, discussed additional supportive facts showing "that Nelson probably could have accomplished the burglary of Brace's home and sexual battery without killing her since Brace likely posed little physical resistance to Nelson." Here, if Phillips had simply ordered Aligada to halt, he could have avoided shooting him. Indeed, here, Phillips already had Sweet's money, so he could have simply run away to avoid capture. Instead, Phillips eliminated Aligada's identification and attempted to eliminate Sweet's but Sweet jumped behind a car and literally "dodged a bullet."

See also Davis v. State, 698 So.2d 1182, 1193 (Fla. 1997)(upheld avoid arrest; "Davis admitted that he didn't want anybody to know that he had done something like that"; "He also admitted that he put her in the dumpster to enable him to get away before her body could be found"), citing Swafford v. State, 533 So.2d 270, 276 (Fla. 1988); Cave v. State, 476 So.2d

180, 188 (Fla. 1985); Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983).

For the foregoing reasons, and as supported by the foregoing authorities, the trial court's finding of avoid-arrest is supported by competent substantial evidence and merits affirmance.

E. Phillips' Case Law, Not Applicable.

Phillips discusses (IB 30-31) four cases. None of them apply.

In Urbin v. State, 714 So.2d 411, 416 (Fla. 1998), unlike here there was testimonial and physical evidence of the shooting occurring during physical combat between the murder victim and the defendant. There, a witness testified that the defendant immediately after the shooting excitedly exclaimed that "the victim kicked him in the leg and that's when he shot him and that's when he ran." Id. at 413. Another witness testified that, immediately after the shooting and while "awful[ly] excited," Urbin said that "the victim tried to kick Urbin's legs out from under him. Urbin said he shot the victim at that point because he bucked and because he had seen his face." Id. The defendant told another person that "he had killed Hicks because he resisted the robbery." Id. Moreover, the medical evidence indicated that there was a physical struggle between the defendant and the victim: "A shooting during a scuffle was also indicated by the facial injuries." Id. at 416.

Urbin relied upon the repeated and consistent theme of the statements that the defendant spontaneously made to others while in an excited state immediately after the robbery and the supporting medical evidence: The dominant motive for the shooting was the victim resisting and physically

struggling with the defendant. This overriding theme of the victim's physical resistance placed the defendant's mentioning the victim seeing the defendant's face in a non-dominant role. Here, in contrast, Phillips shot the victim when he was several feet away, not in the midst of a physical struggle with the victim. Here, in contrast to Urbin, Phillips did not make several spontaneous statements immediately after the incident that diminished avoid-arrest as dominant. Here, in contrast to Urbin, Phillips need not have shot the victim at all to complete the robbery; he already had the robbery booty in-hand and could have simply run away. Here, in contrast to Urbin, Phillips not only did not leave with the booty, he also tried to kill Mr. Sweet who had seen him nearly face-to-face during the robbery. Here, in contrast to Urbin, Phillips not only mentioned his concern about witness identification, he also amplified the circumstances that supported his concern by discussing how he previously interacted with Mr. Aligada and how Aligada was in a much better position to identify him in the parking lot than those people who saw him sneaking in the shadows.

In sum, Urbin does not apply here.

Cook v. State, 542 So.2d 964, 966 (Fla. 1989), is also inapplicable. There, the operative facts included **physical confrontation** with one victim, unlike here, followed by **more physical contact** and also screaming by the avoid-arrest victim, unlike here:

> When Cook continued to demand money, Mr. Betancourt [Victim1] **hit him in the arm with a long metal rod** and Cook shot him. Cook said he was on his way out when Mrs. Betancourt [Victim2] started screaming and **grabbed him around his knees**. He then shot her, ran out the back door, and fled with Harrison and Nairn. Cook told the police that he thought he had shot both of the victims in the arm. The physical

> evidence, as well as the trial testimony of Harrison and Nairn, were consistent with Cook's version of the shootings.

Given the operative facts in that case, Cook, 542 So.2d at 970, reasoned:

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her 'to keep her quiet because she was yelling and screaming' was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.

In Jackson v. State, 502 So.2d 409, 410 (Fla. 1986), unlike here, the only evidence of a motive for the killing was a struggle over the robbery money:

> Herbert Phillibert, opened the cash register, Clinton produced a pistol and pointed it at Phillibert's head. Appellant reached around the cash register and began removing the money when **Mr. Phillibert grabbed appellant, apparently in an attempt to retrieve some of his money. At this point Clinton leaned over the counter and fired a single, fatal shot into Mr. Phillibert**. Approximately ten minutes later two customers entered the store and found Mr. Phillibert lying face-down behind the counter in a semi-conscious state clutching a five dollar bill in his hand.

Here, there was no such struggle for the money, and unlike Jackson, Phillips' motive was not mere "speculat[ion]," but rather proved several times over. Here, in contrast to Jackson, "Evidence adduced at trial revealed that … appellant [did know] the victim," and the facts do demonstrate witness elimination as a dominant motive.

The only similarity between Phillips final case, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), and this case is that the defendant said "he shot the victim for trying to be a hero." Here, as discussed at length supra, Phillips said **AND** did much more than Rogers. One can have many reasons for shooting a "hero," including non-avoid-arrest reasons as well

as, as supported here with competent substantial evidence, avoid-arrest reasons.

Any suggestion that avoid-arrest requires CCP-like calculation would gut the aggravator.[11] The avoid-arrest statute intends no such requirement, as stated in its plain language:

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

§921.141(e), Fla. Stat. The murderer can formulate this "purpose" as circumstances develop at the crime scene, for example where in Consalvo the victim who knows the burglar wakes up, or here where a co-worker who knows robber Phillips sees the robbery in progress. Here, all of the facts clearly provide competent substantial evidence showing that Phillips formulated a "purpose of avoiding or preventing a lawful arrest" and otherwise satisfied the applicable case law, as discussed in section ID supra:

- Phillips knew that Mr. Aligada knew him;
- Phillips shot the victim from a distance with no struggle;
- Robbery was completed when Phillips shot Mr. Aligada;
- Robbery was completed and Mr. Aligada was disabled when Phillips also tried to shoot the robbery victim; and,
- Multiple probative incriminating statements.

See supportive facts discussed at length multiple times, especially section IC, supra.

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[11] Facts showing calculated avoid-arrest may demonstrate CCP, but CCP-calculation is not required for avoid-arrest.

In sum, here there is more than the requisite competent substantial evidence supporting the trial court's finding of avoid arrest. Here, the evidence and the case law support the fining.

F. Harmless Error.

Although avoid-arrest applies, thereby rendering a harmless error analysis unnecessary and inapplicable, arguendo, any error in finding avoid-arrest would be harmless.

The trial court assigned "great weight" to each of the aggravating circumstances, including not only avoid arrest, but also prior violent felony (VIII 1415) and during the commission of an armed robbery (VIII 1415). Moreover, the trial court expressly found that each of the aggravating circumstances was so egregious that --

> any of the considered aggravating circumstances found in this case, singularly applied to the victim and standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murder of Christopher Aligada.

(VIII 1420) As such, any error was harmless. See Carter v. State, 980 So.2d 473, 483 (Fla. 2008) (alternatively finding that any error in finding either the "in the course of a burglary" or CCP aggravator or both would be harmless beyond a reasonable doubt when the trial court concluded that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation; "We agree").

Indeed, here, prior violent felony, which the trial court gave great weight, is "one of the 'most weighty [aggravators] in Florida's sentencing calculus,'" Rodgers v. State, 948 So.2d 655, 670 (Fla. 2006), quoting

Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002).

Here, the prior-violent-felony aggravator was proved twice-over with incidents in which ---

> 1. Phillips shot his aunt in the legs with a sawed-off shotgun, requiring her to go to the hospital and for which Phillips was convicted of Aggravated Battery and received five years in prison with a three-year minimum mandatory for using a firearm (See XVIII 975-90; 1004-1005; Exh-II 142-47 see also XVIII 943-73, 994-1004); and.
>
> 2. About three months after he murdered Mr. Aligada, Phillips attempted to rob a victim at another job site and engaged in a gunfight with another Good Samaritan, firing 13 shots at the citizen but missing each time and fleeing, for which Phillips was allowed to plead guilty to Grand Theft (See XVIII 1007-1027, 1028; Exh II 148-52). See, e.g., Anderson v. State, 841 So. 2d 390, 407 (Fla. 2003)("Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime"); Knight v. State, 770 So. 2d 663, 670 (Fla. 2000)("proper to consider a subsequent crime as a prior violent felony").

Accordingly, Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), held that erroneously finding three aggravating circumstances (avoid or prevent lawful arrest, CCP, pecuniary gain) was harmless where valid aggravation included "the murder was committed by one previously convicted of a violent felony, and that it occurred during flight from an attempted robbery" and mitigation was minimal, there "Rogers was a good father, husband and provider." Here, while the nonstatutory mitigation numbered 20, they were almost entirely "slight" in weight with none of them afforded great weight. (See VIII 1416-20; mitigation listed and categorized supra in Facts section "Sentencing and Attendant Trial Court Findings").

Bryant v. State, 901 So.2d 810, 829-30 (Fla. 2005), referred to this Court's direct appeal opinion at Bryant v. State, 785 So.2d 422, 426 (Fla. 2001), and rejected an IAC-appellate counsel claim based on lack of

prejudice where the defendant's sentence would have been proportionate without an invalid avoid-arrest aggravator, with the prior violent felony aggravator, and where there was no statutory mitigation and minimal nonstatutory mitigation, like here:

> The cases we cited all found the death penalty proportionate where the two aggravators of prior violent felony and crime committed for pecuniary gain were involved. Furthermore, two of the sentences were found proportional despite the existence of statutory mitigating circumstances. In Bryant's *case*, the court found no statutory mitigating circumstances and only a single nonstatutory mitigator - remorse. 785 So.2d at 437. In light of our prior holdings, Bryant's sentence was proportional even without the 'avoid arrest' aggravator. Further, no reasonable possibility exists that the trial court would have found the evidence in mitigation sufficient to outweigh the two remaining aggravating circumstances. Therefore, no prejudice resulted from any error on the part of appellate counsel in not challenging the 'avoid arrest' aggravator on direct appeal.

901 So.2d at 829, referencing 785 So.2d at 436-37, citing Pope v. State, 679 So.2d 710 (Fla. 1996); Melton v. State, 638 So.2d 927 (Fla. 1994); Heath v. State, 648 So.2d 660 (Fla. 1994).

Here, like Bryant, aggravation includes prior violent felony as well as the aggravator of while engaged in the commission of or in an attempt to commit the crime of robbery. As discussed above, while Phillips' mitigation numbered more than Bryant's, it was nevertheless over-all weak. Moreover, here prior violent felony included a similar type of work-site robbery using deadly force and committing the robbery within a few months of this murder.

Aguirre-Jarquin v. State, 9 So.3d 593, 608 (Fla. 2009), held that even if the trial court erroneously found the avoid arrest/witness elimination aggravator, "any possible error was harmless because there was not a

reasonable possibility that Aguirre would have received a life sentence without the trial court finding of the aggravator." While in Aguirre-Jarquin there was a nine-to-three jury recommendation of death, compared with a seven-to-five recommendation here, Aguirre-Jarquin, like here, included another aggravator that this Court has recognized as especially serious, there HAC and here prior violent felony. Moreover, here, the prior violent felony actually consisted of two prior violent felonies, each involving violence with a firearm. In Aguirre-Jarquin and here, the trial court assigned great weight to the other aggravating circumstances. Moreover, Aguirre-Jarquin's mitigation was more substantial than here:

> (1) under the influence of extreme mental or emotional disturbance (moderate weight); (2) substantially impaired ability to appreciate the criminality of his conduct (moderate weight); (3) age (24) (little weight); (4) long term substance abuse problem (moderate weight); (5) dysfunctional family setting (little weight); (6) childhood abuse (little weight); (7) poor performance in school (little weight); (8) brain damage from substance abuse (moderate weight).

Aguirre-Jarquin, 9 So.3d at 600 n.6. Here, as in Aguirre-Jarquin, any error finding avoid arrest was harmless.

In conclusion, there was more than competent substantial evidence supporting the finding of avoid arrest, and, arguendo, even if it were erroneously found, any such error was harmless.

ISSUE II: DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY STATING IT MUST GIVE GREAT WEIGHT TO THE JURY RECOMMENDATION OF DEATH WHERE THE TRIAL COURT INDEPENDENTLY AGREED WITH THAT RECOMMENDATION? (IB 32-35, RESTATED)

ISSUE II claims that the trial court erroneously gave great weight to the jury's death recommendation, thereby abdicating its sentencing role. As purported support for the claim, Phillips quotes the trial court's

sentencing order (at VIII 1420) and also points to the trial court's preliminary penalty jury instructions (at XVIII 928). However, the entire context of the excerpt from the sentencing order demonstrates that the trial court performed its function and independently weighed the aggravating and mitigating circumstances. Moreover, the trial court instructed the jury as the defense requested; the defense cannot be heard to complain on appeal about something that they requested in the trial court and from which it benefitted in the trial court. The State elaborates.

Muhammad v. State, 782 So.2d 343, 362-63 (Fla. 2001), enunciated the principle that ISSUE II claims applies here:

> It is certainly true that we have previously stated that the jury's recommendation should be given 'great weight.' *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). However, this statement was made in the context of a jury's recommendation of a life sentence. This legal principle also contemplates a full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances. We have also made clear that '[n]otwithstanding the jury's recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors.' *Grossman v. State*, 525 So.2d 833, 840 (Fla.1988); *see King v. State*, 623 So.2d 486, 489 (Fla.1993).
>
> ***
>
> Reversible error occurred in this case due to the trial court's decision to afford "great weight" to the jury's recommendation when that jury did not hear any evidence in mitigation and the defendant had, in fact, requested waiver of the advisory jury without objection by the State. Accordingly, we vacate the sentence of death and remand for resentencing proceedings before the trial court.

Here, unlike Muhammad, not only was there a "full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances, but also the trial judge fully performed her role

"conduct[ing] an independent review of the evidence and make his or her own findings regarding aggravating and mitigating factors," Muhammad, 782 So.2d at 362, quoting Sireci v. State, 587 So.2d 450, 452 (Fla. 1991). Here, the trial court's sentencing order reasoned as follows:

> Pursuant to Section 921.141 of the Florida Statutes, **the Court** is required to consider each and every aggravating and mitigating circumstance set forth by statute. Thus, in imposing this sentence, **the Court** has taken into account all of the evidence presented during the trial, including the guilt phase, the penalty phase, and the *Spencer* hearings, as well as the sentencing memoranda submitted by the parties. The sentencing memoranda specifically addressed each of the aggravating and mitigating circumstances that **the Court** is asked to consider in imposing this sentence. **Based on the evidence presented and the argument of counsel, the Court now finds** as follows:
>
> *** [over five pages of trial court's analysis of aggravating and mitigating circumstances]
>
> CONCLUSION
>
> **This Court has carefully considered and weighed** the aggravating and mitigating circumstances found to exist in this case. Understanding that this is not an arithmetic comparison, but one which requires qualitative analysis, **this Court has assigned an appropriate weight** to each aggravating circumstance and each mitigating circumstance as mentioned in this Order. On balance, the aggravating circumstances in this case far outweigh the mitigating circumstances. The jury was fully justified in its 7 to 5 recommendation that the death penalty be imposed upon the Defendant for his murder of Christopher Aligada. This Court is required to give great weight to the jury's recommendations[fn2] **and fully agrees with the jury's assessment of the aggravating and mitigating circumstances presented before them. After also considering the additional mitigating circumstances presented, this Court finds** that the ultimate penalty which this Court can impose in this ease, should be imposed. **This Court further finds that** any of the considered aggravating circumstances found in this case, singularly applied to the victim and standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murder of Christopher Aligada.

(VIII 1414-15, 1420, additional emphasis supplied) Thus, here it is absolutely clear that the trial court considered on its own and weighed,

independent of the jury's recommendation, each aggravating circumstance and each mitigating circumstance. The trial court's "great weight" language, while perhaps overbroad, did not constitute any error because the trial court performed its function as required by law.

Here, as in Rogers v. State, 511 So.2d 526, 536 (Fla. 1987), the trial judge, in reaching its own decision, "agree[d] with the jury's recommendation," but such an agreement is "not error where the record reflects, as here, that the court has weighed relevant factors and reached its own independent judgment about the reasonableness of the jury's recommendation."

Moreover, here, Phillips' complaint regarding the penalty-phase jury instructions was not only unpreserved but also affirmatively waived by the defense. The jury instruction was not fundamental error, and even it were, it would have been affirmatively waived. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991). Indeed, the defense requested this language, thereby inviting whatever technical error might have occurred.

The penalty phase began on April 22, 2008 (XVIIII).

On April 17, 2008, Tuesday, at a hearing between the guilt phase and the penalty phase, the prosecutor requested the standard jury instruction but **the defense wanted** the jury to believe that its recommendation would be given great weight:

[PROSECUTOR]: The only thing, I guess, in terms of just very briefly if we could, the jury instructions, Your Honor. On page two of -- and I apologize, I'm talking about the penalty phase instructions on page two, which is the first part of the penalty phase instructions. Under number two it would read, The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to what punishment should be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

I know in the past and I can't honestly remember what the Court read in the preliminary instructions before jury instructions. I know that in the past **some courts, at defense request, have added some language to that, something to the effect of, I am required to assign and give great weight** to your recommendation and cannot override it unless reasonable men and women would not differ and need to depart. It was something to that effect. And I can't recall whether Mr. Anderson [defense counsel] at one time requested this and quite frankly I can't remember what the Court read in the preliminary instructions in terms of jury selection, prior to jury selection.

THE COURT: Oh, what I read? I don't have it with me, but I have got it in my office.

[PROSECUTOR]: Yeah, I can't remember what the Court read about that. That was the only thing in terms of other than obviously, I guess, arguing over what aggravators or mitigators, et cetera. But other than that, we just used the standard ones. And, again, **the instructions that I propose at this time are the standard instructions. But I know that in the past the courts, at defense request, have added some language there in terms of the jury override, et cetera**.

[**DEFENSE COUNSEL**]: Yes, Your Honor, that is true. **We do request that**. In fact, in every case I have tried that additional proviso has been added by the Court, to the point I had thought it was a standard jury instruction at this point in time.

[PROSECUTOR]: I've got just a single sheet that is on page two that would deal with that specific issue. Again, the language that would be added at the defense request would be, I am required to assign and give great weight to your recommendation and cannot override it unless reasonable men and women would not differ and need to depart from the advisory sentence.

And I can't remember if the Court read something like that or if it is just my imagination from prior cases.

THE COURT: No, I read it. This is just part of what I read. I'm not going to read the whole thing because part of it was, We are going to be asking you some questions.

[PROSECUTOR]: Right.

THE COURT: We are not trying to pry into your personal affairs, et cetera. ***.

At the sentencing hearing evidence will be presented to the jury as to matters relevant to sentencing, including aggravating and mitigating circumstances. The State and the defense will have an opportunity to present arguments for or against the death penalty, following which I will give you instructions on the law that you are to apply in making your recommendation.

The final determination as to the sentence to be imposed is up to me, however. Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law to be given great weight by this Court in determining what sentence to impose in this case. It is only under rare circumstances that this Court could impose a sentence other than what you recommend.

[PROSECUTOR]: Right. I remember the Court reading something like that. **I don't know if Mr. Anderson wanted what the Court already read or wanted this**. I was just proposing something based on prior, which is what the Court read or **we can add whichever Mr. Anderson [defense counsel] wants**.

[**DEFENSE COUNSEL**]: Well, **I think there is one, this form that we are handing up to your bench, Your Honor, is even better**. I would add that I would request that instead of the word recommendation that the jury -- that the expression your sentencing decision be used. Because I think the word recommendation really violates Caldwell versus Mississippi. **The jurors are to believe that their decision is final. They are not to believe that it's a recommendation**, that if they are wrong the Court can correct it or the appellate courts can overrule it. So I would prefer, and I think it is more appropriate that we go with the shorter form that we are passing around up here, which I can hand to the clerk right now.

[PROSECUTOR]: I've given it to Your Honor.

THE COURT: I've got it.

[**DEFENSE COUNSEL**]: And, again, **I would just ask the Court to eliminate the word advisory**, because it suggests to the jury that what they decide is just advice to the Court and ultimately you, Your Honor, is going to decide whether this man gets life or death and that is contrary to Caldwell. **They have got to believe that they are sentencing this man**.

[PROSECUTOR]: Your Honor, Caldwell is old law. There has been numerous U.S. Supreme Court and Florida Supreme Court since Caldwell. And the bottom line is **the standard instructions, which have been found constitutional and approved already, talk about an advisory sentence**. The question is whether the Court then adds something else to that. And, again, that is at the request usually of the defense. I know sometimes they want even more -- I know the Court already read something based, I believe, on the defense request. But I'm just suggesting that **whatever Mr. Anderson requests, I'm not objecting to it. But I am objecting to the part about taking out advisory.**

THE COURT: Well, what I've read is not -- what I read were my introductory remarks. They were not requested by the defense. It is just my habit to give --

[PROSECUTOR]: I apologize, Your Honor.

THE COURT: -- some introductory remarks and in this particular kind of case go into a little bit more detail because of the nature of what could happen should the jury reach a verdict of guilty. So these are specifically tailored to a capital case.

[PROSECUTOR]: Right. Right.

THE COURT: They are not jury instructions. They are just introductory remarks. I agree that it should be -- the jury instruction is in and I also agree with the State that I'm not going to change the jury instruction as to an advisory sentence. If you want to come up with something besides recommendation that's appropriate, we can look at these again on Monday. You can look at it over the weekend and if you want to add -- I think Mr. De La Rionda was just trying to fashion something that he thought might be -- that I would like.

If you particularly don't like that word recommendation, I wouldn't call it a sentencing decision, however. It is not a sentencing decision. But if you want to try to come up with some other word that you are more comfortable with and you and the State agree to it --

[DEFENSE COUNSEL]: Given the current state of the law, Your Honor, I really -- I don't think I can make any -- in fact, I know I can't really argue any more than that. I like what Mr. De La Rionda has proposed here and the Court has a copy of it. It's a short one-paragraph thing. With the proviso that **I would ask the Court to remove the word advisory**. And the Court has just indicated it's not going to do that so I'm going to leave it at that.

THE COURT: Okay. But, again, we are going to be reconvening on Monday should you change your mind or see something different or request something else to be added or changed, we can look at it again.

[DEFENSE COUNSEL]: Your Honor, you're saying Monday. I've got that we are coming in on Tuesday. Do you want me to be here on Monday?

THE COURT: Well, I'm saying Monday because I need to rule on all your motions Monday. So I just thought maybe if you could stop by, both of you, any time. You can tell me. It can be before court. We can start five minutes early for you to come by or right before lunch. Well, lunch Monday starts at 11:15, but I will work around your schedule. I know you weren't intending to be here necessarily.

(XVI 878-85, additional emphasis supplied)

On Monday, April 21, 2008, defense counsel followed-up on his insistence on the jury instructions about which Phillips now complains::

[PROSECUTOR]: The only other thing aside from that, Your Honor, I guess we're still working on the jury instructions. On Page 2 of the actual instructions we inserted the part in the instruction that defense had requested regarding the further instruction, something to the -- well, specifically it reads, 'I am required to assign and give great weight to your recommendation and cannot override it unless reasonable men and women would not differ on and need to depart from the advisory sentence.'

That is at the request of defense. It's not the standard instruction, but I believe the last time defense requested that and we've inserted that. The other -- I apologize.

[DEFENSE COUNSEL]: And, Your Honor, if I might address that. I made motions, which I've not succeeded on in this trial, to ask the Court to **instruct the jury, in essence, that they are the sentencers**, because our position as the defense is that in Haldorf (phonetics) versus Mississippi, and all of its cases **require that the jury believe that they themselves are going to sentence the defendant and that the jury believe that their decision is going to be final, but since I've not prevailed on that motion this would -- this would be the next best thing**.

THE COURT: Okay.

(XVII 900-901, additional emphasis supplied)

Thus, the defense not only invited the jury instruction, it insisted on it. As such, Phillips cannot be heard to complain about it now. See, e.g., Terry v. State, 668 So.2d 954, 962 (Fla. 1996)("[m]ost importantly, a party may not invite error and then be heard to complain of that error on

appeal"); White v. State, 446 So.2d 1031, 1036 (Fla. 1984)(invited error applied to the submission of a chart; "cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis"); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979)(order "induced by stipulation of the parties. One who has contributed to alleged error will not be heard to complain on appeal"); Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984)(citing and summarizing several cases).

Moreover, as the defense request for the jury instruction suggests, there is no doubt that it did not harm Phillips. The defense wanted the jury to feel that it bore the entire responsibility for sentencing Phillips so that it would be more likely to forbear in recommending death. With a seven-to-five vote, the tactic almost "worked."

Because the trial court clearly did perform its proper sentencing function and because the jury being told of a heavier weight on its decision would tend to chill a death recommendation, any error was harmless beyond a reasonable doubt.

ISSUE III: WAS THE DEATH PENALTY PROPORTIONATE? (IB 36-41, RESTATED)

ISSUE III claims that the death sentence imposed in this case is disproportionate to other cases. ISSUE III is incorrect factually and legally.

Lawrence v. State, 846 So.2d 440, 452 (Fla. 2003), described the proportionality-review process as "not a comparison between the number of aggravating and mitigating circumstances; rather, it is a 'thoughtful,

deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases,'" quoting Beasley v. State, 774 So.2d 649, 673 (Fla. 2000), quoting Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

A. Three Aggravating Circumstances, Each with Great Weight.

Here, the "totality of the circumstances" includes facts supporting the reasonableness of the great weight attributed to each aggravator: avoid-arrest (VIII 1415-16), the prior-violent-felony (VIII 1415), and during-the-commission-of-an-armed-robbery (VIII 1415). See Hunter v. State, 8 So.3d 1052, 1071 (Fla. 2008)("[W]eighing the aggravating circumstances against the mitigating circumstances is the trial judge's responsibility and it is not this Court's "function to reweigh those factors'"; "weight that the trial court ascribes to the aggravating and mitigating circumstances is subject to review for an abuse of discretion"), citing Bevel v. State, 983 So.2d 505, 522 (Fla. 2008); Merck v. State, 975 So.2d 1054, 1065 (Fla. 2007). See also Consalvo v. State, 697 So.2d 805, 820 (Fla. 1996)("avoid arrest and felony murder aggravators do not refer to the same aspect of the defendant's crime" so they do not merge). See also Sexton v. State, 775 So.2d 923, 934 (Fla. 2000)("weight to be accorded an aggravator is within the discretion of the trial court and will be affirmed if based on competent substantial evidence"; reject attack on CCP "that the trial court should not have given that aggravator much weight because Sexton's significant mental illness prevented him from planning or orchestrating the murder").

As in ISSUE I, here Phillips (IB 36-37) erroneously minimizes the facts supporting the avoid-arrest aggravating circumstance. To briefly summarize the factual discussion of ISSUE I supra: Phillips knew that the murder victim previously knew him from Phillips' job-discussions with the murder victim as short as a week or two prior to this robbery-murder; Phillips saw Mr. Aligada approaching knowing he (Phillips) had no mask on; Phillips aimed, fired at, and shot unarmed Aligada when they were a number of feet apart, not in the midst of a struggle; Phillips shot Mr. Aligada after he (Phillips) had already obtained Mr. Sweet's money; after already obtaining Mr. Sweet's money and shooting Aligada, who dropped to the ground, Phillips then shot at Sweet as Sweet ran away; and, Phillips made several statements concerning his avoid-arrest motive, such as, indicating that if he did not shoot Mr. Aligada, he (Phillips) would be "guaranteed to go to prison."

Therefore, not only was there competent substantial evidence supporting the avoid-arrest aggravator, as discussed at length in ISSUE I supra, the trial court was reasonable in assigning it great weight (VIII 1415-16).

The trial court also afforded great weight to the other two aggravators, which Phillips concedes (IB 37) apply. However, Phillips (IB 37-38) erroneously attempts to minimize the significance of his prior violent felony convictions.

As also discussed in ISSUE I's "F. Harmless Error" section, supra, the prior-violent-felony aggravator was proved twice-over. In a 1996 incident, Phillips shot his aunt in the legs with a sawed-off shotgun, requiring her to go to the hospital and for which Phillips was convicted of Aggravated

Battery and received five years in prison with a three-year minimum mandatory for using a firearm (See XVIII 975-90; 1004-1005; Exh-II 142-47; see also XVIII 943-73, 994-1004). Phillips attempts to soften the impact of this prior violent felony by citing to his relative's testimony in which they opined that it was an accident. However, Phillips overlooks the investigating officer's penalty-phase testimony (XVIII 975-90) and overlooks that he (Phillips) was not convicted of an "accident," but rather of Aggravated Battery for which he received three years of prison and the firearms minimum mandatory.

Indeed, Officer Amos testified in the penalty phase that Ms. Farns, Phillips' mother, told the officer that she was arguing with Phillips about having a shotgun while on probation, and the argument escalated to the point that "he went and got the shotgun, he loaded it, pointed it at her chest, and said he'd kill her," resulting in the mother fleeing. (XVIII 983-84) Ms. Tatum, the victim in that aggravated battery, told the officer that she went "over there to confront him [Phillips] for threatening his mother … in reference to killing her." (XVIII 982) Ms. Tatum said that Phillips actually shot her during an argument with her in which he fired at her about five to seven feet away from her. The officer saw that she was shot on both sides of her calves, with multiple pellet wounds to both of her legs. (XVIII 977-78, 982-83) "The wounds to her legs were substantial." (XVIII 987) The gunshot wounds did not appear to have been inflicted through a ricochet. (XVIII 986, 988; see also XVIII 990) The officer also interviewed Phillips' sister, Dewanda Powe, who said that she saw Phillips

point the shotgun at Ms. Tatum and fire. (XVIII 978-79, 989) When the officer interviewed them, neither Ms. Tatum nor Ms. Powe said that the gun went off accidentally. (XVIII 989)

The other prior violent felony supporting the great-weight attributed to this very serious aggravator occurred only about three months after Phillips aimed at, and shot and killed, Mr. Aligada in this case. Like here, in the other violent felony, Phillips fired at a citizen attempting to intervene when Phillips was robbing another person. Like in this murder, Phillips attempted to rob a victim at a job site. In that other robbery, Phillips engaged in a gunfight with the intervening Good Samaritan, firing 13 shots at the citizen but missing each time and fleeing. (See XVIII 1007-1027, 1028; Exh II 148-52) While Phillips was allowed to plead guilty to Grand Theft in that other robbery, the facts of that other incident are, indeed, violent and very aggravated. See, e.g., Anderson v. State, 841 So. 2d 390, 407 (Fla. 2003)("Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime"); Knight v. State, 770 So. 2d 663, 670 (Fla. 2000)("proper to consider a subsequent crime as a prior violent felony").

The trial court also afforded great weight to the during-the-commission of-an-armed-robbery aggravator, and found:

> Before the Defendant arrived at Builder's First Source, the Defendant arranged for a get-away driver to drop him off and wait for him. The Defendant arrived at the parking lot of Builders First Source at around 8:45 pm., on October 18, 2005. He was carrying a loaded handgun. He asked an employee what time the shift ended and then waited near Wilbur Sweets vehicle. When the Defendant saw Mr. Sweet, he approached Mr. Sweet, pointed the loaded gun at Mr. Sweet and told him to hand over the money.

(VIII 1415) The trial court found that Phillips then, at gunpoint, obtained Mr. Sweet's $3100, which "Mr. Sweet intended to use to buy a car for his son." (Id.) At this juncture, Mr. Aligada approached and Phillips shot at Aligada twice resulting in --

> [a]t least one bullet hit[ting] Mr. Aligada, who died of his gun shot wounds the following day. On April 9, 2008, the jury found the Defendant guilty of the murder of Christopher Aligada and the armed robbery of Wilbur Sweet. This aggravating circumstance has been given weight in determining the appropriate sentence to be imposed in this case.

(Id., underlining in original) As documented in the Facts "The Armed Robbery and Murder" section supra, these factual findings are supported by the evidence, and, accordingly, Phillips has not challenged them in this appeal.

B. Weak Mitigation.

While Phillips attempts to minimize the aggravators in this case, he (IB 38) also attempts to maximize the mitigation. In contrast, the trial court reasonably rejected several mitigators and afforded only slight weight to 15 of the 20 remaining ones: 1 childhood frequent moves and changes in homes and schools; 2 childhood mental illness; 4 childhood learning disabilities; 5 Ritalin was not taken as prescribed because Defendant spit it out; 6 difficult childbirth; 7 raised in drug and crime-infested neighborhoods; 9 no stable father figure; 10 disfavored as a child; 15 raised in poverty; 16 on-the-job injury; 17 reverent; 21 respects and helps the elderly; 22 kind to animals; 23 respects judicial system; 24 friendly. The only mitigators that the trial court afforded more than slight weight were reasonably not given anything more than moderate weight:

little weight given to 11 deprived of food and clothing as a child; some weight given to 8 mentally ill mother and 12 physical abuse as a child; and, moderate weight given to 13 mental abuse as a child and 14 suffered the loss of his loving grandmother.

The salient evidence supporting the relatively weak weight of the mitigation includes the following.

Whatever learning disability Phillips may have had growing up has virtually disappeared. Phillips' sister testified that Phillips told her that he reads in prison:

> A Oh, he would just tell me the nature of books that he'd read, and we'd just compare books back and forth, because he found out that I liked to read, and we'd just compare books. And he used to always tell me in his mind that was his way of escaping into books.

(XIX 1120) She explained that these were not "baby books." (XIX 1121)

When Fred Powe was asked if Phillips can read and write, Mr. Powe responded that "he fill out papers for me." (Suppl 25)

Regarding the Bible, Phillips "knew his stuff," and he knew about the Ten Commandments. (XVIII 1106)

Accordingly, at one point during the trial, Phillips interjected his articulate intelligence:

> I had asked Mr. Shea to bring to the Court's attention that my indictment did not endorse a true bill, nor was it notarized or the court stamp saying it was filed in open court. And he failed to do so and I would just like to have it on record.

(XIX 1208) Phillips was also appropriately responsive during the trial court's colloquys with him. (See XIV 738-40; XIX 1206-1209) Phillips said he was 29 years old at the time of a colloquy. (VIII 739)

Phillips also understood the potential significance of evidence in this

case, as he told Detective Dingee that he could explain away the DNA. (XIII 704-705)

Concerning Phillips' hyperactivity, at one juncture, Phillips chose not to take his Ritalin. Phillips would hold the pills in his mouth and then throw them out when "they" were not looking. (XVIII 1051-54) Indeed, "hyperactivity disappears with age. It goes away." (XIX 1171)

Moreover, to whatever degree Phillips may have been hyperactive in his growing years, he was also violent and anti-social, as, for example, the prosecutor pointed out in his cross-examination of Dr. Mandoki:

- Phillips "hitting his sister" (XIX 1150);
- "He hits others and takes items from the teacher's desk" (XIX 1151);
- He "fights constantly with his peers" (XIX 1158);
- "He is extremely untruthful. He blames others when items he has taken are found in his desk" (XIX 1151);
- A "main concern" is Phillips' temper (XIX 1158);
- "He … causes great disturbance in the cafeteria" (XIX 1152);
- "Sometimes he will get so mad at her that he will physically attack his mother and even drag her around the apartment by her hair. (XIX 1153)

In her penalty phase testimony, his mother admitted that Phillips was "[s]ometimes" a "handful" (XVIII 1048), and "the next thing you know they done got into something… arguing or fighting, wanting to jump on him and stuff." (XVIII 1055) While the mother said that Phillips was not "violent then," facts permeating his childhood indicated otherwise, and she admitted that, when pushed too far, "he click, he click" (XVIII 1055).

Thus, while Phillips (IB 38) mentions being abused by his mother, he

ignores his abuse of her, including the shotgun incident that began with Phillips pointing a sawed-off shotgun it at his mother's chest and telling her that "he'd kill her," resulting in the mother fleeing. (XVIII 983-84)

Moreover, while there was evidence of a job-site accident involving Phillips (See IB 38), it is evident that whatever disability resulted did not impede Phillips from shooting his aunt, robbing Mr. Sweet, shooting Mr. Aligada, running away from the lumberyard, and firing 13 bullets at another victim while again running away.

Phillips also ignores the testimony he adduced that showed Phillips' grandmother loving (XVIII 1099-1100) him and raising him until he was about eight years old. (XVIII 1070). Then, shortly after she died, Mr. Powe looked after Phillips. Phillips "like[d] to wear good clothes and things," so Phillips would "hustle" and Powe would "give him a little money" he had. (Suppl 8, 11) Mr. Powe's daughter would also pass along to Phillips some of the money that her father gave to her. (XIX 1121-22) Powe paid Phillips' rent and bought him beds. (Suppl 8) He also bought food and clothes for Phillips. (Suppl 9) Mr. Powe raised Phillips the same way he raised his daughter. (XIX 1117)

Accordingly, in the Spencer hearing Fred Powe referred to Phillips as "my son, my son, my stepson. I raised him *** [f]rom about 12 or 15 on …." (Suppl 7) "[H]e's my kid." (Suppl 16) Phillips is as "close" to him as "any child" of his. (Suppl 12-13) Phillips knows that Mr. Powe loves him. (Suppl 22) Mr. Powe treated Phillips the same as his daughter. (Suppl 8)

Thus, Phillips did have a male role model during much of his childhood:

Mr. Powe was "more like a father figure to" Phillips. (XVIII 1055) The trial court found:

> The Defendant's father was killed when the Defendant was 6 years old. The Defendant's sister's father, Fred Powe, helped the Defendant when he could. Mr. Powe testified that the Defendant was his stepson and he helped raise him, Mr. Powe gave the Defendant's mother money for rent and to buy furniture. He also testified that he would argue with the Defendant's mother as to how the Defendant was being raised. The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.

(VIII 1418)

While ISSUE III (IB 38) does not mention Phillips' supposed depression, a doctor testified for the defense that depression makes people feel helpless and hopeless (XIX 1138-39), but Phillips proved himself quite adept at attempting to improve his situation by robbing and shooting at people. Also, when Phillips was working, Phillips' mother wanted Phillips' money, but he stood up for himself and would not give it to her. (Suppl 11)

Also, Phillips' half-sister bragged about a childhood incident in which Phillips, with a bat, chased off an intruder. (XVIII 1109)

Further, the prosecutor's cross examination of Dr. Mandoki revealed the weaknesses of any depression diagnosis:

> Q Now, you said that he has a mental illness and that is that he's depressed?
>
> A Yeah.
>
> ***
>
> Q Okay. So a person such as that wouldn't be able to plan, like, a robbery in terms of being able to figure out where the person would be with money and all that, or would a person be able to do that?
>
> A They cannot -- they cannot plan it well. You know, they cannot have, like -- you know, most depressed people cannot really make sound decisions.

> Q All right. So in other words, they would have problems making sure that whenever they plan to do a robbery, they would have a getaway driver and they would find out where the person was that had the money, right?
>
> A You know, I can't answer that, but I don't want to say even how does that happen. But we're speaking about not because he cannot plan, but his lack of motivation --
>
> (XIX 1172-74)

Accordingly, defense witness Dr. Miller opined that Phillips "has characteristics of" antisocial personality disorder. (XIX 1198-1200)

C. Given the Strong Aggravators and Weak Mitigation, Each Aggravator Supports the Death Penalty.

Given the relatively weak mitigation in this case, discussed in the preceding section as well as in the Facts supra, the trial court found that each aggravator in this case would support the death penalty:

> This Court finds that any of the considered aggravating circumstances found in this case, singularly applied to the victim and standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murder of Christopher Aligada.

(VIII 1420) As such, the death penalty is proportionate. Cf. Carter, 980 So.2d at 483.

D. Additional Case law Supporting Proportionality.

Several additional cases support upholding the death sentence in this case as proportionate.

As discussed in the "F Harmless Error section of ISSUE I supra, the prior violent felony aggravating circumstance is also "especially weighty." Moreover, this aggravator, like here, can be supported with facts that weight it sufficiently to support the death penalty as proportionate. See, e.g., Frances v. State, 970 So.2d 806, 817 (Fla. 2007)(two murders), citing

Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (affirming death sentence where single aggravating circumstance of prior violent felony was "weighty"); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (affirming death sentence where sole aggravating factor was prior second-degree murder).

As also discussed in the "F Harmless Error" section of ISSUE I, Bryant v. State, 901 So.2d 810, 829-30 (Fla. 2005), referred to this Court's direct appeal opinion at Bryant v. State, 785 So.2d 422, 426 (Fla. 2001), as supporting proportionality, where, even without avoid-arrest, the prior violent felony aggravator applied, and where there was no statutory mitigation and minimal nonstatutory mitigation, like here. See Bryant, 901 So.2d at 829, referencing 785 So.2d at 436-37, citing Pope v. State, 679 So.2d 710 (Fla. 1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances); Melton v. State, 638 So.2d 927 (Fla. 1994) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation); Heath v. State, 648 So.2d 660 (Fla. 1994) (affirming defendant's death sentence based on the presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the statutory mitigator of

extreme mental or emotional disturbance).

Like Melton, here there is prior violent felony and at least one other aggravator and some nonstatutory mitigation.

A fortiori, here, unlike Pope and Heath, there is no statutory mitigation.

In Lebron v. State, 982 So.2d 649, 667-70 (Fla. 2008), like here "the jury recommended the death penalty by a vote of seven to five." Like here, Lebron 's aggravators included:

> (1) Lebron had previously been convicted of a felony that involved the use or threat of violence; and (2) Lebron committed the capital felony while he was engaged, or was an accomplice, in the commission of the crime of robbery.

Like here, several nonstatutory mitigators were present:

> The trial court also found the following nonstatutory mitigators: (1) Lebron's mother used drugs ("very little weight"); (2) Lebron performed poorly in school ("some weight"); (3) Lebron was good with children ("very little weight"); (4) the profile of Lebron's parents was mitigating ("very little weight"); (5) Lebron's [*667] mother rejected him and had negative feelings about him ("some weight"); (6) Lebron behaved properly during trial ("very little weight"); and (7) Lebron had emotional problems, mental health problems, and lacked the "world's best mother" ("little weight").

This Court, since the trial court in Lebron had not indicated weights for the aggravators, afforded them "at least moderate weight," whereas here the trial court reasonably afforded each of the three aggravators the greater "great weight." Lebron upheld the death sentence as proportionate. It is proportionate here.

Several cases that Lebron discussed are also applicable here:

> In ***Melton v. State***, 638 So.2d 927 (Fla. 1994), this Court held the death sentence to be proportionate for a murder committed during a robbery where the trial court found two aggravating factors (i.e., prior violent felony and committed for financial gain) and two

nonstatutory mitigating factors (i.e., Melton's good conduct while awaiting trial, and his difficult family background). *See id.* at 929.

In *Freeman v. State*, 563 So.2d 73 (Fla. 1990) *** , this Court held that the death sentence was proportionate for a murder committed during a burglary where the trial court found two aggravating factors (i.e., prior violent felony and committed for financial gain and murder occurred while Freeman was committing a burglary (merged)) along with four nonstatutory mitigating factors (i.e., Freeman was of low intelligence, he was abused by his stepfather, he possessed some artistic ability, and he enjoyed playing with children). *See id.* at 75. In declining to find the death sentence to be disproportionate, this Court concluded that the 'nonstatutory mitigating circumstances were not compelling.' *Id.* at 77 ***.

In *Miller v. State*, 770 So. 2d 1144 (Fla. 2000), we held the death sentence to be proportionate for a murder committed during an attempted robbery where the trial court found two aggravating factors (i.e., prior violent felony and homicide was committed during an attempted robbery and for pecuniary gain (merged)) and ten nonstatutory mitigating factors (i.e., victim did not suffer, the alternative sentence was life without possible release, Miller turned himself in, he showed remorse and apologized to the victim's family, Miller cooperated with the police, he suffered emotional distress over the death of his sister and a close cousin, Miller had a frontal lobe defect that affected inhibition and the ability to control impulses, he would likely do well in long-term incarceration, he was loved by his family and performed good deeds, and Miller had adjusted well while incarcerated). See id. at 1146 n.1.

As this Court reasoned in Lebron, "[l]ike *Melton*, *Freeman*, and *Miller*, in which similar aggravators were found, the trial court in the present case found nonstatutory mitigators that were not compelling. In *Melton* and *Freeman*, this Court upheld the death sentence despite both defendants having difficult family backgrounds." Lebron, 982 So.2d at 669. Here, similar aggravators, plus avoid arrest, were found, and Phillips' nonstatutory mitigators "were not compelling" even though at some portion of Phillips' childhood, he had a "difficult family background[]."

Pope v. State, 679 So.2d 710, 712 n. 1, 716 (Fla. 1996), upheld as proportionate the death sentence where aggravators were a previous violent

felony and the murder was committed for pecuniary gain. There, statutory mitigators were extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of his conduct. Nonstatutory mitigation included intoxication at the time of the offense, the violence occurred subsequent to a boyfriend/girlfriend dispute, and the defendant was under the influence of a mental or emotional disturbance. Here, the aggravation was stronger than in Pope and the mitigation was weaker than in Pope. Phillips' death sentence should be affirmed.

Ferrell v. State, 680 So.2d 390, 391 n.22, 391-92 and accompanying text (Fla. 1996), upheld death sentence with only one aggravator of defendant previously "convicted of committing … a second-degree murder bearing many of the earmarks of the present crime." Ferrell included "a number of mitigating circumstances … assigned little weight." There, the mitigation included "impaired, was disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful." Here, Phillips committed another robbery "bearing many of the earmarks of the present crime" and shot at a victim there 13 times and Phillips shot his aunt after threatening his mother. Here, Phillips' mitigation barely rises above "slight" as a whole.

Rodgers v. State, 948 So.2d 655, 669-72 (Fla. 2006), upheld the death penalty where the trial court found that "the prior violent felony conviction was established and afforded it 'extremely great weight.'" Here, three aggravators, including prior violent felony, were each afforded great weight. Rodgers's prior violent felony was a 1963 robbery and a 1979

manslaughter, whereas here Phillips threatened to kill his mother and then shot his aunt in the legs with a shotgun and also attempted to shoot a pursuing citizen with 13 rounds during a robbery within three months of shooting Mr. Aligada.

While Rodgers focused on the similarity of the current domestic killing with the prior manslaughter, here this murder and Phillips' attempt to kill an apparent co-worker of the targeted robbery victim closely resembles this case, except instead of firing a couple of shots at the victim and killing him, as here, in the other robbery, Phillips fired 13 and missed.

Rodgers' nonstatutory mitigation included:

> 'Using the defendant's terminology,' the trial court found the following nonstatutory mitigation: (1) that if not legally mentally retarded, Rodgers was at best borderline (some weight)[trial court rejected mentally retarded under section 921.137, Florida Statutes (2003)]; (2) that Rodgers was abandoned by his father (little weight); (3) that Rodgers had low bonding to school and no school transportation (very, very little weight); (4) that Rodgers was generous and kind to others (very little weight); and (5) that Rodgers had the love and support of and for his siblings (very, very little weight).

Rodgers, 948 So.2d at 661. Rodgers' trial court also found a "single statutory mitigating factor" of "any other factor in the defendant's background," "based on Rodgers's impoverished background. He was raised in a shack without utilities, worked in the fields as a child, and had little opportunity for schooling in segregated Alabama in the 1940s and 1950s." Id. at 669 n.190 and accompanying text. Here, in contrast, Phillips is not currently near-retarded or otherwise mentally disabled; Phillips did have a father figure during much of his childhood (Mr. Powe), and like Rodgers, Phillips is apparently loved by a number of family members.

Rodger's trial court "concluded that the single aggravating factor outweighed the mitigating circumstances and sentenced Rodgers to death." This Court upheld the trial court, citing to the principle that a "prior violent felony conviction … like HAC, is one of the 'most weighty in Florida's sentencing calculus.' *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002)." The trial court here also merits affirmance.

Two cases that Rogers' cited are noteworthy because in them, like here, the prior violent felony did not involve a completed homicide:

> *Lemon v. State*, 456 So.2d 885, 888 (Fla.1984) (affirming a death sentence for the murder of the defendant's girlfriend where the prior conviction was for assault with intent to kill a female victim, and likening the case to others "involv[ing] defendants killing women with whom they had a relationship after a previous conviction for a similar violent offense"); *** *Harvard v. State*, 414 So.2d 1032 (Fla.1982) (affirming a death sentence for the defendant's murder of his second ex-wife where the prior conviction was for aggravated assault arising from a shooting attack on his first ex-wife and her sister). In this case, Rodgers had two prior violent felony convictions-a robbery and his shooting and killing his girlfriend, the latter being a similar offense-and the trial court assigned the factor extremely great weight.

Rodgers, 948 So.2d at 670-71. See also Duncan v. State, 619 So.2d 279 (Fla. 1993)(discussed in Rogers and included several mitigators).

In Rogers v. State, 511 So.2d 526, 533-34 (Fla. 1987)(Jerry Layne Rogers), the two valid aggravating circumstances were "the murder occurred during flight from an attempted robbery" and "previously convicted of a felony involving the use or threat of violence." Here, the aggravation was even stronger than in Rogers, and, like here, the mitigation was weak. Rogers affirmed. The trial court merits affirmance here.

Moore v. State, 701 So.2d 545, 551 (Fla. 1997), like here involved

prior violent felonies of "prior violent felonies of armed robbery and aggravated battery," there through convictions and here through the violent facts constituting armed robbery and through a conviction for aggravated battery. Moore like here included avoid arrest. Moore included pecuniary gain, whereas here Phillips gunned down Mr. Aligada during an armed robbery in which he obtained $3100 of Mr. Sweet's money. Although Moore included no nonstatutory mitigation, it included the statutory mitigator of age, whereas here there is no statutory mitigation. Like here, the mitigation was weak, there slightly weighted and here almost entirely afforded slight weight. Moore upheld the death penalty. Phillips' death penalty should be upheld.

Consalvo v. State, 697 So.2d 805, 820 (Fla. 1996), upheld the death sentence where there were "two aggravators … [of] avoid arrest and murder committed during the course of a burglary." Here, the aggravation was stronger, including the very weighty prior violent felony. In Consalvo, like here, "[t]here are no statutory mitigating circumstances" and weak nonstutory mitigation, there "employment history and appellant's abusive childhood [afforded] 'very little weight.'" There, this Court held that "the existence of the two aggravators is sufficient to outweigh the very little weight given to the nonstatutory mitigating circumstances set forth in the sentencing order." Here, the three aggravators were "sufficient to outweigh" the weak mitigation.

Jackson v. State, 502 So.2d 409, 413 (Fla. 1986), struck avoid arrest and HAC, leaving two valid aggravators of previous conviction of a violent

felony (attempted armed robbery) and committed during the course of a robbery. Although there was no mitigation in Jackson, here the mitigation is weak and the aggravation, much stronger.

Bevel v. State, 983 So.2d 505, 518 (Fla. 2008)(8-4), upheld the death penalty for the "first-degree murder of Stringfield." There, as here, the "surrounding facts and circumstances of the prior crime" were important. There, Bevel's prior violent felony history included "Bevel [pleading] guilty to the lesser included offense of attempted robbery without a firearm," from an original charge of "attempted armed robbery with a firearm." And, there, "the State introduced evidence at the penalty phase detailing the crime in which Bevel attacked a man in his backyard with a firearm, pointed the gun to the side of the victim's head and told him to "get butt naked and assume the position." Here, Phillips' prior violent felony history is at least as weighty as Bevel's. Phillips' history includes a shootout during an armed robbery within a few months of this armed robbery and also at a work site. But-for Phillips' apparently poor aim as he fired 13 times in the other armed robbery, there would have been another murder here, as there was in Bevel. Here, Phillips also threatened to kill his mother and shot his aunt with a sawed-off shotgun. Here and in Bevel, there was only "minimal nonstatutory mitigation," Bevel, 983 So.2d at 525.

See also Taylor v. State, 855 So. 2d 1 (Fla. 2003)(plurality opinion, discussed in the next section); section "F. Harmless Error" in Issue I supra.

E. Phillips Case Law, Inapplicable.

Phillips (IB 39-40) cites to three cases as purported support for ISSUE III: Terry v. State, 668 So.2d 954 (Fla.1996); Johnson v. State, 720 So.2d 232, 238 (Fla. 1998); and, Hess v. State, 794 So.2d 1249, 1268 (Fla. 2001).

Frances v. State, 970 So.2d 806, 817 (Fla. 2007), explained why Terry v. State, 668 So.2d 954, 965 (Fla.1996), did not apply there; it similarly does not apply here.

> In *Terry*, the prior violent felony **did not represent an actual violent felony previously committed by the defendant**. 668 So.2d at 965. Rather, the aggravator was based on the defendant's contemporaneous conviction as a principal to an aggravated assault simultaneously committed by a codefendant who pointed an inoperable gun at the victim's husband. *Id*. While we recognized that this contemporaneous conviction qualified as a prior violent felony and a separate aggravator, we concluded that we could not ignore the circumstances, namely that the felony occurred at the same time as the murder, was committed by a codefendant, and involved the threat of violence with an inoperable gun. *Id*. at 966. However, our final observation on this point in *Terry* belies Frances' argument here. We explained that **the situation in *Terry* 'contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide.'** *Id*. These are the exact circumstances in Frances' case.

Here, "the defendant himself actually committed" the prior aggravated battery by shooting his aunt in the legs with a shotgun and by attempting to kill a Good Samaritan citizen, which Phillips succeeded in doing in this murder case.

Phillips argues (IB 39) that, like here, Terry involved a "robbery-gone-bad." Quite to the contrary, the significance of the "robbery gone bad" depends upon its facts, which the State has discussed at length supra. Here, the facts of the murder are much stronger than in Terry and the facts of the prior violent felonies are much stronger and much more weighty than

Terry's quasi-prior-violent-felony.

Johnson v. State, 720 So.2d 232, 238 (Fla. 1998), "pose[d] a close question on whether the sentence of death is warranted." Johnson explained that the prior violent felony aggravator was based

> in part on an aggravated assault committed by Calvin upon his brother, Anthony. Anthony testified in the present case that he was not injured in the confrontation with his brother and that the entire incident occurred because of a misunderstanding. The aggravator is also based in part on Calvin's two contemporaneous convictions as principal to crimes against Big Gaines simultaneously committed by codefendant Anthony.

Here, in contrast, while Phillips' family at the penalty phase attempted to minimize Phillips' culpability for shooting his aunt a decade earlier, Phillips was, in fact, convicted of intentionally shooting his aunt, that is convicted of Aggravated Battery, not merely assaulting the aunt, unlike Johnson, and not merely of an accident during a misunderstanding, unlike Johnson. Furthermore, while the trial court here made no factual finding concerning the family's penalty phase testimony, it did give this aggravator great weight and cited to not only the conviction for the shootout but also Phillips' conviction for the Aggravated Battery. Moreover, Phillips' discussion of Johnson ignores the significance of his conviction for the separate incident of his gunfight in his other armed robbery, involving his 13 rounds fired at the citizen, only three months from this armed robbery and murder and under circumstances much like this case.

Moreover, Johnson included a statutory mitigator, not present here, and in Johnson, the trial court afforded "substantial weight" to a mitigator,

not present here.

In sum, Johnson's aggravation was weaker than here, and Johnson's mitigation was stronger than here. Johnson does not apply. Instead, the cases the State cites in section "IIID" above apply.

Douglas v. State, 878 So.2d 1246, 1263 (Fla. 2004), distinguished Johnson: "the trial court in Johnson did not find HAC as an aggravator, and this Court concluded that 'the prior violent felony aggravating circumstance, although properly found to be present, is not strong when the facts are considered.'" Here, there is additional aggravation besides prior violent felony, but more importantly, "when the facts [of the prior violent felony] are considered," here the aggravator is, in fact, "strong," as the trial court found with its "great weight."

Accordingly, Taylor v. State, 855 So. 2d 1, 32 n.33 and accompanying text (Fla. 2003)(plurality opinion; 10-2), distinguished Johnson and cited to some of the cases on which the State relies in section "IIID," concluding that Johnson and related cases "are inapposite, involving either less egregious facts or less aggravation and more mitigation." The trial court in Taylor made the following mitigation findings:

> (1) Taylor was raised in a **dysfunctional family and suffered neglect and abuse during his first eleven years** (proven); (2) by the time Taylor was encouraged to have an interest in education, it was too late, and he dropped out of junior high school (proven); (3) as a child and adult Taylor was known to be a thief, but not a violent person and an act of violence is out of character for him (not proven); (4) Taylor makes friends easily, enjoys people who enjoy him, and does good deeds for friends and strangers (not proven); (5) Taylor enjoys family relationships and activities (not proven); (6) Taylor has shown that he can be a skilled, reliable, and diligent worker inside and outside of prison (proven); (7) Taylor performs well when he has structure in his life (not proven); (8) Taylor has

> been and can continue to be a positive influence in the lives of family members (not proven).

855 So. 2d at 13 n.10.

Taylor's prior violent felony was a "1981 offense for attempted armed robbery," 855 So. 2d at 32 n.34, whereas here the aggravator is far-stronger and avoid arrest does apply, more than compensating for Taylor's 10-2 jury vote. Taylor's mitigation was roughly equivalent to Phillips'. Taylor and its distinguishing of Johnson support affirmance here.

Phillips final case is Hess v. State, 794 So.2d 1249, 1268 (Fla. 2001), which was a plurality opinion. Hess relied on Terry and Johnson, and therefore, Hess is not applicable because Terry and Johnson are inapplicable. Hess reasoned:

> Like the factual circumstances in Terry, the exact circumstances surrounding the robbery-murder in the instant case are unclear. Appellant provided several different recitations to the police as to how the murder occurred. The only other person allegedly present at the time of the crime was appellant's wife who did not actually witness the murder. And, as noted above, while the evidence supports a finding of two aggravating factors, those factors are not as compelling as we have found in other cases, especially in light of the totality of the aggravating and mitigating circumstances in this case.

Here, the material facts concerning "how the murder occurred" are clear and found by the trial court: Phillips waited in the business's parking lot with his loaded handgun until his robbery prey (Mr. Sweet) appeared; Phillips pointed his .357 magnum at the robbery victim; Phillips obtained Mr. Sweet's money and rather than flee with it, Phillips stood his ground and gunned down Mr. Aligada as Aligada approached, then Phillips tried to shoot his robbery prey, Mr. Sweet, as Sweet ran away.

Furthermore, in Hess, 794 So.2d at 1266, unlike here, "the state

presented no facts as to the circumstances surrounding the offenses" for the prior violent felony aggravator. While in Hess and here, it appears that a victim in a prior felony has forgiven the defendant (here, the aunt), here there is nothing whatsoever to suggest that the citizen with whom Phillips engaged in a gunfight has forgiven him, so that prior violent felony is unattenuated. Moreover, as previously pointed out, the gunfight in the other armed robbery was only three months after this murder and involved the circumstance of a victim leaving a worksite, like this murder incident. Hess is inapplicable.

Moreover, in Hess, the mitigation included substantially weightier mitigation than here. Especially noteworthy, Hess included as a mitigator: "(13) appellant suffered from some mental or emotional disturbance when this murder was committed (moderate weight)," which was not present here. 794 So.2d at 1258. Thus, Hess found it "[p]articularly noteworthy … that appellant has a history of learning disabilities, was considered ten years behind his chronological age, was considered borderline retarded during his school years and was placed in special education classes as a result of his mental or emotional infirmities." Id. at 1267. There is no such evidence here. To the contrary, Phillips has become a reader in jail, he helps Mr. Powe fill out forms, and he demonstrated his intelligence in the courtroom, as discussed supra.

Further, in Hess, statutory mitigation applied: "In addition, we have held that the trial court erred in not finding as statutory mitigation the fact that appellant had no significant history of criminal activity prior

to this crime, an important statutory mitigation not considered by the trial court." Id. at 1266-67. Here, there is no statutory mitigation, nor anything approximating it.

In sum, Hess does not apply here.

Phillips' case law is inapplicable, and the cases discussed in the preceding section (IIID) are applicable. The death sentence is proportionate and merits affirmance.

ISSUE IV: DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY NOT STRIKING THE ENTIRE JURY PANEL AND BY NOT GRANTING A NEW TRIAL DUE TO JURORS BRIEFLY AND INADVERTENTLY VIEWING THE DEFENDANT IN JAIL CLOTHES? (IB 42-44, RESTATED)

ISSUE IV concerns some jurors briefly and inadvertently seeing Phillips in his jail uniform in a hallway.

While ISSUE IV's "acknowledge[ment]" (IB 43) suggests that this claim would not generally entitle Phillips to relief on this claim, the claim argues that, in light of the seven-to-five jury death recommendation, it was "reversible error" (IB 43-44) for the trial court not to "revisit" the issue when it reviewed Phillips motion for new trial.

The events targeted by ISSUE IV occurred prior to opening statements. Phillips told the trial court that he saw some of the trial jurors in this case in the hallway. (XII 332) Phillips said he recognized a "guy and a female" and the officer forced Phillips to keep moving down the hallway. (XII 335) A bailiff told the judge that he was walking to Phillips' side "kind of trying to block the view if anybody showed up." (XII 336) At one juncture, the bailiff saw one of the jurors come around a corner, and the juror responded to the bailiff's motion to go the other way. (XII 336) The

bailiff was not sure if any jurors saw Phillips in the hallway. (XII 336)

At defense counsel's request, the judge then inquired of Mr. Pruner, a juror (XII 338), who said he did not see Phillips in the hallway. (XII 338-39)

Defense counsel then moved to strike the entire jury panel because "some other jurors may have seen [Phillips] in his prison garb walking down the hall." (XII 339) The judge indicated her intent to inquire of all of the jurors, and defense counsel agreed. (XII 340) After discussing jury instructions and exhibits, the judge inquired of all the jurors "if any of you … observed Mr. Phillips anywhere in the courthouse, other than in here … this morning," and three jurors (Mr. Staplefoote, Ms. Shelly, and Mr. McNamara) responded. (XII 346-48)

The judge then inquired of each of the three jurors separately. Mr. Staplefoote said he saw Phillips in the hall "**in his clothing** before he changed into the suit he now has on." Staplefoote said he could set aside his observation in reaching a verdict, and counsel suggested no other questions. (XII 348-49)

Juror Shelly told the judge that she saw Phillips in the hall. She continued: "all I noticed is that what he had on was different than what he had on yesterday." In response to defense counsel's questions, Juror Shelly said she saw him in a "**green uniform**" and she "thought they came over [from the jail] dressed in a suit." (XII 350-51) In response to the judge's question, she said she could set aside what she saw and base her verdict solely on the instructions on the law. (XII 351-52)

Juror McNamara told the trial court that he asked at the information desk if he could use the bathroom, and when he took a step that way, he saw Phillips with a **green prisoner uniform**. He was "25, 28 feet away" at the time, and McNamara "stepped back immediately" and they let McNamara use the juror restroom. (XII 353) When the judge asked him if he could set aside what he saw and base his verdict solely on the evidence presented during the trial and the court's instructions on the law, Juror McNamara responded, "No problem. I have no problem with that." (XII 354)

The judge directed each of the three jurors not to discuss her inquiry with any other juror. (XII 349, 352, 354)

Defense counsel renewed his motion to strike the entire panel, and the judge reserved ruling. (XII 354-56)

At the lunch recess, with the jury absent, the trial court discussed Cooper v. State, 739 So.2d 82 (Fla. 1999); Jackson v. State, 545 So.2d 260 (Fla. 1989); and Johnson v. State, 750 So.2d 22 (Fla. 1999). The trial judge concluded that the three jurors saw Phillips inadvertently and that the observation was "not so prejudicial that it requires the jury panel to be stricken or that a mistrial be entered." (XII 488-91)

After the jury returned its guilty verdicts (XIV 830-33; VI 1111-13) and after the jury recommended the death penalty (VII 1352; XIX 1303-1306), the defense filed a motion for new trial in which it stated: "The Court erred in denying the defense's motions for mistrial, particularly the motions for mistrial based on jurors admitting they had viewed the Defendant in jail garb." (VII 1362)

When the motion for new trial was orally argued towards the end of the Spencer hearing, defense counsel did not initially mention any jail-clothes claim, and the trial court denied the motion for new trial (See Suppl 37-39), then, a little, later defense counsel mentioned "the jail garb issue" (Suppl 40), and the trial court confirmed that it is denying the motion for new trial (Suppl 41).

Phillips now argues that the motion for new trial should have been granted due to the 7-5 jury vote recommending death. However, Phillips has not shown where such a claim was presented to the trial court, and the State has not seen where this claim was presented below. Therefore, as such, ISSUE IV, was not preserved, barring it here. As this Court enunciated in Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved. ***E.g.***, ***Steinhorst v. State***, 412 So.2d 332, 338 (Fla.1982); ***Black v. State***, 367 So.2d 656 (Fla. 3d DCA 1979).

This Court has applied preservation principles to related claims. For example, Finney v. State, 660 So.2d 674, 683 (Fla. 1995), held regarding a shackling claim:

> No objection was made to the court's decision to defer to the sheriff on the matter, nor did counsel request that the court inquire into the reasons for the sheriff's decision. Because the **specific claim** raised here was never raised to the trial court, the claim is not preserved for appeal.

See Gore v. State, 846 So.2d 461, 471 (Fla. 2003)("court offered trial counsel the opportunity to voir dire the jury pool regarding whether or not they had witnessed Gore being shackled. Trial counsel declined because he

felt it would 'emphasize' the issue. Thus, this issue was not preserved for appeal"; no IAC appellate counsel), citing Sireci v. Moore, 825 So.2d 882 (Fla. 2002); Buckner v. State, 714 So.2d 384, 388 (Fla. 1998)("We summarily reject the assertion that Buckner was deprived of his right to watch the videotape due to the shackling because that issue was not properly preserved for review"); Taylor v. State, 848 So.2d 448, 450 (Fla. 4th DCA 2003)("requirement that the defendant request an inquiry as to the need for shackling is consistent with the principle that the burden of demonstrating error is on the defendant"); Brown v. State, 856 So.2d 1116, 1116 (Fla. 4th DCA 2003)(appellate issue of "whether the shackling of Brown during trial without conducting an evidentiary hearing entitles him to a new trial" unpreserved where "defense counsel moved [the trial court] to have Brown's shackles removed"; same argument must be made to trial court to preserve it). See also Hendrix v. State, 908 So.2d 412, 426 (Fla. 2005)(IAC appellate counsel claim; "Defense counsel never objected to the shackling issue with the trial court, so there would be no information in the record as to whether Hendrix was shackled during the trial").

Moreover, if the merits are reached, ISSUE IV has none. The trial court was correct. Even if Phillips had been viewed in the hallway with shackles, he would be entitled to no relief. However, as narrated above, the three jurors briefly only saw Phillips in his jail uniform.

Cooper v. State, 739 So.2d 82, 85 n.7, n.8 (Fla. 1999), rejected the issue, "(4) in denying Cooper's motion for mistrial after jurors witnessed Cooper in shackles." Cooper held: "Cooper, however, was not tried in

shackles, and the fact that jurors may have inadvertently seen him in shackles when he was being transported to or from the courtroom does not require reversal." Here, there is no evidence that Phillips was "tried in shackles" or even tried in his jail uniform. If "inadvertently seen … in shackles" is not enough for a mistrial, then momentarily seeing Phillips in a uniform is certainly not enough for any relief here.

Like the trial court here, Cooper cited to Jackson v. State, 545 So.2d 260 (Fla. 1989). Jackson rejected a claim based upon "the jury inadvertently seeing the defendant in handcuffs":

> As we held in *Neary v. State*, 384 So.2d 881, 885 (Fla.1980), 'the inadvertent sight of the appellant in handcuffs was not so prejudicial that it required a mistrial.'

Jackson, 545 So.2d at 265. A fortiori, here the jurors only glimpsed at Phillips in his jail uniform.

The trial court also cited to Johnson v. State, 750 So.2d 22, 26 (Fla. 1999), which rejected an inadvertent jury view of the Defendant in handcuffs:

> Issue four involves an issue also raised in Cooper's direct appeal: the jury's observation of the defendants in handcuffs and chains as they were brought into the courtroom. Johnson was not forced to stand trial in handcuffs and chains. The jury's observation occurred as the defendants were escorted past the jury in a hallway outside the courtroom. Consistent with our ruling in *Cooper*, we find that the jury's inadvertent view of Johnson in handcuffs does not warrant reversal of Johnson's convictions or sentences. *See Cooper*, 739 So.2d at 85 n. 8.

Here, Phillips was only viewed in his uniform for a moment, and each of the three jurors indicated, without any hesitation or equivocation, that they would not let the observation affect their proper function as jurors.

Further, Neary v. State, 384 So.2d 881, 885 (Fla. 1980), rejected a

handcuffs claim:

> The contention that Neary was prejudiced because some jurors inadvertently saw him being brought to the courtroom in handcuffs is without merit. We recognize that an individual accused of a crime cannot be forced over his objection to stand trial in prison garb. ***Estelle v. Williams***, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). This appellant, however, was not forced to stand trial in prison clothes or in handcuffs, and we find that the inadvertent sight of the appellant in handcuffs was not so prejudicial that it required a mistrial.

In conclusion, jurors briefly and inadvertently viewing Phillips in his jail uniform is not so prejudicial to require any relief. Phillips on appeal speculates that perhaps it made a difference in the jury recommendation of death. However, speculation is not a ground for reversal. Instead, if Phillips wanted to pursue such a claim, his counsel should have raised it below so the trial judge could have inquired appropriately of the jurors. Here, the trial judge conducted interviews with the jurors that were commensurate with the defense's claim to her, and the interviews revealed brief and inadvertent views of a defendant who has been charged with murder and armed robbery in a jail uniform.[12] Each juror said the momentary view would have no effect, and neither the record nor Phillips demonstrates otherwise. Phillips is entitled to no relief.

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[12] Indeed, it is common knowledge that defendants charged with murder will be held in jail pending trial. Indeed, here, concerning the penalty phase, jurors and the public would be justifiably concerned if a defendant who has been convicted of murder and armed robbery was not held in jail during the penalty proceedings.

ISSUE V: ARE FLORIDA'S SENTENCING PROCEDURES UNCONSTITUTIONAL UNDER RING V. ARIZONA? (IB 45-47, RESTATED)

ISSUE V, arguing Ring v. Arizona, 536 U.S. 584 (2002), correctly acknowledges (IB 45-46), that this claim is meritless under the case law.

The finding of prior violent felony (VIII 1415) renders Ring inapplicable and therefore this claim, meritless. See, e.g., Poole v. State, 997 So. 2d 382 (Fla. 2008)("prior violent felony conviction aggravator took a case outside the scope of *Ring*"); Bevel v. State, 983 So. 2d 505, 526 (Fla. 2008)("Where one of the aggravating circumstances is a 'prior violent felony' conviction, this Court has consistently held that *Apprendi* and *Ring* do not apply"); Jones v. State, 855 So. 2d 611 (Fla. 2003)("Florida capital sentencing scheme was constitutional as applied to defendant where one of the aggravating circumstances found against him was that he had a prior violent felony conviction").

Furthermore, the jury's guilt-phase finding of guilty as charged of Armed Robbery (VI 1113; XIV 830-33) satisfies Ring. See, e.g., Salazar v. State, 991 So. 2d 364 (Fla. 2008).

Indeed, here, the jury also found beyond a reasonable doubt that the First Degree Murder was committed under both premeditation and during the commission of a felony (VI 1111; XIV 830-33), further satisfying Ring.

See Hudson v. State, 992 So. 2d 96 (Fla. 2008)("Hudson's *Ring* claim fails because the evidence established that he had a prior violent felony conviction-the second-degree murder conviction that he incurred as a juvenile-and he was convicted by a unanimous jury of the contemporaneous kidnapping of Fizzuoglio in this case"), citing Johnson v. State, 969 So.2d

938, 961 (Fla. 2007)(holding that relief is not available under *Ring* where one of the aggravators rests on the separate conviction for kidnapping, which satisfies Sixth Amendment requirements); Bryant v. State, 901 So.2d 810, 823 (Fla. 2005)(holding that *Ring* does not apply where one of the aggravating circumstances is a prior violent felony).

Furthermore, Ring does not apply where, as in Florida, the jury is not increasing the maximum penalty, which is already set at death. See Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Shere v. Moore, 830 So.2d 56, 62 (Fla. 2002); Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001); Mills v. Moore, 786 So.2d 532, 536-37 (Fla. 2001).

Yet further, even if Ring applied to this case, it was satisfied. This is not an override case. Phillips had a jury in his penalty phase that recommended death. As observed in Jones v. United States, 526 U.S. 227, 250-51 (1999), the Sixth Amendment is not violated when a jury recommends a death sentence. Moreover, there is no jury-unanimity requirement. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972)(upholding a conviction based on a 9-to-3 jury vote); Apodaca v. Oregon, 406 U.S. 404 (1972)(upholding convictions by less than unanimous jury, 11-1 and 10-2).

ISSUE VI (ADDED): WAS THE EVIDENCE SUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER?

The State adds this section because this Court conducts an independent review of sufficiency of evidence.

In determining the sufficiency of all the evidence, it is viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45

(Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since ...").

Here, the evidence of guilt was overwhelming.

Phillips' confessions alone render the evidence sufficient. Meyers v. State, 704 So.2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply …"); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) ("We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime"). Phillips confessed to this murder and armed robbery to Ms. Joyce (XIII 532, 540-41; XIX 1241-42) as well as the police (XIII 650-713; XIX 1243-44).

Furthermore, eyewitnesses identified Phillips as the robber and shooter. (See XII 380-81, 398, 393-94, 404; XIII 643-44; SE 10; XII 413-14; XIII 641-43; SE 11; see also 421-22, 426-25)

Furthermore, Phillips DNA (XIII 582-83; SE 34) was identified, at one in 9.5 trillion odds (XIII 597, 598-99, 630), on the gear shift of Mr. Sweet's vehicle (XII 477-78; SE 36), which he (Phillips) had driven away from the robbery-murder scene (XII 384, 391, 425-26, 433, 437).

The evidence of guilt was much more than sufficient.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on July 27, 2009: W.C McLain, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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