

IN THE SUPREME COURT OF FLORIDA

GALANTE ROMAR PHILLIPS,

Appellant,

v.

CASE NO. SC08-1882

STATE OF FLORIDA,

Appellee.

_____ /

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 21 volumes. Volumes 1-9 contain the records of the lower court and transcripts of some hearings. These volumes will be referenced with the prefix "R." Volumes 10-21 contain the transcripts the court reporter prepared including jury selection, the guilt and penalty phases of the trial, sentencing and various hearing transcripts. The prefix "T" will be used to reference these volumes. A supplemental record containing the Spencer hearing will be referenced with the prefix "SR." Two separately numbered volumes contain copies of certain exhibits. The exhibits will be reference with the exhibit number assigned in the trial court during the proceedings. The appendix to this brief is a copy of the trial court's sentencing order.

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On November 29, 2006, a Duval County grand jury indicted Galante Romar Phillips for first degree murder for the shooting death of Christopher Aligada and for the armed robbery of Wilbur Sweet. (R1:25-26) Both offenses allegedly occurred on October 18, 2005. (R1:25-26) The indictment superseded an information for second degree murder and armed robbery filed on October 25, 2006. (R1:8-9) The State filed its notice of intent to seek a death sentence on December 8, 2006. (R1:36) Phillips proceeded to a jury trial, and on April 9, 2008, the jury returned guilty verdicts on both counts of the indictment. (R6:1111-1113) After the penalty phase held on April 22-23, 2008, the same jury recommended a death sentence with a vote of 7 to 5. (R7:1352-1354) At a Spencer hearing held on June 26, 2008, Phillips presented one additional witness. (R7:1380; SR1:1-62) The court permitted additional argument as a continued Spencer hearing on August 1, 2008. (R7:1381-1393; T20:1315-1330)

Circuit Judge Mallory D. Cooper adjudged Phillips guilty and imposed sentence on September 19, 2008. (R8:1406-1422; T21:1335-1354) (copy of sentencing order attached as an appendix to this brief) The court sentenced Phillips to death for the murder and life in prison for the robbery. (R8:1406-1422; T21:1335-1354) In

support of the death sentence, the court found three aggravating circumstances: (1) Phillips had a previous conviction for a violent felony; (2) the homicide was committed during a robbery; and (3) the homicide was committed to avoid arrest. (R :1414-1416) The Court addressed 25 nonstatutory mitigating circumstances the Defense presented and entered findings as follows:

(1) The defendant experienced frequent moves and changes in home and schools as a child. (slight weight)

(2) The defendant suffered from childhood mental illness. (slight weight)

(3) The defendant suffered from adult mental illness. (not found)

(4) The defendant suffered from childhood learning disabilities. (slight weight)

(5) The defendant's childhood attention-deficit drug, Ritalin, was not administered as prescribed. (slight weight)

(6) The defendant's birth was a difficult one and the defendant did not breathe for a period of time. (slight weight)

(7) The defendant was raised in drug and crime infested neighborhoods. (slight weight)

(8) The defendant was raised by a mentally ill mother. (some weight)

(9) The defendant was raised without any stable father figure.
(slight weight)

(10) The defendant was openly disfavored as a child. (slight weight)

(11) The defendant was deprived of food and clothing as a child. (little weight)

(12) The defendant suffered physical abuse as a child. (some weight)

(13) The defendant suffered mental abuse as a child. (moderate weight)

(14) The defendant suffered the loss of his grandmother, the only adult who loved him as a child, when the defendant was ten. (moderate weight)

(15) The defendant was raised in poverty. (slight weight)

(16) The defendant suffered devastating on-the-job injury.
(slight weight)

(17) The defendant is reverent. (slight weight)

(18) The defendant is trustworthy with family members. (not found)

(19) The defendant is supportive of family members. (not found)

(20) The defendant is protective of family members. (not found)

(21) The defendant respects and helps elderly persons. (slight weight)

(22) The defendant is kind to animals. (slight weight)

(23) The defendant respects the jury and the judicial system. (slight weight)

(24) The defendant is friendly. (slight weight)

(25) The defendant is remorseful. (not found)

(R8:1416-1420)

Phillips filed his notice of appeal to this Court on October 1, 2008. (R8:1430)

Motion To Strike Jury Panel

On the first day of trial after jury selection, three jurors observed Phillips being escorted in a courthouse hallway in handcuffs and wearing a jail uniform. (T12:328-356) Although Phillips changed clothing before entering the courtroom, he was not allowed to change clothes before walking through the courthouse hallways. The trial court inquired of the jurors to determine who may have seen Phillips in jail clothes. Three jurors said they saw him, and the court questioned each individually. (T12:347-354) Juror Staplefoote testified that he was in the designated waiting area for jurors when he saw Phillips walking in the hallway before he changed his clothing into the suit he wore in court. (T12:348-349) Staplefoote said he could set aside the observation and

would not use it in reaching a decision on a verdict. (T12:349) Juror Shelly stated she saw Phillips in the hallway and noticed he wore different clothing, a green uniform. (T12:349-350) The uniform indicated to her that he was in jail. (T12:351) She thought he would have been permitted to change into different clothes before being brought to court. (T12:351) She said she could set aside the observation in reaching a verdict in the case. (T12:350-352) Juror McNamara testified he saw Phillips in a green jail prisoner uniform in the hallway outside the courtroom. (T12:352-353) He told the court he could set aside the observation in reaching a verdict. (T12:354)

Defense counsel moved to strike the jury panel on the ground that these jurors knew Phillips was a prisoner and might believe he was incarcerated for another offense besides the case being tried. (T12:354) The court delayed ruling, and, later, the court denied the motion. (T12:354-356, 488-491)

Facts - Guilt Phase

Wilbur Sweet worked as a yard manager at a lumber company, Builder's First Source in Jacksonville. (T12:374-375) On Tuesday, October 18, 2005, Sweet left work about 8:30 p.m. (T12:376) About twelve employees were leaving work at that time. (T12:378) Sweet's supervisor and friend, Christopher Aligada, was also walking to the parking lot. (T12:379-380) Since Sweet thought he was going to

complete the purchase of a car from another employee, Landon King, he had \$3100 in cash with him that day. (T12:377; 438-441) Sweet went to his burgundy Yukon SUV in the fenced parking area, and cranked the vehicle. (T12:380) The Yukon had been stolen a couple of weeks earlier, and due to damage, Sweet had to crank the vehicle from the outside using a screwdriver. (T12:380, 398)

As Sweet turned to enter the vehicle, a man with a gun confronted him and demanded his money. (T12:380-381) Sweet described the man as a black male with a medium build, wearing a white tank top with shorts and using a .357 magnum pistol. (T12:381, 385-386) In court, he identified Phillips as the man. (T12:380-381) At first, Sweet said he had no money, but the man pointed the gun, said give me the money and he went into Sweet's pocket and took the money. (T12:382) He also took Sweet's wallet. (T12:382) After taking the money, the man turned the gun away from Sweet and fired two shots. (T12:382-383, 400-401) Sweet was facing the man and did not see where he fired. (T12:383) He later realized that Chris Aligada had been shot. (T12:383) The shots happened quickly, spontaneously -- apparently because the man saw Aligada coming toward them from the side. (T12:403) Sweet ran away, jumped across a parked car and the man shot in his direction. (T12:384) When the shooting stopped, Sweet ran to another car and hid under it. (T12:384) Sweet then saw the man driving away in the

burgundy Yukon. (T12:384) About 20 yards away toward the entrance to the building, Sweet saw Aligada on the ground. (T12:384) He ran to him, and then he ran to the building to call for help. (T12:384) Sweet returned to Aligada, saw an injury to his arm and wrapped it with a shirt. (T12:385) When the bleeding did not stop, Sweet also saw an injury to Aligada's side. (T12:385) The police and rescue personnel arrived and took Aligada to the hospital. (T12:385)

Two employees, Tim Long and Mark Walton, testified they saw someone they did not recognize in the fenced parking area that evening. (T12:407-413, 421-422) Long described the man as a bigger individual, muscular and about 240 pounds. (T12:411) Walton described the man as younger, short hair and stocky. (T12:426) He seemed suspicious just waiting in the parking lot. (T12:418-421) Walton saw the man and Sweet interacting and Aligada walking toward Sweet. (T12:422-424) He heard two gunshots. (T12:422, 424) Aligada ran and then fell to the ground. (T12:424) Walton heard three shots fired and the man shot at Sweet. (T12:427, 432) Walton was scared, ran to his truck, and drove down a service road heading back to the building to call for help. (T12:425) As he drove, he saw the man driving Sweet's vehicle. (T12:425)

Officer C.P. James arrived at the lumber company. T12:442-445) After talking to witnesses, he had a BOLO broadcast with a description of the suspect and Wilbur Sweet's vehicle. (T12: 445-

448) As he responded to the scene, Officer James Carter found the burgundy Yukon abandoned in the street a few blocks from the lumber company. (T12:448-451) He remained with the Yukon and secured it until crime scene personnel towed the vehicle. (T12:451-454)

Crime scene investigators recovered evidence from the parking lot of the lumber company and the Yukon. (12:458-478) A blue car located in the parking lot had been damaged by a gunshot. (T12:468-472) There was a bullet hole in the car door and a broken window. (T12:468-472) Bullet fragments were recovered from the vehicle, and these were submitted to FDLE for examination. (T12:471-472) The investigators processed the burgundy Yukon belonging to Wilbur Sweet for latent fingerprints and possible DNA evidence. (T12:472-478)

Dr. Eugene Scheuerman received Aligada's body from the hospital and performed an autopsy on October 19, 2005. (T12:492, 495-497) Scheuerman concluded the death was a homicide caused by a gunshot wound to the abdomen. (T12:497) A gunshot wound passed through the upper left arm and a second wound entered the upper left flank. (T12:497-502, 506) Due to the location and irregular shape of the wound entering the body, Scheuerman concluded a single bullet traveled through the arm and into the body. (T12:497-502, 506) Bullet fragments were found inside the body and collected for evidence. (T12:503-504)

A firearm and tool mark expert with FDLE, Maysaa Farhat, examined the bullet fragments from the car and from the body of Aligada. (T13:547, 550-554) She determined that a fragment from the car and a fragment recovered at autopsy were fired from the same firearm that was either a .38 or .357 magnum revolver. (T13:550-557)

Katrina Joyce was Galante Phillips girlfriend and lived with him from August 2005 through October 2005, and she continued to date him for a time after October. (T13:528-529) Near the end of October, Phillips told her that he robbed someone and shot a person who tried "to be a hero" and stop the robbery. (T13:532) He said the robbery occurred in a parking lot. (T13:532-533) Joyce moved to Virginia in March of 2006. (T13:533) After talking to her sister about Phillips' statements to her, Joyce called the Jacksonville Sheriff's Office and spoke to Detective Scott Dingee. (T13:533-535, 639-640) On July 25, 2006, Dingee arranged for Joyce to see Phillips. (T13:535) Joyce also consented to have her conversation with Phillips recorded. (T13:535-536, 546, 640-641) Portions of the recorded conversation were played for the jury. (T13:536-542) (State Exhibit No. 32) During the conversation, Joyce brought up the subject of the robbery and shooting. (T13:5537-538) Phillips said the man tried to play hero and put himself in danger. (T13:540) Phillips said he had to shoot him to avoid

others and himself from being placed in danger. (T13:540-541) The money from the robbery was split among three people. (T13:541)

Leigh Clark, an expert with the FDLE DNA section tested various swabbed samples taken from the Yukon for DNA profiles. (T13:562, 579) She made comparisons to test to the known DNA profiles of Aligada, Sweet and Phillips. (T13:584) Partial DNA profiles were found on the steering wheel (State Exhibit 35), the gear shift (State Exhibit 36), and the armrest (State Exhibit 37). (T13: 580-589) These DNA profiles contained mixtures of more than one person's DNA. (T13:581-582) The testing of the steering wheel sample excluded Aligada, but neither Sweet nor Phillips could be excluded. (T13:585-586) (State Exhibit 35) However, a profile match could not be made to either Sweet or Phillips. (T13:585-586) The gear shift revealed a mixture of profiles. (T13:587-588) (State Exhibit 36) The minor contributor could not be matched to anyone, but Sweet could not be excluded. (T13:587-588) Phillips' DNA matched as the major contributor to the mixture. (T13:588-599) Testing of the armrest sample revealed insufficient information to match the partial profiles. (T13:586-587) (State Exhibit 37) Sweet could not be excluded. (T13:586-587) However, both Phillips and Aligada were excluded. (T13:586-587)

Detective Scott Dingee interviewed Phillips on October 4, 2006. (T13:635, 645) The interview was videotaped and played for

the jury. (T13:650-713) After being confronted with the information the detective had available, including the recorded conversation Phillips had with Katrina Joyce, Phillips admitted his culpability for the offense. (T13:654-664) The detective suspected that others were involved, since in the conversation with Katrina Joyce, Phillips mentioned splitting the money. (T13:668) Phillips denied anyone else was involved, and he said the money was not split. (T13:668-674, 679, 681-682) Phillips stated that he had talked to Aligada about obtaining a job at the lumber company a couple of weeks earlier. (T13:684-685, 701) Phillips said Aligada created a "situation" when he tried to take the gun from him. (T13:685) He said Aligada "rushed up on me" and attempted to grab the gun. (T13:685) Phillips had seen Sweet before the day of the offense, and he knew Sweet carried a large amount of money. (T13:687-688) Phillips knew Sweet's vehicle, and he followed Sweet to his work. (T13:689) When Aligada approached and grabbed for the gun, Phillips shot twice. (T13:690-691, 699) Phillips had a previously planned trip to Georgia, and he scattered the parts to the dismantled gun along the way. (T13:696-697)

Penalty Phase And Sentencing

At the penalty phase, the State introduced a judgment for aggravated battery for an incident in 1996, where Phillips shot his aunt in the leg with a shotgun when he was 17-years-old. (T18:943-

960, 990) Phillips pled guilty to the offense as an adult and received a sentence of five years. (T18: 1005) His aunt, his mother, his sister and the arresting officer testified about the events. (T18:943-1003)

On October 14, 1996, Galante Phillips was living with his mother, Joanna Farns. (T18: 961-962) Farns had an argument with her son because he had a sawed-off shotgun someone had given him. (T18:964-965) He did not want to get rid of it, and he said he was keeping it for a friend. (T18:965) At one point, Galante pointed the gun at his mother, and she left. (T18:966-967) Farns contacted her sister, Sandra Tatum, through a niece. (T18:967) When Farns returned home, the police were there. (T18:968) She learned her sister had come to the house and had been shot in the legs with the shotgun. (T18:968)

Sandra Tatum, Phillips aunt, came to the house after receiving the information that her sister was having a confrontation with Galante. (T18:943-946, 950) Her sister, Joanna Farns, was already gone when she arrived. (T18:946) Tatum found Galante there with a shotgun. (T18:947, 950-952) She was perhaps five to seven feet away when the shotgun discharged and the pellets hit her in one leg. (T18:952-953) She did not remember Galante pointing the gun at her, and she believes the gun was pointed down and unintentionally fired. (T18:959) At the emergency room, Tatum had her leg

bandaged, and she was released. (T18:954-955) She denied she told the police that she had a heated argument with Galante or he had threatened anyone. (T18:957)

Dewanda Powe, Phillips' sister, was present at the residence at the time Sandra Tatum was shot. (T18:995-997) She lived with her father at the time, but happened to be at the house. (T18:1002) Galante had also called her and said their mother was "tripping." (T18:1003) Powe remembered the verbal confrontation between Galante and Tatum included a warning to Galante not to hurt his mother. (T18:997) Tatum kept her hand in her pocket where she kept her registered firearm. (T18:997-998) Powe did not tell the police at the time, because she was not asked. (T18:997) Tatum place her gun in the trunk of her car before the police arrived. (T18:999) Powe remembers Galante swinging the shotgun back and forth while Tatum confronted him, and the gun accidentally discharged. (T18:998, 1000)

Stephen Amos was the officer who arrested Phillips for the shooting of his aunt. (T18:975-976) According to his report, Sandra Tatum stated that she was shot in both calves of her legs after an argument with Phillips. (T18:977) Amos noted birdshot sized pellet wounds to Tatum's legs. (T18:977) Tatum and Dewanda Powe reported that Phillips pointed and fired the sawed-off shotgun

when five to seven feet away from Tatum. (T18:978-979) Phillips was 17-years-old at the time of his arrest. (T18:991)

In February 2006, Phillips pled guilty to a charge of grand theft for a 30 month sentence. (T18:1028) The State presented the testimony of Detective E.M. Cayenne to establish that the facts of the offense included the use of a firearm. (T18:1007) Phillips robbed the victim in a parking lot with a gun. (T18:1009-1010) A co-worker of the victim's pulled a gun and shot at Phillips. (T18:1010-1022) Phillips fired back, but no one was injured. (T18:1010, 1021-1022)

The State presented the testimony of three victim impact witnesses. Linda Aligada, the victim's mother, and Christina Aligada, the victim's neice, testified about the loss to the family. (T18:1029-1040) Wilbur Sweet, the victim of the robbery in this case and the friend of Aligada, testified about the loss of his friend and coworker. (T18:1041-1043)

Five witnesses testified for the defense at penalty phase. Phillips' mother, Joanna Farns, and sister, Dewanda Powe, testified about Phillips' background and childhood. (T18:1044; 1088) Zelana Duggins presented Phillips' school records. (T18:1079) Two psychiatrists testified -- Dr. Miguel Mandoki and Dr. Ernest Miller. (T19:1123; 1187)

Joanna Farns suffered from severe depression her entire life, and she shot herself in 1975, shortly before Galante was born. (T18:1044-1045) During Galante's birth, forceps were used to turn him, and he had trouble starting to breath after his birth. (T18:1048-1049) Galante lived with Farn's mother until he was eight-years-old. (T18:1047) Farns had difficulty raising Galante because of her depression and her crack cocaine addiction. (T18:1047-1049) Galante's father was a drug dealer, went to prison and ultimately, he was killed when Galante was six-years-old. (T18:1057) The only potential male role-model for Galante was Fred Powe, who was Galante's half-sister's father. (T18:1056) Fred Powe never lived in the same house -- he was around occasionally. (T18:1088-1089) Farns said when Galante was with her, they lived in four of five different houses. (T18: 1059-1060) All of the houses were in neighborhoods with a high levels of illegal drug activity. (T18: 1060)

Galante had learning difficulty and attended special education classes in school. (T18:1050) He was prescribed Ritalin for hyperactivity, but Galante did not want to take the medication. (T18:1052-1051) Farns and the school had difficulty getting Galante to take the medication properly. (T18:1051-1052) Dr. Mandoki lowered the dose, but Farns is not sure Galante took the medication. (T18:1053-1054)

After the shooting incident involving his aunt, Galante went to prison and returned to Farns' home when released. (T18:1066) He had difficulty finding work. (T18:1066-1067) A relative got Galante a job with the railroad. (T18:1067) Unfortunately, Galante was injured on the job. (T18:1068) Someone accidentally backed over him in a truck, pushing him into a wall. (T18:1068) He required back surgery, and he never had another job. (T18:1068)

Dewanda Powe, Phillips' sister, testified about their life growing up. (T18: 1088--1089) Galante, Dewanda and their other sisters each had different biological fathers. (T18:1089-1091) Galante never had a father figure in his life. (T18:1089) Dewanda's father, Fred Powe, was involved in her life, although he never married her mother and never lived in the same house. (T18:1089-1091) For a time, Fred Powe did provide some support to Galante. (T18:1090-1092) He would bring him soap and shampoo and try to teach him about personal hygiene. (T18:1090-1093) Dewanda said their mother never taught the children anything about personal care, and her father taught her everything about feminine hygiene. (T18: 1093) Galante always wore hand-me-down clothes, while his sisters received clothes from their respective fathers. (T18:1090-1092) While his sisters received Christmas gifts from their fathers, Galante almost never had a new gift. (T18: 1095) Sometimes, Fred Powe would bring something to Galante, but because

he did not know Galante, the gift would not be something Galante wanted. (T18:1095)

Dewanda said that their mother's drug addiction was active while they were growing up, and she would find her mother's crack pipes that she thought were bubble blowers. (T18:1093-1094) They had food shortages in the house, and Galante started stealing food at the 7-Eleven convenience store. (T18:1094) The store clerks saw what Galante was doing, and they started giving him food out of pity. (T18:1094) Their mother would beat them, often with an engine fan belt with the ridges on the surface. (T1:1095-1096) Dewanda thought her mother beat her just for stress relief. (T18:1096) She would wet the fan belt first. (T18:1096) Sometimes she would beat Galante when he was in the bath tub while he was wet and naked. (T18:1096) At times, she would wake Galante up while he slept in bed and beat him. (T18:1096-1097) She beat him with a cast iron frying pan, a mop or other objects. (T18:1096) Often, their mother would verbally abuse him. (T18:1096) She told Galante he was dumb. (T18:1098) When Galante's mother found out the man she thought was his father was not, she told him his real father was no good, and Galante would be no good. (T18:1098) She told him, "He ain't shit. You ain't going to be shit. You ain't never going to have shit." (T18:1098) She threatened to shoot or stab the children. (T18:1096-1097) Their mother frequently told them she

never wanted children. (T18:1097) She said she could not wait until they died and she could collect insurance money. (T18:1097) Galante would talk to Dewanda during these times to try to make her feel better. (T18:1097)

Galante and Dewanda used to talk about having other family members as parents -- aunts or uncles. (T18:1099) Galante loved his grandmother with whom he lived when he was young. (T18:1099) Dewanda and a sister were living with their mother until one day Galante showed up. (T18:1099) They did not know he existed. (T18:1099) Their mother told them he was their brother, and he would be living with them. (T1096) Galante's grandmother became disabled, and he loved and respected her. (T18:1100-1101) After his grandmother died, Galante was greatly impacted since she was the only person who showed him real love. (T18:1100) Around age twelve, Galante started running away. (T18:1100)

Dewanda remembers Galante as caring and kind. (T18:1003-1104) He helped an elderly neighbor and was kind to animals in the neighborhood. (T18:1103-1104) Dewanda, herself, had a terminal illness. (T18:1104) Her testimony was videotaped at the hospital. (T T18:1087-1089) She could not walk or care for herself. (T18:1104-1105) For a time, Galante cared for her including changing her diaper she had to wear, bathing her, and preparing her medicine. (T18:1105) At times, he helped pay her bills. (T18:1108)

Zelana Duggins, who worked for the Duval County School Board, presented ten years of school records for Phillips. (T18: 1079-1082) Galante attended fifteen different schools over the ten year period. (T18:1081-1082) These schools included the Hubbard House, which is a school at the shelter for abused women. (T18:1084) He also attended the school in the juvenile detention center. (T18:1082) A psychological report on Galante in the first grade classified him as emotionally handicapped with learning disabilities and attention deficit disorder. (T18:1082-1083) Galante attended special education classes. (T1082-1083)

Dr. Miguel Mandoki, a child psychiatrist, first evaluated Galante Phillips at seven-years-old in 1986. (T19:1123, 1125) With follow-up, Mandoki saw Galante for a period of months. (T19:1149-1150) Mandoki performed some testing, admitted Galante for inpatient observation to assess the best course of medications. (T19:1126-1127) Galante's primary diagnosis was attention deficit and hyperactivity disorder along with some learning disabilities. (T19:1127-1129) Mandoki prescribed Ritalin. (T19:1127-1128) A child with these difficulties could not settle down enough to learn, and Galante's poor family situation would have compounded his problems. (T19:1129-1130) His home environment essentially left him to raise himself, often worried about a secure place to sleep and food to eat. (T19:1129-1131, 1134, 1143-1144) Galante likely

suffered chronic, clinical depression over the years. (T19:1135-1139) Given his mother's mental illness, Galante was genetically predisposed to suffering mental problems. (T19:1132) Depression leads to lack of motivation, low energy, sleep problems, and an inability to care for oneself. (T19:1138) Severe depression can lead to irrational, angry behavior. (T19:1140) Dr. Mondoki stated, that looking back with the benefit of hindsight, he should have called for Galante to be removed from his home when he saw him at seven-years-old. (T19:1146-1147)

Dr. Ernest Miller, a psychiatrist, evaluated Galante Phillips. (T19: 1187-1196) Miller reviewed medical and school records, and interviewed family members in his preparations. (T19:1187-1189) Additionally, he heard Dr. Mandoki's testimony. (T19:1189) Phillips' genetic history and his family experiences shaped him. (T19:1190) His mother suffered mental illness, depression and drug addiction, that predisposed Phillips to such problems. (T19:1190-1191) Compounding Phillips' problem was lack of anyone meaningful in his life except his grandmother for his first eight years of life. (T19:1191) After he lost her, his symptoms arose. (T19:1191) His mother was not only emotional absent, but she was also mentally and physically abusive. (T19:1191-1192) Galante thought his mother hated his father and directed that anger toward him. (T19:1192) She beat him for no apparent reason. (T19:1192) Miller

stated that persons who are beaten in this manner lose the ability to trust and form attachments. (T19:1193) Phillips' resulting self-esteem and depression issues led him to act out aggressively. (T19:1193-1194) He had 14 juvenile charges by time he was 17-years-old. (T19:1193) Miller noted that Phillips' medical records showed a variety of psychological labels were used in attempt find a treatment plan for him. (T19:1195) Miller's conclusion was that Phillips' behavior is best explained by the abuse and abandonment he suffered as a child. (T19:1195)

At the Spencer hearing, Fred Powe, Dewanda Powe's father, testified about his involvement with Galante. (SR1:8-31) Although not Galante's biological father, he came to consider Galante a son. (SR1:8) When Galante was 12 or 15, Powe started giving him money for clothes. (SR1:9) Galante was hustling for money to buy clothes because his mother never gave him any money, even though she collected a check for Galante's survivor benefits from his deceased father's social security. (SR1:9) Powe said he paid rent and bought Galante and his daughter beds. (SR1:9) He tried to talk to Galante and give him advice. (SR1:12) Galante always minded him and listened. (SR1:13)

Powe testified that Galante's mother was cruel. (SR1:12) She was a prostitute, and she had a number of men coming into the house. (SR1:10-11) For a time, she was married to a man who would

lock the children in a room and not let them leave the house. (SR1:9) Sometimes she would get angry when the children wanted something to eat. (SR1:10) She would give the food to the dog and tell the children to go there to eat. (SR1:10) Powe took his daughter from the house when she was nine. (SR1:11) When Galante was old enough to work and would get a little money, his mother wanted to take it from him. (SR1:11) Powe heard Galante's mother tell the children she wanted them dead. (SR1:14) She said she "... held her hand to the Lord, I do not want -- I wish they was dead. I could cross my legs and broke their neck when they was born." (SR1:14)

Fred Powe testified that his life was better because Galante became a part of it. (SR1:17) After Galante was grown, he would come to see Powe almost every week. (SR1:13) Galante was always respectful and kept his word. (SR1:16)

SUMMARY OF ARGUMENT

The evidence in this case was insufficient to support the jury instruction or the trial court's finding the aggravating circumstance that the homicide was committed to avoid arrest. Sec. 921.141 (5) (e) Fla. Stat. This Court has long held that this aggravating circumstance is not factually supported when the victim is not a law enforcement officer unless the evidence proves beyond a reasonable doubt witness elimination as the sole or dominant motive for the murder. See, e.g., Green v. State, 975 So.2d 1081, 1086-1088 (Fla. 2008); Urbin v. State, 714 So.2d 411, 415-416 (Fla. 1998); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Such proof does not exist in this case. The evidence shows the murder was the result of Phillips reactively shooting at the victim who was attempting to grab Phillips' gun and stop the completion of the robbery -- not a calculated effort to eliminate a witness. See, e.g., Urbin v. State, 714 So.2d at 416; Cook v. State, 542 So.2d 964, 970 (Fla. 1989).

The trial judge used an incorrect legal standard in determining the scope of the court's authority to override a jury's death recommendation. Although the law requires the sentencing judge to give "great weight" to a jury's sentencing recommendation, a different standard applies for life and death recommendations. Even though this case involves a 7 to 5 death recommendation, the

trial court incorrectly used the stricter Tedder standard for overrides of life recommendations in imposing the death sentence. Phillips' death sentence has been unconstitutionally imposed as a result of this error. Art. I Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

The death sentence is not a proportional penalty in this case. This crime was the reactive shooting of someone who was attempting the stop of a robbery. As Phillips was engaged in robbing Sweet, Aligada approached Phillips, yelled at him to stop and attempted to grab Phillips' gun. Phillips reactively turned and fired his pistol. Aligada died from a single gunshot wound. Only two valid aggravators are present and the trial court found twenty non-statutory mitigating factors. A review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I Secs. 9, 17, Fla. Const.

Three jurors observed Phillips being escorted in a courthouse hallway in handcuffs and wearing a jail uniform. Although Phillips changed clothing before entering the courtroom, he was not allowed to change clothes before walking through the courthouse hallways. Phillips moved to the strike the jury. Jurors' seeing the defendant in jail clothing is inherently prejudicial. See, Estelle v. Williams, 425 U.S. 501 (1976). The trial court denied the motion and also denied the motion for new trial on this issue.

Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Phillips acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Phillips now asks this Court to reconsider its position in Bottoson and King.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

The evidence in this case was insufficient to support the jury instruction or the trial court's finding the aggravating circumstance that the homicide was committed to avoid arrest. Sec. 921.141 (5) (e) Fla. Stat. This Court has long held that this aggravating circumstance is not factually supported when the victim is not a law enforcement officer unless the evidence proves beyond a reasonable doubt witness elimination as the sole or dominant motive for the murder. See, e.g., Green v. State, 975 So.2d 1081, 1086-1088 (Fla. 2008); Urbin v. State, 714 So.2d 411, 415-416 (Fla. 1998); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Such proof does not exist in this case. The evidence shows the murder was the result of Phillips reactively shooting at the victim who was attempting grab Phillips' gun and stop the completion of the robbery -- not a calculated effort to eliminate a witness. See, e.g., Urbin v. State, 714 So.2d at 416; Cook v. State, 542 So.2d 964, 970 (Fla. 1989). The additional fact that the victim and Phillips may have recognized each other does not provide the needed proof. See, e.g., Gerald's v. State, 601 So.2d 1157, 1164 (Fla. 1992); Consalvo v. State, 697 So.2d 819 (Fla. 1996). The court is not permitted to substitute "logical inferences" for missing proof.

See, e.g., Williams v. State, 386 So.2d 538 (Fla. 1980).

Consideration of this aggravating circumstance that was not proven beyond a reasonable doubt has unconstitutionally skewed the sentencing process in favor of death. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, and XIV U.S. Const. Phillips now asks this Court to reverse his death sentence.

In the sentencing order, the trial court wrote the following in support of the conclusion that the avoiding arrest aggravating circumstance was applicable:

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 elimination of the witness. *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992). However, the Florida Supreme Court has upheld this circumstance either the Defendant said it was his motive or when the circumstances surrounding the crime clearly show it was the motive. There were 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 8, 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. Aligada 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 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 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. Aligada 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.

(R8:1415-1416) These facts simply do not support the aggravating circumstance.

This crime was a spontaneous shooting of someone attempting to grab Phillips' gun and stop the completion of a robbery. Sweet, the robbery victim, testified the shots happened quickly, spontaneously -- apparently because Phillips saw Aligada coming toward them from the side. (T12:403) In his statements, Phillips said Aligada was shot as he "rushed" Phillips to take the gun and "tried to play hero" to stop the robbery. (R13: 532, 537, 541) Because of a prior

encounter about a job, Phillips and the victim *may* have recognized one another. Phillips, at least at some point during or after the crime, realized Aligada was the person he had contact with about a job because he provided this information in his later statements. (R13:684-685) On numerous occasions, this Court has rejected the avoiding arrest aggravating circumstance on similar facts:

1. Urbin v. State, 714 So.2d 411 (Fla. 1998). Urbin shot the robbery victim who resisted the robbery. Statements Urbin made were that he shot the victim because he “bucked”(resisted) and because he saw Urbin’s face. This Court disapproved the aggravator, concluding this was an instinctive shooting and the fact that the victim saw Urbin’s face was at best a secondary motive.

2. Cook v. State, 542 So.2d 964 (Fla. 1989). Cook was demanding money from a robbery victim when the victim hit Cook with a metal rod prompting Cook to shoot him. The victim’s wife was outside screaming and grabbed at Cook as he left he building. Cook shot her and fled. Both victims died. Cook later said he shot the wife because she was screaming. This Court reversed the finding that the wife’s homicide was committed to avoid arrest because the shooting was instinctive and not calculated to eliminate a witness.

3. Jackson v. State, 502 So.2d 409 (Fla. 1986). During an armed robbery, the victim attempted to grab the defendant as he removed money from the cash register. Jackson’s brother then shot the

victim who was then on the floor. This Court concluded the avoiding arrest circumstance was not proven because the trial court's assumptions that the murder was to eliminate a witness was only one possible motive for the killing and too speculative to establish the aggravating circumstance.

4. Rogers v. State, 511 So.2d 526 (Fla. 1987). During an attempted robbery of a Winn-Dixie store, Rogers was leaving the store after a clerk had been unable to open a cash register. Upon seeing a man from the store attempting to slip away out the back of the store, Rogers shot the man three times and killed him. Rogers told his accomplice the victim "was playing hero and I shot the son of a bitch." This Court found the evidence insufficient to prove the avoiding arrest circumstance.

The evidence was insufficient to prove the avoiding arrest aggravating circumstance in this case. Both the jury and the trial court improperly considered this aggravating factor in the sentencing process. Phillips asks this Court to reverse his death sentence.

ISSUE II

THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE SINCE IT USED AN INCORRECT LEGAL STANDARD IN DECIDING THE SCOPE OF ITS AUTHORITY TO OVERRIDE A JURY'S DEATH SENTENCE RECOMMENDATION.

The trial judge used an incorrect legal standard in determining the scope of the court's authority to override a jury's death recommendation. Although the law requires the sentencing judge to give "great weight" to a jury's sentencing recommendation, a different standard applies for life and death recommendations. See, e.g., Aguirre-Jarquín v. State, __ So.2d __, 34 Fla. L. Weekly S299 (Fla. Mar. 26, 2009) (Pariente, J., specially concurring discussing the "great weight" standard). A life recommendation has a special standard that must be used in deciding whether to override it in favor of a death sentence. See, e.g., Keen v. State, 775 So.2d 263, 282-286 (Fla. 2000); Tedder v. State, 322 So.2d 980, 910 (Fla. 1975). The court is permitted to override in favor of a death sentence only when the facts suggesting death as the appropriate sentence are so compelling that no reasonable person could differ that death is the proper sentence. *Ibid.* The life recommendation must be followed if there is any reasonable basis for the jury's life recommendation decision. *Ibid.* A death recommendation, while a consideration in sentencing, may be overridden based upon the sentencing court's own independent weighing of the aggravating and mitigating circumstances. See, Smith v. State, 866 So.2d 51 (Fla. 2004); Ross v. State, 386 So.2d

1191, 1197-1198 (Fla. 1980) Even though this case involves a 7 to 5 death recommendation, the court incorrectly used the stricter Tedder standard defining the court's authority to override the jury's recommendation. Phillips' death sentence has been unconstitutionally imposed as a result of this error. Art. I Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

Comments in the trial court's sentencing order reveal the judge's misunderstanding of the override principles and the erroneous use of the Tedder standard in this case. The court's sentencing analysis was ultimately its determination that the jury's death recommendation was reasonable. In part, the order states:

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 and fully agrees with the jury's assessment of the aggravating and mitigating circumstances presented before them....***

(R8:1420) (emphasis added) The sentencing judge apparently thought the override standard was the same for both life and death recommendations -- whether the jury's recommendation was reasonable.

In a footnote in the sentencing order, the court supported the

statement of the need to give great weight to jury recommendations using citations to both a death recommendation case, Blackwood v. State, 946 So.2d 960 (Fla. 2006), and Tedder v. State, 322 So.2d 908 (Fla. 1975), the case establishing the special standard to be applied in life recommendation decisions. (R8:1420, f.n. 2)

Earlier in the case, there is additional evidence of the judge's misunderstanding of the different standards to be applied in life and death recommendation cases. During preliminary instructions at the beginning of penalty phase, the court advised the jury of the court's role as follows:

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 the need to depart from the advisory sentence.

(T18:928) This instruction states the higher Tedder standard to be applied in deciding whether to override a life recommendation as if it applied to both life and death recommendations. Phillips acknowledges that this instruction was given at request of defense counsel in an effort to impress upon the jury the importance of its recommendation. (T17:900-901) However, the fact that the court agreed to give the instruction as worded, indicates the court must have thought the instruction correctly stated the law regarding overriding either a life or a death recommendation. This conclusion is then reinforced when the court cited in the sentencing order both a death recommendation case, Blackwood, and

Tedder for the proposition that the court had to give the jury's 7 to 5 death recommendation great weight. (R8:1420)

Since this case involves a death recommendation essentially based on a single juror's vote, the trial court's use of the erroneous override standard cannot be deemed harmless. Phillips asks this Court to reverse his death sentence.

ISSUE III
THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. *Ibid.* However, proportionality review is not a process of counting aggravating and mitigating circumstances -- the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. *Ibid.* A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I Secs. 9, 17, Fla. Const.

This crime was the reactive shooting of someone who was attempting the stop a robbery. As Phillips was engaged in robbing Sweet, Aligada approached Phillips, yelled at him to stop and attempted to grab Phillips' gun. Phillips reactively turned and fired his pistol. Aligada died from a single gunshot wound. Sweet, the robbery victim, testified the shots happened quickly, spontaneously -- apparently because Phillips saw Aligada coming

toward them from the side. In his statements, Phillips said Aligada was shot as he “rushed” to take the gun and “tried to play hero” to stop the robbery.

Aggravating And Mitigating Circumstances

Although the trial court found three aggravating circumstances, only two are valid. As discussed in Issue I, *supra*, the avoiding arrest aggravator was not proven. The remaining aggravating circumstances are that the homicide was committed during a robbery and that Phillips had a previous conviction for a violent felony. The felony murder aggravator, standing alone, will not support a death sentence. See, e.g., Williams v. State, 707 So.2d 683 (Fla. 1998); Jones v. State, 705 So.2d 1364 (Fla. 1998); Thompson v. State, 647 So.2d 824 (Fla. 1994); Rembert v. State, 445 So.2d 337 (Fla. 1984). The addition of a prior conviction for a violent felony in this case does not elevate this crime to one permitting a death sentence because of the nature of the prior convictions. First, Phillips’ 1996 conviction for aggravated battery was based on the shooting incident involving his aunt when Phillips was 17-years-old. He pled guilty and received an adult sentence of five years. His aunt testified at penalty phase that Phillips did not intentionally shoot her. She thought the gun accidentally discharged, and she was wounded in her legs. They were having a verbal confrontation and Phillips was swinging the firearm

around at the time. The second conviction used to support the prior conviction for a violent felony was a grand theft based on a guilty plea in 2006, for what the State presented as actually the offense of robbery. Phillips was attempting a robbery when a third person tried to intervene and fired a weapon at Phillips. Phillips fired his weapon in return, but no one was injured.

The trial court found twenty non-statutory mitigating circumstances applied in this case. (See, sentencing order) Many of these were based on the evaluation of the two psychiatrists and the testimony at penalty phase of family members about the physical and mental abuse Phillips suffered while growing up impoverished with a drug addicted, mentally ill mother. Phillips had no male role model in his home, and he never knew his father who was a drug dealer and died. From his mother, Phillips suffered emotional abuse, irrational beatings with objects, food deprivation, and abandonment. In school, Phillips was diagnosed with attention deficit hyperactive disorder and other learning disabilities. He was assigned to special education programs. As an adult, he had difficulty finding a job, and when he did obtain one, he lost it due to an injury on the work site. Dr. Miller's conclusion was that Phillips' behavior is best explained by this abuse and abandonment he suffered as a child.

Comparable Cases

This Court has reversed the death sentence as disproportionate in other similar cases:

1. Terry v. State, 668 So.2d 954 (Fla. 1996). Terry and a codefendant, Floyd, were looking for places to rob. They targeted a convenience store operated by Mr. and Mrs. Franco. Terry provided the firearms, an inoperable .25 caliber pistol and a .38 caliber pistol that proved to be the murder weapon. Floyd held Mr. Franco at gunpoint using the inoperable pistol while Terry robbed Mrs. Franco in the office area. After a scream and a gunshot, Terry emerged from the office. Mrs. Franco had been fatally shot.

The jury recommended a death sentence by a vote of 8 to 4. There were two aggravating circumstances present: (1) a previous conviction for a violent felony based on Terry being a principle to Floyd's aggravated assault on Mr. Franco; (2) the homicide was committed during a robbery. No mitigation was found. The trial court rejected Terry's age of 21 as a statutory mitigator. Additionally, the trial court rejected the minimal non-statutory mitigation of Terry's emotional problems and impoverished background. Even with minimal mitigation, this Court held the death sentence disproportionate because the evidence supported the theory this was a "robbery-gone-bad."

2. Johnson v. State, 720 So.2d 232 (Fla. 1998). The defendant, Calvin Johnson, and his brother, Anthony Johnson,

committed a burglary/robbery/murder. Anthony initiated the robbery of the intended victim, while Calvin took the father of the victim inside his house and robbed him. Calvin also shot the father inside the house, wounding him. He took the father to the porch where the father was shot four more times ultimately leading to his death. The jury recommended death by a vote of 9 to 3. Two aggravators were present -- the defendant had previous convictions for violent felonies and the homicide was committed during a burglary for pecuniary gain merged as one aggravator. The defendant had previous convictions in 1989, for violent felonies. One conviction was an aggravated assault for shooting at his brother who was not injured and said the incident was a misunderstanding. A second conviction was for aggravated battery for shooting another individual. The contemporaneous convictions for robbery and attempted murder of the separate victim in this case, the son, were also used to support the previous conviction for a violent felony aggravator. In mitigation, the trial court found the defendant's age of 22-years-old. Non-statutory mitigation included the defendant's troubled childhood, he had been employed, he surrendered to the police and he earned his GED. This Court held the death sentence was not proportional.

3. Hess v. State, 794 So.2d 1249 (Fla. 2001). Hess was convicted for first degree murder and robbery for the shooting

death of a security guard. The guard had been shot in the chest and his wallet was missing. The jury recommended a death sentence by a vote of 8 to 4. Two aggravating circumstances were present: (1) the homicide was committed during a robbery; (2) Hess had prior convictions for violent felonies occurring after the murder based on convictions of sexual activity with a child and lewd assault on a child committed on his eleven and twelve year-old nieces. The court found no statutory mitgators. Sixteen non-statutory mitigators were found that included Hess's history of learning disabilities and emotional problems. This Court held the death sentence disproportionate.

Phillips death sentence is disproportionate. He asks this Court to reverse the sentence and remand this case for imposition of a life sentence.

ISSUE IV

THE TRIAL COURT ERRED IN NOT STRIKING THE JURY PANEL OR GRANTING A NEW TRIAL AFTER JURORS OBSERVED PHILLIPS WEARING A JAIL UNIFORM AS HE WAS ESCORTED IN A COURTHOUSE HALLWAY.

On the first day of trial after jury selection, three jurors observed Phillips being escorted in a courthouse hallway in handcuffs and wearing a jail uniform. (T12:328-356) Although Phillips changed clothing before entering the courtroom, he was not allowed to change clothes before walking through the courthouse hallways. Phillips moved to strike the jury. Jurors' seeing the defendant in jail clothing is inherently prejudicial. See, Estelle v. Williams, 425 U.S. 501 (1976). The concern is that such a view diminishes the presumption of innocence and creates the possibility that it may influence the jurors' vote. *Ibid.*

The trial court inquired of the jurors to determine who may have seen Phillips in jail clothes. Three jurors said they saw him, and the court questioned each individually. (T12:347-354) Juror Staplefoote testified that he was in the designated waiting area for jurors when he saw Phillips walking in the hallway before he changed his clothing to the suit he wore in court. (T12:348-349) Staplefoote said he could set aside the observation and would not use it in reaching a decision on a verdict. (T12:349) Juror Shelly stated she saw Phillips in the hallway and noticed he wore different clothing, a green uniform. (T12:349-350) The uniform indicated to her that he was in jail. (T12:351) She thought he

would have been permitted to change into different clothes before being brought to court. (T12:351) She said she could set aside the observation in reaching a verdict in the case. (T12:350-352) Juror McNamara testified he saw Phillips in a green jail prisoner uniform in the hallway outside the courtroom. (T12:352-353) He told the court he could set aside the observation in reaching a verdict. (T12:354) The court denied the motion on the ground that the jurors' view of Phillips in jail clothes was inadvertent and brief. (T12:354-356, 488-491) Phillips again raised the issue in his motion for new trial that the court denied. (R7:1360-1363; SR1:38-41)

Phillips acknowledges that this Court has held that jurors' brief, inadvertent view of a defendant in jail clothing does not necessarily require the striking of the jury or a new trial. See, e.g., Hernandez v. State, 34 Fla. Law Weekly S149 (Fla. Jan. 30, 2009); Heiney v. State, 447 So.2d 210 (Fla. 1984); Neary v. State, 384 So.2d 881 (Fla. 1980). However, in a death penalty case such as this one where the jury death recommendation was based on a vote of 7 to 5, the trial court should have revisited this issue, with knowledge of the jury's vote, on the new trial motion. One of the three jurors who viewed Phillips in jail clothes, Juror Staplefoote, became the foreperson of the jury. (T14:830; T19:1303)

A change of a single juror's vote would have been a life

recommendation -- dramatically changing the sentencing process and this Court's review.

The trial court's failure to reexamine this issue, in light of the ultimate 7 to 5 vote on the death recommendation is reversible error. Phillips' has been adjudged guilty and sentenced in violations of his constitutional rights. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. This Court should now reverse the judgment and sentence in this case.

ISSUE V

THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously denied various motions dismiss, to modify jury instructions and to require jury findings of the factors used for imposition of the death penalty based on the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). (R5:841, 868, 993; R6:1129-1169; R7:1245, 1248, 1335; R9:1545, 1569, 1587-1592, 1602; T16:853, 871-873) Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstance in the indictment.

Phillips acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, even

though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Additionally, Phillips is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Phillips asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional.

Phillips' death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant Galante Romar Phillips asks this Court to reverse his judgments and sentences and remand his case for a new trial for the reasons presented in Issue IV. Alternatively, for the reasons presented in Issues I, II, III, IV and V, Phillips asks this Court to reduce his death sentence to life in prison.

CERTIFICATE OF SERVICE AND COMPLIANCE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Steve White, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Galante Phillips, #J03479, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this ____ day of April, 2009.

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,
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