IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-876

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

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

References to the record on appeal are designated as "[vol. no.] R [page no.]". References to the supplemental record on appeal are designated as "[vol. no.] SR [page no.]". All other references are self-explanatory or otherwise explained herewith.

STATEMENT OF THE CASE

On April 22, 2010, Terrance Phillips (DOB 7/16/91) was charged by indictment with two counts of first degree murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery (1 R 27-28).[1]

[1]Phillips had been originally charged by information with two counts of second degree murder, one count of armed robbery, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery (1 R 19).

Phillips had three codefendants: Antonio Baker,[2] Barbara Anders,[3] and Shanise Bing.[4]

On January 17, 2012, Phillips' trial commenced before Judge Mark Hulsey. After entering pleas in their own cases, Phillips' codefendants, Anders and Bing, testified on behalf of the State.[5]

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[2]Baker (DOB 11/13/89) was also indicted on two counts of first degree murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery (16 R 168-69).

[3]According to Anders' testimony during Phillips' trial, she was indicted with two counts of first degree murder, one count of armed burglary, one count of conspiracy to commit armed robbery, and one count of armed robbery (8 R 423). Anders also testified that the State was "seeking the death penalty against [her]" (8 R 424).

[4]In her testimony during Phillips' trial, Bing (DOB 7/29/92) affirmed that she was charged with two counts of murder, one count of armed robbery, one count of attempted armed robbery, and one count of conspiracy to commit robbery (7 R 390). In her testimony it was not revealed that the murder counts were for murder in the second degree.

[5]Anders testified that she "enter[ed] a plea of guilty to some of those charges" and agreed to "cooperate with the State of Florida" (8 R 424). She told Phillips' jury that "with the charges that [she] pled guilty to" she was "still looking at life in prison" (8 R 424). The only consideration that she received from the State was its agreement "not to seek the death penalty against [her] because of [her] cooperation." (8 R 424). Besides that, Anders testified that no other promises were made.

Bing was permitted to plead to conspiracy to commit robbery and armed burglary before Phillips' trial (7 R 390). When she testified against Phillips, the jury was told that she was facing "a maximum of life in prison on the armed burglary" and "a maximum of 15 years in prison on the conspiracy to commit armed robbery (7 R 390). The jury was also told that Bing had not been promised anything in exchange for her testimony and that her sentencing would be some time in the future (7 R 390). Further, the jury was told that the murder counts and the attempted armed

Phillips' other codefendant, Antonio Baker, went to trial on February 6, 2012.[6]

In Phillips' case, the jury found him guilty as charged on all counts in the verdict it returned on January 20, 2012. As to the first degree murder charges, the jury found both premeditation and felony murder (3 R 556-62).

On January 27, 2012, the penalty phase of Phillips' trial was held. After Phillips and the State presented additional evidence, the jury recommended the imposition of a death sentence for both murders by votes of 8-4 (3 R 582-83).

The trial judge followed the jury's recommendation and sentenced Phillips to death for each murder (4 R. 663). Justifying those sentences, the court found and gave great weight to three aggravating circumstances:

> 1. Phillips was previously convicted of a capital felony or felony involving the use or threat of violence to a person;
>
> 2. Phillips was on probation at the time of the murders;
>
> 3. The murders were committed while Phillips was committing a burglary or attempted armed robbery.

(4 R 651-54).

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robbery count had not been dropped and were still pending against Bing (7 R 391).

[6]Baker's jury found him guilty as charged. A penalty phase followed, and on February 17, 2012, the jury returned life recommendations. Thereupon, Baker received life sentences on the two murder convictions (16 R 168).

As to mitigating factors, the trial judge made the following findings:

> 1. Phillips was 18 at the time of the murders (considerable weight);
>
> 2. Phillips has a borderline IQ of 76 (moderate weight);
>
> 3. Phillips has a learning disability (moderate weight);
>
> 4. Phillips has a severe speech impediment (slight weight);
>
> 5. Phillips is easily influenced (slight weight);
>
> 6. Phillips was impacted by the murder of his father (little weight);
>
> 7. Phillips was a loving and caring family member and was a steadfast friend and good neighbor (some weight);
>
> 8. Phillips was a good sport (slight weight);
>
> 9. Phillips grew up in a high crime neighborhood (some weight);
>
> 10. Phillips was neglected and abused as a child (some weight);
>
> 11. Phillips is reverent and God fearing (slight weight);
>
> 12. Phillips was respectful during court hearings (slight weight).

(4 R 654-62).

As to Phillips' other non-capital convictions, the trial judge adjudicated him guilty and sentenced him as follows:

> 1. Armed burglary - mandatory sentence of life in prison;

2. Attempted armed robbery - mandatory sentence of life in prison;

3. Conspiracy to commit armed robbery - fifteen years in prison.

(4 R 663-64). Phillips then filed this appeal.

On June 20, 2014, following the decision in Hall v. Florida, 134 S.Ct. 1986 (2014), Phillips filed a motion requesting this Court to relinquish jurisdiction of his case to the circuit court for a determination of whether his sentence of death stands in violation of the Eighth Amendment due to his intellectual disability. In this motion, Phillips noted that "Dr. D'Errico testified at the penalty phase that Mr. Phillips scored a 76 on the IQ test he administered, which placed Mr. Phillips in the fifth percentile (11 R 1057)."[7] Phillips also noted that his school records showed his history in special education classes

[7]Dr. D'Errico administered the unidentified IQ test in January of 2012. Under the well recognized Flynn effect, scores on an IQ test should be reduced for each year that had passed since it was normed. Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010) ("The Flynn effect acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field. The parties in this case agree that the Flynn effect is an empirically proven statistical fact."). Thus, assuming that it was the WAIS-IV that Dr. D'Errico administered in January of 2012, four years had passed since it was normed before its release in 2008. As such, Phillips' recalibrated IQ score would be 75 or below. If Dr. D'Errico had used the Stanford-Binet-V when testing Phillips, the recalibrated IQ score would fall even further since it was normed nine years back in time, prior to its 2003 release.

for specific learning disabilities (11 R 1055-56),[8] and that these records reflected both deficits in adaptive functioning[9] and onset before the age of 18. However, this Court denied Phillips' motion for relinquishment in an order issued on September 3, 2013, which indicated that three justices dissented.[10]

STATEMENT OF THE FACTS

On December 24, 2009, three men, Aurelio Salgado (DOB 7/27/61), Manuel Ton Hernandez, and Mateo Hernandez-Perez (DOB 4/1/83), were living in an upstairs apartment in the Lighthouse

[8]Phillips was involved in special education classes from the first grade until he quit school in the ninth grade (11 R 1060).

[9]The trial record contained additional evidence of deficits in adaptive functioning. It was also reported in the records that Phillips had been involved in speech therapy between the first and fourth grades for a speech impediment or phonological disorder (11 R 1056). Additionally, Dr. D'Errico reviewed an incident report from the Department of Children and Families in 2002, in which Phillips showed up at school with his face burned (11 R 1060). The burn was caused by a hot clothes iron (11 R 1060). Phillips said he did it to himself; he wanted to see if the iron was hot (11 R 1060).

[10]Subsequently, the United States Supreme Court issued its decision in Brumfield v. Cain, 135 S.Ct. 2269 (2015), and held that it was unreasonable for a state court to fail to conduct an evidentiary hearing on an Eighth Amendment claim based upon Atkins v. Virginia, 536 U.S. 304 (2002), when the capital defendant had an IQ score of 75. Here, the well-established Flynn effect requires Phillips' IQ score to be recalibrated to 75 or lower, and makes his situation indistinguishable from the one at issue in Brumfield.

Bay Apartments (7 R 315).[11] In the afternoon, they drove to a convenience store to buy soda and beer (7 R 318-19). Arriving at the same store at the same time around 3:00 PM were three young women, Barbara Anders, Shanise Bing, and Tanequa Dwight (7 R 375-76; 8 R 428).[12] Anders and Dwight entered the store and approached the three men and asked for change for a five dollar bill (7 R 319-20).[13] Salgado made change for them (7 R 320; 8 R 428). During this encounter, Dwight gave one of the men Anders' phone number (7 R 376; 8 R 428-29).

Subsequently, the women took a bus "[t]o Pearl Street" (7 R 394). They went there to meet "[a] guy" (7 R 394). Anders wanted to meet the guy "[t]o get some money" (7 R 394). When the women got there, Anders "had sex" with the guy and then got "paid for that" (7 R 396).[14]

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[11]The dates of birth for Salgado and Hernadez-Perez, as well as for Reynaldo Antunes-Padilla (DOB 10/25/77), appear at 10 SR 1325.

[12]Anders was 18 years old and Bing was 17 years old (1 R 4). Salgado was 48 years old and Hernandez-Perez was 26 years old.

[13]Anders, Bing and Dwight needed change for bus fare (7 R 394).

[14]In her testimony, Anders indicated that there were "two other black men" in the house on Pearl Street (8 R 464). She denied going into a "back room with one of them" and denied "earn[ing] $20 out there with one of those people" (8 R 464). She testified that "[w]e was all just chillin' and smoking" (8 R 465). She explained that they were smoking "[w]eed." "We just smoked like two blunts." (8 R 465).

According to Bing, after Anders got her money, Anders' boyfriend, Antonio Baker, was called "[t]o come pick us up and take us back to the south side" (7 R 396).[15] While Bing testified that Anders called Baker (7 R 377), Anders testified that Dwight called Baker (8 R 466). Anders explained:

> Q Okay. You kind of jumped there, but why did you call Antonio Baker?
>
> A I didn't call Antonio Baker.
>
> Q Okay. Who called him?
>
> A Tanequa Dwight.
>
> Q And for what purpose?
>
> A To rob the Mexicans.

(8 R 466). Thus, according to Anders, a nefarious plan was in place before Antonio Baker was even called to come pick her, Dwight and Bing up from Pearl Street:

> Q Okay. Well, let's talk about that. So prior to Ms. Dwight calling Antonio Baker, ah, you had knowledge that you were going over there to meet with these Mexican gentlemen; right?
>
> A Yes, sir.
>
> Q And that at that point you, in your mind, you had already known that you were going over there to do something nefarious or something bad when you got there?
>
> A Yes, sir.

---

[15]Anders had begun "dating" Baker in February of 2009. She testified at Phillips' trial that she "loved" Baker (8 R 432). Anders even had his first "name tattooed on [her] chest" (8 R 432).

(8 R 467).

Baker showed up shortly thereafter in a rental car with Phillips, his cousin, in the passenger seat (8 R 433). A second car arrived that was driven by Phillips' brother. Anders and Bing got in the car driven by Baker, while Dwight got in the car driven by Phillips' brother (7 R 378; 8 R 433).[16]

Baker, Anders, Bing and Phillips were together in the rental car being driven by Baker, and they were headed back to the Lighthouse Bay Apartments where the "Mexican males" lives and where Anders lived (7 R 378; 8 R 435). Bing testified that while in the car she overheard a conversation between the other three (7 R 362). From the conversation, she understood that "we were going to go in, they was going to come in after us and rob them." (7 R 363). However, Bing testified that she did not "recall exactly who said what while in that car" (7 R 363).

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[16]Anders testified that after giving the men her phone number and hatching the nefarious plan to do something bad, Dwight's involvement ended when she got into the car driven by Phillips' brother. Of course when she testified, Anders had reason to be angry with Dwight and to claim that she was responsible for the nefarious plan. Anders had originally told the police that the murders happened when Baker flew into a jealous rage when he and Phillips discovered her and Bing smoking a joint and drinking beer with "the Mexican males." (8 R 505). After giving this version to the police, Anders was released. However, the police had wired Dwight and arranged for her to meet up with Anders following her release. The recording of Anders' conversation with Dwight led to murder charges being filed against her and a notice of the State's intent to seek a death sentence. When she testified, Anders acknowledged that she no longer "like[d]" Dwight whom she had thought "was [her] best friend." (8 R 510).

While testifying, Bing was asked about Phillips' participation in the conversation in the car:

> Q Can you be more explicit as to exactly what that plan was?
>
> A That we was going to go in there and we was going to rob them.
>
> Q And who - - who - - what words were said by Mr. Phillips that you overheard of his participation in that plan?
>
> A I don't necessarily remember.
>
> Q You don't necessarily remember?
>
> A No, sir.

(7 R 363-64). She later elaborated that while she claimed to have heard the conversation, she wasn't "tuned in" and did not know "too much what was said":

> Q Um, is it my understanding that at no time did you overhear Mr. Phillips participate in a plan to go rob anyone?
>
> A I did hear the conversation, but I wasn't tuned in. Basically I was just - -
>
> THE COURT REPORTER: I'm sorry, I can't hear her. Could you back her up a little bit.
>
> THE WITNESS: (inaudible).
>
> THE COURT REPORTER: "I wasn't tuned in. Basically - - "
>
> THE WITNESS: I didn't like - - basically I can't give you no - - too much what was said because I don't really know.

(7 R 367).[17]

However, in her testimony, Bing was clear as to one thing:

> Q The question is, you never overheard Mr. Phillips making any statement that he was going to rob anyone; did you?
>
> A I can't deny it because I don't know.
>
> Q You don't know? In fact, **it was Anders' idea to go rob somebody; isn't that correct?**
>
> **A Yes, sir.**
>
> **Q What?**
>
> **A Yes, sir.**
>
> **Q It was her idea; correct?**
>
> **A Yes, sir.**

(8 R 404-05) (emphasis added).[18] Later, Bing repeated that Anders, also known as "Cookie," was "the leader who set everything up that night":

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[17]While overruling the defense's objection to the testimony on hearsay and foundation grounds, the trial judge noted that Bing "just testified that she was there but she didn't perceive what was being said." (7 R 369). He later added: "Her testimony was contradictory in what she - - in how she responded to your questions and she responded to Mr. Shea's questions were almost completely opposite." (7 R 370).

[18]Throughout their testimony, Bing and Anders gave conflicting and contradictory testimony. It simply isn't possible for both to have provided truthful testimony. For example, Bing testified that it was Anders' plan to rob the Hispanic men from the convenience store, while Anders claimed that Dwight came up with the idea.

Q From your recollection of that evening, would it be true to say that it was Cookie who was the leader who set everything up that night?

A Yes, sir.

Q Yes?

A Yes, sir.

(8 R 411).

Indeed, after the women were with "the guy" on Pearl Street, Hernandez-Perez called Anders (7 R 321, 341; 8 R 436). Salgado testified that Hernandez-Perez wanted to have sex with the girl from the store in exchange for money (7 R 340-41). Salgado indicated that they believed "the girl was 16 years old" (7 R 341).[19] However because she did not speak Spanish and Hernandez-Perez did not speak English, he handed the phone to Salgado to translate for him (7 R 321). Anders in her testimony explained:

Q Okay. And what happened when the Mexican called you?

A I didn't understand him.

Q And then what happened next?

A Somebody else called me back in English.

Q And were you able to understand that person?

[19]Thus, Hernandez-Perez, who was 26 years old, called Anders in an attempt to have sex with a female under the age of 18. Under Florida law, sexual activity between a 26 year old and someone under the age of 18 constitutes a felony in the second degree. *See* § 794.05, Fla. Stat. (2014).

A Yes, ma'am.

Q What happened next?

A He asked us to come over.

(8 R 436).[20]

Salgado testified at Phillips' trial that after Hernandez-Perez handed him the phone he spoke with Anders:

Q Do you remember talking to one of the girls with Mateo Hernandez-Perez?

A Yes.

Q Why did he hand you the phone?

A Because he didn't speak English.

Q And did you talk to whoever was on the other line?

A Yes.

Q What did you say to her?

A That my friend wanted her service.

Q Okay. And what was meant by that?

A He wanted her service, you know, how can I say? Sex.

Q And were you communicating that to Mateo Hernandez-Perez?

A Yes.

[20]Anders during cross claimed that though "[t]hey invited us over", she was not sure why during the phone conversation (8 R 471) ("Q[:] To do what? A[:] He didn't say over the phone, we talked about it when I got there.").

(7 R 321-22).[21]

While denying that it was her idea and denying that she wanted to participate, Anders acknowledged in her testimony that there was a plan to rob "the Mexicans" (8 R 436). The plan was for Anders and Bing to pretend like they wanted to have sex with the "Mexicans just to rob them" (8 R 436). Anders and Bing were going to "[p]retend like we wanted to have sex with the Mexicans" (8 R 436). Baker and Phillips were going to "[j]ust come in and rob them" (8 R 437).[22]

Meanwhile, after returning to their apartment from the convenience store, Salgado, Ton Hernandez, and Hernandez-Perez had been joined by Reynaldo Antunes-Padilla (DOB 10/25/77), who lived on the first floor of the apartment building with his brother (7 R 317, 321). At "around six, more or less", Anders and Bing arrived at the apartment and talked to Hernandez-Perez and Salgado, who was translating the ensuing conversation (7 R

[21]Salgado testified through an court interpreter at Phillips' trial (7 R 313).

[22]In December, 2009, Baker was 20 years old and Phillips was 18 years old (9 R 656).

322, 343, 381; 8 R 438).[23] According to Salgado, Anders appeared to be in charge (7 R 343).[24]

Anders testified that the men offered "alcoholic beverages" which she did not accept (8 R 472). The ensuing conversation was about the amount of money to be paid in exchange for sex (7 R 324; 8 R 438).[25] Salgado testified:

> Q Did you hear any conversation about money in exchange for sex?
>
> A Yes.
>
> Q Who was that conversation between?
>
> A Mateo [Hernandez-Perez].
>
> Q Do you recall how much money?
>
> A Yes, 20.
>
> Q $20?
>
> A Yes.

---

[23]Given that the meeting at the convenience store was at around 3:00 PM and the women arrived at the apartment at around 6:00 PM, about three hours had passed. During that time period Salgado and his companions had been drinking beer that had been purchased at the convenience store. Salgado testified that he had drunk about six beers in the two hours before the women arrived (7 R 342).

[24]Salgado had identified Anders "from photographs that were shown to [him] by the Jacksonville Sheriff's Office after the commission of the crime" (7 R 343). Anders was "the older, heavier girl" (7 R 343).

[25]On December 24, 2009, Anders was 18 years old, while Bing was 17 years old. Hernandez-Perez was 26 years old, Antunes-Padilla was 32 years old, and Salgado was 48 years old. Sexual activity between any of the men and Bing would have been a felony in the second degree. *See* § 794.05, Fla. Stat. (2014).

Q What do you recall happening next?

A She was asking for more. She asked how much we have.

(7 R 324).

Bing in her testimony indicated that Anders asked the men for $100:

Q And when you got there, how much did she ask for?

A A hundred.

Q Okay. And what did the - - the young man say?

A That he didn't have no money.

(8 R 405).[26]

After this discussion of money for sex, Bing saw Anders make a phone call. Bing testified:

Q And right after that phone call, what happened?

A There was a knock on the door.

Q And then who answered the door?

A Cookie [Anders].

Q Who was standing on the other side of that door when Cookie [Anders] answered it?

A Man and Antonio.

Q Is that the defendant in this case?

---

[26]Anders in her testimony simply said that she did not agree to have sex with Hernandez-Perez for $20. She made no mention of asking for more (8 R 438). During her cross, she denied saying she wanted $100 (8 R 472)("But you didn't say, I want $100? A[:] No, sir.")

A Yes, ma'am.

Q And Antonio Baker?

A Yes, ma'am.

(7 R 384).

Anders testified that her phone call had been to Antonio Baker:

Q Prior to the knock on the door, did you get on the phone?

A Yes, ma'am.

Q And who did you contact?

A Antonio.

(8 R 439).[27] However, she testified that she refused to open the door after hearing the knock:

Q Who came to the Mexicans' apartment?

A Antonio and Terrance [Phillips].

Q What happened once they got inside?

A They knocked on the door, and the Mexicans asked me to open the door, and I said no.

(8 R 439).[28]

---

[27]Cell phone records showed that there were phone calls between Anders and Baker immediately before and after the crimes (9 R 673).

[28]Salgado testified that the two men entered the apartment through an unlocked door (7 R 324-25, 343). He further testified that the two men who entered were not invited to come into the apartment - "Never" (7 R 325).

Bing's description was that "Man [Phillips] and Antonio [Baker]" entered the apartment when Anders opened the door (7 R 384). She later affirmed that "as soon as both gentlemen walked in that [she] ran out" (8 R 406). She then immediately corrected her testimony saying, "I walked out." (8 R 406).

Anders testified that Antonio and Terrance came to "the Mexicans' apartment (8 R 439). She testified that "[t]hey came in." (8 R 440). After they came in, Anders testified that Bing "ran out of the house" (8 R 441).

Salgado testified that the two men "entered together" (7 346).

Both Bing and Anders testified that when Baker and Phillips entered the apartment, Phillips was carrying a gun (7 R 385; 8 R 440). Salgado testified that the guy with the gun was wearing a hoodie that covered most of face (7 R 325, 326). As a result, Salgado was not able to identify the person with the gun.[29]

Bing testified that because she left the apartment as soon as Baker and Phillips entered, she "didn't see what happened inside" (7 R 385).

Anders testified that when Baker and Phillips entered the apartment:

> Terrance had the gun and they got into a fight, and they was jumping him and I jumped in and hit the man in

[29]Det. Don Slayton testified that Salgado was never able to identify the gunman (9 R 673).

> the head with a bottles [sic], and Antonio jumped in, and I ran out of the house and there was a gunshot and then another gunshot

(8 R 440). She clarified that "the fight almost happened immediately once they entered" (8 R 440). When asked "[h]ow many Mexicans were fighting [Phillips] that you saw," Anders testified "[t]hree." (8 R 441). She testified that she tried to help Phillips by hitting one of them "in the head with a bottle" (8 R 441). At that point, a "Mexican was trying to fight [Anders]" (8 R 441). Baker then jumped in to help Anders. Anders testified that she then "left out of the house." (8 R 441). During her testimony on direct examination, Anders said it was when she was outside the apartment going down stairs that she heard two gunshots (8 R 441-42). However during cross-examination, Anders testified that she had gone all the way down the steps and was "[s]tanding by the pool" when she "hear[d] the first shot" (8 R 491).

Salgado's account differed in some respects. He testified:

> Q What happened when the two men entered?
>
> A He put the gun on my friend's head.
>
> Q Which friend?
>
> A Mateo [Hernandez-Perez].
>
> Q And what happened next?
>
> A My friend pushed his hand off.
>
> Q Did anyone else try to help?

A Yes.

Q Who?

A Reynaldo [Antunes-Padilla].

Q Where was Manuel Ton [Hernandez]?

A Manuel ran to the bathroom.

Q And what did you do?

A I stood up and I hit at the black guy to get - - to get to lose the gun.

Q Okay. So you were also trying to help with the man who had the gun?

A Yes.

Q What happened to you next?

A The other one hit me on the head.

Q With what?

A I think with a bottle.

Q Do you recall what happened to the two girls that were in the apartment?

A No, I don’t recall.

Q How did the hit to your head affect you?

A I was [seeing] stars and it was hurting a lot.

* * *

Q How many times were you hit with the bottle?

A I was [seeing] stars and I pulled my hand and they hit me here (indicating).

Q Okay. So the man without the gun tried to hit [you] again?

A Yes.

Q Okay. But [you] blocked it with [your] hand?

A Yes.

Q Okay. What did you do next?

A I run, looking for the door.

Q Before you left to go look for the door, what was going on with your other two friends, Reynaldo Antunes-Padilla and Mateo Hernandez-Perez?

A They were fighting.

Q With who?

A With the black guy.

Q The one with the gun or without the gun?

A The one with the pistol.

(7 R 327-29).[30]

Salgado's bedroom had a backdoor through which he could exit the apartment and reach a stairway (7 R 329). Salgado said one guy ran after him just to the backdoor (7 R 357) ("Q[:] and about how far behind you was he? A[:] He got to the door. To the door."). When Salgado was halfway down the stairs, he heard three gunshots (7 R 329).

When the gunshots were heard, Bing, Anders and Salgado had all left the apartment. Not one of these three testifying witnesses was in the apartment when the gunshots were fired. The

[30]Manuel Ton Hernandez, the individual who ran into the bathroom, did not testify at trial as he had been deported back to Mexico (9 R 633).

only statement from anyone inside the apartment when the gun discharged was the statement that Bing said Phillips made afterwards to the effect that "he dropped the gun and the gun went off" (7 R 387).

Bing, who was waiting outside, testified that after the gunshots, Anders, Phillips and Baker came running (7 R 386). They all got in the rental car that Baker had been driving (7 R 386-387). Bing then testified:

> Q Once you were inside the car, did you hear the defendant say anything?
>
> A Yes, ma'am.
>
> Q What do you recall hearing him say?
>
> A **He said that he had lost his shoe, he got hit upside the head with a beer bottle, he dropped the gun and the gun went off.**
>
> Q Did you actually see a gun in his hand anymore once he was in the car?
>
> A No, ma'am.

(7 R 387) (emphasis added).

According to Anders, after they all got inside the car Phillips and Baker said not to say anything about what happened and everything would be okay (8 R 442). Anders also testified that Phillips said he lost his shoe (8 R 443).[31] Anders testified that she had "see[n] the gun after the fact." (8 R

[31]DNA from a shoe at the scene inside the apartment matched Phillips (9 R 704-06).

443). And when asked who had the gun, Anders responded: "Man [aka Phillips]" (8 R 443). However, she did not indicate when "after the fact" that she saw "Man" with "the gun." (7 R 387; 8 R 443).[32]

Anders admitted in her testimony that she originally told the police that it was Baker who "had the gun when he came in" to the apartment (8 R 506).[33] She also acknowledged that she "told the police that Antonio [Baker] shot [the victims]" (8 R 511). She testified that she told Dwight, who she did not know was wearing a wire and recording her, the details of her statements to the police after she was released from jail on December 29, 2009 (8 R 508-11). Anders also testified that in the conversation with Dwight she was posturing (8 R 544) ("Q[:] Were you trying to appear tough to her? A[:] Yes, ma'am."). In the portion of the tape recording of Anders' conversation with Dwight which was played to the jury, the following exchange occurred at one point:

MS. DWIGHT: What you told them?

---

[32]Later in redirect, Anders was asked "[w]ho did you see directly after in the car with a firearm" (8 R 543). At that time, she answered: "Phillips" (8 R 543).

[33]According to her testimony, Anders "never told the detectives" the truth about what occurred (8 R 544). She testified that she only "decided to tell the authorities" the truth "[a]fter the death penalty was filed against [her]" (8 R 544). She also testified that she told the police that Baker shot the victims because she was mad at him after learning that he was cheating on her with another girl.

MS. ANDERS: Tonio shot them. Man shot them.

(8 R 527).[34] But according to her testimony, Anders was standing by the pool (or alternatively going down the stairs) when she heard the first gunshot. She was not in a position to know what happened inside the apartment after she left, and she never asserted that Phillips made any statements to her about what happened in the apartment after she left. In fact during recross, Anders admitted that she had no knowledge of who fired the shots:

> Q So this statement, "Antonio shot him, Man shot him," there is no foundation or basis for you making that statement that you have any personal knowledge of; is there?
>
> A No, sir.

(8 R 539).[35]

In the tape recording that the State introduced into evidence, Anders discussed the beating that Phillips was taking at the hands of "the Mexicans" before she ran out of the apartment:

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[34]The tape recording was laden with street slang and often inaudible. It is not clear which statements made in it by Anders were factual, which statements were posturing for Dwight, and/or which statements were made sarcastically. The State introduced the tape on the basis that it showed that Anders first indicated that her December 28th statements to the police were not true when her conversation with Dwight was recorded on December 29th (8 R 497-98).

[35]Anders also claimed that her laughter when discussing the homicides with Dwight was "[b]ecause I wasn't fixing to show my feelings in front of her" (8 R 540).

MS. DWIGHT: I heard [Phillips] was getting his ass whooped.

MS. ANDERS: Why he was getting his ass whooped?

MS. ANDERS: (Laughing).

* * *

MS. DWIGHT: Hey, (inaudible) Cookie [Anders] said that (inaudible) and Tonio [Baker] was just standing there watching.

MS. ANDERS: He was. He let Man [Phillips] get beat up (laughing).

MS. DWIGHT: Yeah.

MS. ANDERS: But he wasn't.

MS. DWIGHT: How he - - how he end - - how the fuck they end up beating Man [Phillips]?

MS. ANDERS: I don't know.

(8 R 527-28).[36]

Hernandez-Perez and Antunes-Padilla were both shot and died from their wounds. Hernandez-Perez was shot twice, once in the left thigh and once through the left hip (9 R 714). He also had an abrasion and contusion on his left eye, as well as some stippling, indicating the gun had been fired within two or three feet of him (9 R 716-17, 720). The thigh wound was not fatal, but the hip wound had pierced the iliac artery, and he bled to death as a result (9 R 715-16, 718).

[36]Later in the tape recording, Dwight summarized that "Man [Phillips] done got beat out of his shoe" (8 R 531).

Antunes-Padilla was shot on the right side of the chest near the nipple. From there, the bullet passed through his right lung, through the aorta and spine, cracked some ribs, bruised his left lung and finally exited his left back (9 R 732). He died from that single wound (9 R 737). He also had some gunshot stippling and minor blunt force trauma above his left eye (9 R 735-36).

Four days later, on December 28th, the police questioned Bing about what had happened (7 R 388).[37] In essence, Bing told them the same things she testified to at trial (7 R 388). Bing testified that she was charged with two counts of murder, one count of armed robbery, one count of attempted armed robbery, and one count of conspiracy to commit robbery (7 R 390).[38] She testified that she entered a plea of guilty to the count of conspiracy to commit robbery and the armed burglary, and that the other charges were still pending (7 R 390). She further testified that she faced a maximum of life in prison on the armed burglary charge and fifteen years on the conspiracy count, and potential criminal liability on the still pending murder charges

[37]The police tracked down Anders and Bing from the call log on Hernandez-Perez's phone listing Anders' cell phone number (9 R 636-37).

[38]In her testimony, Bing made no mention of the fact that she was only charged with second degree murder.

(7 R 390-91). According to Bing, she had not been promised anything for her testimony (7 R 390).

As previously noted, Anders was also brought in for questioning on December 28th (8 R 444). She gave multiple conflicting statements (9 R 671). She initially denied any involvement in the attempted robbery and shootings, instead telling the police she had gone to the apartment solely to drink beer and smoke marijuana (9 R 644). Anders was indicted for two counts of first degree murder, armed burglary, attempted armed robbery, and conspiracy to commit armed robbery (8 R 423). The State of Florida gave notice that it was seeking the death penalty against her (8 R 424). Anders testified that she decided to enter a plea of guilty to some of the charges and to cooperate with the State (8 R 424). In return, the State of Florida agreed not to seek the death penalty against her because of her cooperation (8 R 424). Even with those charges that she pled guilty to, Anders testified that she was still looking at life in prison (8 R 424). Besides that agreement, Anders testified that no promises were made to her regarding the sentence that she would ultimately receive (8 R 424).

During Phillips' penalty phase proceeding, the State presented the following victim impact evidence:

Wilmer Antunes-Padilla testified that his family is from Honduras and he has nine brothers and sisters (10 R 945). Wilmer

lived with his brother Reynaldo in December of 2001 (10 R 945). They came to the United States to get ahead and to help their family in Honduras (10 R 946). Wilmer testified that Reynaldo was a good and humble person, and that his death had affected their family a lot (10 R 946-47). Wilmer prepared a statement, which was read to the jury (10 R 948-49). Within the statement, Wilmer asked "of this Honorable Judge and jury is for God to illuminate your minds with knowledge and wisdom, and that this Court punish with all the weight of the law this terrible crime and that God forgive the assass - - the person that assassinated my brother." (10 R 949).

Augustine Hernandez-Perez, Mateo's brother, testified that they are from Mexico, and that they came to the United States to work and look for dreams (10 R 952-53). Augustine described Mateo as a good and hard working person who sent money home to their family (10 R 953).

Aurelio Salgado testified that he was friends with the victims (10 R 955). After the murders, Aurelio stated that he is now afraid to go outside (10 R 955-56).

In addition to the victim impact testimony, the trial court read a stipulation that Phillips was convicted of a felony and placed on probation at the time of the subject crimes (10 R 958). Further, Sandy Manning, a probation officer at the Department of Corrections, testified that Phillips was placed on probation on

November 9, 2009 (10 R 958-59). Part of his conditions for probation was the he would not own, possess, or carry a firearm (10 R 961). He was also prohibited from associating with any person engaged in any criminal activity (10 R 961).

On behalf of Phillips, the defense presented the following lay and mental health mitigating evidence:

Denise Thornton, Phillips' sister, testified to his good qualities, including the fact that he helped out around the house and he was respectful of others (10 R 964-65). When she needed something, he was there for her (10 R 965). Thornton testified that Phillip's father was gunned down when he was young (10 R 966). He became quiet and withdrawn after his father was murdered (10 R 967).

Priscilla Jenkins, Phillips' grandmother, testified that Phillips was a kindhearted person, well behaved and respectful (10 R 974-75). He went to church and played football (10 R 975). Phillips was about five or six when his father was murdered (10 R 976). While Jenkins thought Phillips was pretty good in school, she wasn't aware of what kind of grades he was getting, just that he went everyday (10 R 976, 980). She knew he dropped out in the tenth grade (10 R 981). She didn't know anything about special education (10 R 977). Jenkins further testified that Phillips struggled a little bit with his speech; some words he couldn't pronounce, and he talks real slow (10 R 976-77).

Michael Hogg, Phillips' grandfather, testified that Phillips was very respectful and he was very close to his mother (10 R 984). He was very kind and had a good attitude (10 R 985). Hogg wasn't always in Phillips' life because he was incarcerated (10 R 989).

Valecia Douglas, Phillips' aunt, testified that Phillips was a good boy and quiet (10 R 990).[39] She was stunned about this incident as it was not in Phillips' character to harm anybody (10 R 995). Douglas also testified that Phillips always had a speech impediment and struggles with words (10 R 993-94). Phillips had a learning disability and was in special education classes (10 R 994). According to Douglas, the only time a teacher called was because Phillips didn't turn in his homework (10 R 998). The reason why he didn't turn it in was because he didn't know how to do it (10 R 998).

Kamilla Jenkins, Philips' aunt, testified that Phillips was very helpful and would babysit for her kids (11 R 1009). He was quiet and very respectful (11 R 1010-11). For a while, Phillips became more withdrawn after his dad was killed (11 R 1012). He started drinking at a young age and was hanging out with the wrong people when he got to high school age (11 R 1012, 1018). Phillips lived in a high crime area, and there were a lot of young guys who stayed in trouble (11 R 1013).

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[39]Douglas is also Antonio Baker's mother (10 R 996).

Terrance Douglas, Phillips' cousin, testified that Phillips was fun to be around and he would put a smile on your face no matter what the situation was (11 R 1020). If you asked him to do anything, he would do it for you (11 R 1021). Phillips had a speech impediment; you couldn't really understand him unless he repeated things two or three times (11 R 1023). Douglas never thought Phillips would be in anything like this because he always tried to keep Douglas out of trouble (11 R 1024).

Nathaniel Thomas, Phillips' godfather, testified that Phillips was easily influenced (11 R 1034). Phillips did not live in a good neighborhood, and he fell in the wrong crowd (11 R 1039). Thomas was concerned that Phillips was not getting enough parental supervision (11 R 1041). At one point his concern got so high that he called the authorities (11 R 1042). Thomas further testified that Phillips couldn't speak at the age of four to five; he couldn't pronounce words properly (11 R 1036). Phillips never got taken to the doctor to work with him on speech therapy (11 R 1036). When his dad died, because of his learning disability, Phillips wasn't really aware or able to react to what was happening (11 R 1043).

Dr. Michael D'Errico, a clinical and forensic psychologist, testified that he performed an evaluation of Phillips on January

16, 2012 (11 R 1053, 1055).[40] He assessed Phillips' understanding of the legal process to determine if he had the capacity to assist his attorney (11 R 1055). He also assessed Phillips' sanity at the time of the offense (11 R 1055). And he performed an "Intellectual Assessment Standardized Intelligence Test", although he did not identify in his testimony what test instrument he used (11 R 1055).

Dr. D'Errico testified that he reviewed a stack of school records, which described Phillips' history in special education classes for specific learning disabilities (11 R 1055-56).[41] It was also reported in the records that Phillips had been involved in speech therapy between the first and fourth grades for a speech impediment or phonological disorder (11 R 1056). In addition, Dr. D'Errico reviewed an incident report from the Department of Children and Families in 2002, in which Phillips showed up at school with his face burned (11 R 1060). The burn was caused by a hot clothes iron (11 R 1060). Phillips said he did it to himself; he wanted to see if the iron was hot (11 R 1060).

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[40]The record does not explain why defense counsel waited until the day before the trial began to have a mental evaluation of Phillips conducted when the charges against him had been pending for two years.

[41]Phillips was involved in special education classes from the first grade until he quit school in the ninth grade (11 R 1060).

Dr. D'Errico testified at the penalty phase that Phillips scored a 76 on the IQ test he administered, which placed Phillips in the fifth percentile ("In other words he - - 95 percent of all of the entire population of the United States if given the same test would score higher than Mr. Phillips did on this test." (11 R 1057). Dr. D'Errico concluded that Phillips has significantly subaverage intelligence and he falls in the borderline range of intellectual functioning (11 R 1056).[42] Dr. D'Errico testified that this result was consistent with psychometric intelligence testing performed on Phillips while he was a youngster in school (11 R 1056-57).

Dr. D'Errico further testified that a borderline IQ person who is in a bad neighborhood full of bad people and criminal activity would be more vulnerable (11 R 1059). Dr. D'Errico elaborated:

> [I]ndividuals who do function within the borderline range or retarded individuals are typically easily influenced by their peers, and it's been my experience that the - - people with - - it's - - I run into - - I've run into it many times, people of average intelligence, when they're growing up they want to be firemen, a police officer or a lawyer or a doctor. People who, and especially people who are in special

[42]According to Dr. D'Errico's testimony, Phillips was not retarded (11 R 1056). Apparently relying upon this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), Dr. D'Errico explained that an individual can be classified as mentally retarded if he scores 70 or below on an IQ test. Phillips' score, which was above 70, placed him in the borderline range (11 R 1056-57).

> education in school, they just want to be normal. Okay. So if they are in a peer group that normal for the peer group is to engage in various and sundry criminal activities, that's what a - - you know, a borderline intellectual person would think is the thing to do.

(11 R 1058-59). Dr. D'Errico reiterated that Phillips' historical intellectual functioning coupled with his current intellectual functioning qualifies him with a diagnosis of borderline intellectual functioning according to the diagnostic manual (11 R 1059). He further reiterated that Phillips was not merely slightly below the normal range of intelligence; he was significantly below the normal range of intelligence (11 R 1064-65).

With regard to Phillips' speech impediment, Dr. D'Errico testified that Phillips was involved in speech therapy classes from first to fourth grade (11 R 1060). Dr. D'Errico also testified to the fact that similar to his borderline intelligence, Phillips' speech impediment would make him more vulnerable:

> It would - - that fact would all - - the fact that he had to go to speech therapy would be similar to the other factor of his being involved in special education classes, you know, it - - it would make him more vulnerable to wanting to appear like he fits in better with his peers, whoever the peers may be at that time.

(11 R 1062-63).

DISPOSITION OF THE CHARGES AGAINST THE CODEFENDANTS

At Phillips' request, this Court ordered the record on appeal to be supplemented with the files and records of the clerk of the circuit court regarding the court proceedings in the cases of Phillips' codefendants: Bing, Anders, and Baker.

A. SHANISE BING

As to Shanise Bing, the supplemental record shows that two separate informations with two separate case numbers were filed against her, both arising from the events of December 24, 2009, at the Lighthouse Bay Apartments. First, on January 19, 2010, an information was filed in Case No. 2010-CF-679. This information contained two counts and charged Bing with armed burglary and attempted armed robbery (12 SR 1551).

Second, on February 23, 2010, an information was filed in Case No. 2010-CF-002009. This information contained three counts and charged Bing with two counts of second degree murder with a weapon and one count of conspiracy to commit armed robbery (12 SR 1663-64).[43] An amended information correcting a typographical error was filed in the case on February 25, 2010 (12 SR 1665-66).

On June 3, 2010, a court hearing was held in State v. Bing. Though the cover page of the transcript contains only one case number, 2010-CF-002009 (12 SR 1613), within the body of the

[43]Bing was never charged with first degree murder even though she was a participant in the underlying felony. Moreover, Phillips' jury was never advised that Bing was not charged with first degree murder.

transcript it is apparent that the proceeding was also a hearing in Case No. 2010-CF-679. Bing's counsel explained that Bing was withdrawing her previous pleas and entering a guilty plea as to Count I of the information in Case No. 2010-CF-679, and a guilty plea as to Count 3 of the information in Case No. 2010-CF-002009 (12 SR 1618-19). Thus, Bing pled guilty to armed burglary (Count 1 of Case No. 2010-CF-679) and to conspiracy to commit armed robbery (Count 3 of Case No. 2010-CF-002009). The presiding judge (Judge Mark Mahon) advised Bing that "because you've entered this plea today, we're not going to trial." (12 SR 1621). Moments later, the judge further explained: "because you entered a plea today, and we're not having a trial, you lose the rights that go along with a trial." (12 SR 1621). After the pleas were accepted, Bing's counsel advised the judge that a presentence investigation report was not being requested "at this time." (12 SR 1626). The judge then stated: "we need to set this matter over for sentencing." (12 SR 1627). Thereupon, the following discussion occurred:

> [THE COURT:] What kind of timeframe are y'all expecting? Is it going to be a while probably?
>
> MS. KITE [the prosecuting attorney]: Yes, sir.
>
> THE COURT: It's going to be a pending disposition of the codefendant?
>
> MS. KITE: Yes.

(12 SR 1627).

The online docket for the Duval County Clerk of Court shows that the sentencing was repeatedly continued thereafter. There was never a suggestion in the records that there was anything left pending other than a sentencing on the two counts on which guilty pleas had been entered. Clearly, the judge understood that the other counts had been disposed of when the guilty pleas were entered.

Ultimately, the sentencing hearing was conducted on June 28, 2012 (12 SR 1630). At that time, Judge Mark Hulsey presided (12 SR 1630). Bing's attorney advised the judge that because of Bing's cooperation, the State was able to make a case against her codefendants (12 SR 1653) ("And, based on this, because the other co-defendants did not, in fact, tell what happened, [law enforcement was] able to put together the pieces based on her testimony in order to charge the others that were involved in this case") (12 SR 1653). The prosecuting attorney then stated for the record:

> And what [defense counsel] has said is 100-percent true. Without her testimony it would have been very, very difficult for the investigators from the Sheriff's Office to move forward in the investigation. She really was the pivotal point in the investigation. And I say that because her involvement in this particular case didn't give maybe as much value to the jury as Barbara Anders, because Barbara Anders was inside the apartment for much longer than Ms. Bing was.

(12 SR 1655). Later, she elaborated regarding Anders:

> During the course of this case Barbara Anders was her friend and probably is no longer because of her

> testimony about the truth of the situation that Barbara Anders was more involved than she initially wanted everyone to believe.

(12 SR 1656).

The judge then followed the prosecutor's recommendation and sentenced Bing to six months in the county jail followed by one year of probation (12 SR 1595, 1658-59). At the end of the sentencing hearing, the prosecutor stated for the record: "The State will nolle-prosequi 30 {sic} the remaining counts in both cases." (12 SR 1661).

B. BARBARA ANDERS

On April 22, 2010, Barbara Anders was indicted on five counts (10 SR 1353-54). These included two counts of first degree murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery (10 SR 1353). On July 13, 2010, Anders entered guilty pleas "to counts three, four and five in the indictment in this case" (10 SR 1469). A document (entitled: Plea of Guilty and Negotiated Sentence) was placed in the court file (10 SR 1375). It provided:

> PG [pled guilty] - Ct 3 (armed burglary), Ct 4 (attempted armed robbery), and Ct 5 (conspiracy to commit armed robbery). State will NP [nolle prosequi] Cts 1 & 2. Ms. Anders agrees to testify truthfully at all subsequent proceedings. Sentencing hrg - Judge will determine appropriate sentence. Court costs and conflict counsel fees. State will withdraw the notice of intent to seek the death penalty. And waive seeking the death penalty in this case.

(10 SR 1375). In the transcript from the plea hearing, the State also "waive[d] the guidelines on this . . . and any minimum mandatories." Anders was told that "this Court would have the authority to sentence her anywhere from zero to life." (10 SR 1470).

After Anders' plea was accepted, the parties indicated that the sentencing would be "probably a ways down the road" (10 SR 1478). The prosecutor explained:

> I believe Terrance Phillips' would really be the controlling case. Antonio Baker was recently arrested. I haven't indicted him yet. I'm sorry, he hasn't been indicted yet.

(10 SR 1478).

On July 14, 2010, the presiding judge signed an order entitled: Order Discharging Attorney and Authorizing JAC to Make Payment for Services (10 SR 1377). Because "the State's Nolle Prosequi of Counts One and Two, and the Court finding that the charges for which counsel was appointed to represent Defendant are dropped," the order discharged penalty phase counsel "from any further representation of Defendant" (10 SR 1377).

Anders' sentencing hearing was conducted on May 17, 2012. During those proceedings, the prosecutor who was counsel for the State at Phillips' trial advised the court:

> All of the individuals in this particular case were very young. Shanise Bing at the time this all happened was 17 years old; Barbara Anders had just turned 18; and then her boyfriend and his cousin Terrance Phillips

were both very young. Terrance Phillips being the middle of the two, and then Antonio being the oldest.

(11 SR 1538).[44]

It was a stroke of luck in this particular case that Terrance Phillips left behind that shoe. It was instrumental in the jury's evaluation of Ms. Anders and Ms. Bing's testimony that is one of the things that they said that the couldn't make up.

Ms. Anders, unlike Shanise Bing, had the most information to give the jury partly because she was the one that remained in there the longest before fleeing, before the gunshots took place; but also her memory of what happened inside the car leading up to the events, the fact that she had to admit to the meeting of these individuals at the convenience store, and that she was the one exchanging the phone calls back and forth between the people that she couldn't understand on the other side.

(11 SR 1538-39).

She [Anders] has, like I argued to the jury, a lifetime of reasons to tell the truth. **She never tried to distance herself from it.** She told everything that she did even to the fact that she hit one of the Mexicans over the head with one of the bottles **because she**, unlike Shanise Bing, **was in it with Antonio Baker. And it wasn't until he started getting into the fight that she joined in.** I think the Court should look at that because it gives the Court a context of why she was in the situation she was in. She went in there holding herself out as something and **they couldn't make a deal on money and she could have walked out, but those two men walked in and changed her life forever.**

(11 SR 1541) (emphasis added).[45]

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[44]Anders (DOB 11/11/91) was less than four months younger than Phillips (DOB 7/16/91). Antonio Baker (DOB 11/13/89) was two years older than Anders.

[45]Of course, the reason Anders had the most information was because she was the one who met the men and set the whole thing up. Anders did in fact try to distance herself from what

The prosecutor then advised the judge at Anders' sentencing:

> I say all this, Your Honor, because I want the Court to understand why the State's recommendation is the way it is. If the Court is somewhat concerned about the fact that Terrance Phillips got the death penalty and Antonio Baker got life, the Court should not be concerned.
>
> The Florida Supreme Court says that the proportionality arguments regarding the death penalty in Terrance Phillips shouldn't be equated to this case: Number one, she cooperated. That takes her out of it; and then, number two, that proportionality arguments are only argued in reference to comparing death penalty cases to other death penalty cases.

(11 SR 1541-42).

Finally, the prosecutor argued to the judge on Anders' behalf:

> I think she should be given great consideration, number one, for telling the truth in a terrible situation. And when I met with Ms. Anders, so long ago, I said, "You've got to make the best of a bad situation, and the truth is all you have." That's all she had. That lady in that letter can call her a liar all day long, but the evidence and her testimony should show that Court otherwise.
>
> Number Two is that she not only had to testify on one trial, she had to testify in two trials. The second trial would have been the toughest for her **because it was the person that not only she suffered abuse from, but she also still loved.** She had to look over and identify him, and that was genuine.

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occurred as the prosecutor stated during Bing's sentencing. And, the reason "those two men walked in and changed her life forever" was because she called them to get them to come to the apartment and according to Bing literally opened the door so that they could enter the apartment.

> I don't know if the Court remembers that moment I asked Ms. Anders, **"Do you still love him?" And she does**. Even though she can't be with him, she still cares about him.

(11 SR 1543) (emphasis added).[46]

At the conclusion of Anders' sentencing hearing, she was sentenced to one year in the county jail followed by two years of probation (10 SR 1438; 11 SR 1547).

C. ANTONIO BAKER

Baker was arrested in the instant case on April 27, 2010. On August 26, 2010, he was indicted for two counts of first degree murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery. Baker's trial began on February 6, 2012.

During his trial, one of the witnesses that the State called was Shanise Bing (5 SR. 747). In the course of her cross-examination, Bing testified as follows:

> Q Ms. Bing, would it be fair to say that Cookie (Anders) set this up?
>
> A Yes, sir.
>
> Q Okay. So if there is a mastermind amongst the four of you, it's Cookie?
>
> A Yes, sir.

(5 SR 763).

---

[46]It was not disclosed at Phillips' trial that Anders still loved Baker, and thus had motive to recant her earlier statement to law enforcement that Baker was the shooter.

In response to this testimony, the State elicited the following testimony from Bing in its redirect examination:

> Q But you know the defendant, Antonio Baker?
>
> A Yes, ma'am.
>
> Q And Antonio Baker is the person in the apartment with you; is that right?
>
> A Yes, ma'am.
>
> Q And Antonio Baker was the person in that car making a plan to rob these Mexican; is that correct?
>
> A Yes, ma'am.
>
> Q Are you positive about that?
>
> A Yes, ma'am.

(5 SR 766).

The State also called Barbara Anders. In its direct examination of Anders, the State elicited the following testimony regarding law enforcement's questioning of her on December 28, 2009:

> Q And when the police got you down there, did you - - did they go over your rights with you?
>
> A Yes, ma'am.
>
> Q Did you sign the form?
>
> A Yes, ma'am.
>
> Q Did they ask you questions about what happened?
>
> A Yes, ma'am.
>
> Q And you initially tell them the truth about it?

A No, ma'am.

Q Did you tell them initially who you were with on December 24, 2009?

A No, ma'am.

Q Why not?

A Because I didn't want nobody to get in trouble.

* * *

Q Okay. Did you admit your involvement to the police in this matter?

A No, ma'am.

Q Okay. Did you initially identify the individuals you were with to the police in this matter?

A Yes, ma'am.

Q I mean initially. I mean first, the first time they asked you?

A No, ma'am.

(5 SR 725-26, 728). No testimony was elicited from Anders regarding her statement to the police that Baker had the gun and shot the victims.[47] No testimony was elicited about her taped conversation with Dwight.

[47]Anders' testimony at Phillips' trial was that she told the police that she saw Baker with the gun and that he shot the victims. She testified that this was a lie she told the police because she was angry with Baker. Since she wanted to get back at Baker and get him in trouble, her testimony at Baker's trial that she did not want to get anybody in trouble simply was not true. The best explanation for this very different testimony at Baker's trial is that Anders still loved Baker and shaded her testimony to benefit him, as the prosecutor noted at her sentencing.

The jury found Baker guilty as charged on all counts. The penalty phase was conducted on February 17, 2010, after which the jury returned life recommendations for both murders. The judge sentenced Baker to a life sentence on each count of first degree murder. Baker also received a life sentence on Count 3, 15 years for Count 4, and 15 years as to Count 5, all to run concurrent.

SUMMARY OF ARGUMENT

1. The Eighth Amendment applies with special force in capital cases and mandates that a death sentence be proportional. Death sentences under the Eighth Amendment are reserved for the worst of the worst. The sentence of death is not proportionate in this case. The aggravating factors found by the trial court, in light of the underlying facts surrounding them, do not establish this as one of the most aggravated of capital cases. The mitigation established in the record and found by the trial court does not establish that this is the least mitigated of cases. Moreover, given the disparate treatment to Phillips' equally or more culpable codefendants, Phillips' death sentence is disproportionate.

2. The trial court erred in allowing improper victim impact evidence. In a statement prepared by a family member, the judge and jury were asked for God to illuminate their minds with knowledge and wisdom, and that the court punish Phillips with all the weight of the law for this terrible crime. This statement

runs afoul of the precedent of the United States Supreme Court, this Court, and § 921.141(7), Fla. Stat. (2014), which states that "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence."

3. Insufficient evidence exists to support a guilty verdict of premeditated first degree murder. There is no evidence of a fully-formed conscious purpose to kill. To the contrary, there is a complete absence of evidence of how the shooting occurred.

4. Phillips was deprived of his right to due process because the State failed to disclose evidence which was material and exculpatory in nature and/or the prosecution permitted false and/or misleading evidence to be presented and go uncorrected to his jury and/or gave Anders a contingent reward. When the proper materiality analysis is conducted as to the multiple due process violations present in Phillips' case, his convictions and/or sentences of death cannot stand, and must be vacated.

5. The death penalty is unconstitutionally imposed because Florida's sentencing procedures are unconstitutional under the Sixth Amendment pursuant to Ring v. Arizona, 536 U.S. 584 (2002).

6. Phillips was involved in special education classes from the first grade until he quit school in the ninth grade. He has significantly subaverage intelligence and he falls in the

borderline range of intellectual functioning. However, because the result of his IQ score was over 70, Phillips' was barred from being deemed mentally retarded due to this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007). In light of the United States Supreme Court's subsequent decisions in Hall v. Florida, 134 S.Ct. 1986 (2014), and Brumfield v. Cain, 135 S.Ct. 2269 (2015), Phillips submits that his case must be remanded for a determination of mental retardation.

ARGUMENT I

PHILLIPS' DEATH SENTENCES ARE DISPROPORTIONATE AND VIOLATE THE EIGHTH AMENDMENT AS A RESULT.

A. INTRODUCTION

The United States Supreme Court has held that the Eighth Amendment requires that criminal punishment must be "proportioned" to the crime for which the punishment is imposed:

> The Eighth Amendment succinctly prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. **We explained "that it**

> **is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense**." Id., at 367, 30 S.Ct. 544. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 997–998, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also id., at 1009–1011, 111 S.Ct. 2680 (White, J., dissenting).

Atkins v. Virginia, 536 U.S. 304, 311 (2002) (emphasis added).

The Supreme Court has also held that in capital cases the Eighth Amendment applies with special force:

> **Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force**. Thompson, 487 U.S., at 856, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment). **Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."** Atkins, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Godfrey v. Georgia, 446 U.S. 420, 428–429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 568 (2005) (emphasis added).[48]

The Supreme Court reiterated the limits that the Eighth Amendment imposes in capital cases in determining whether death sentences are proportional:

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[48]Additionally, the Supreme Court has held that the Eighth Amendment requires even non-capital sentences to be proportional. Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).").

> When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.
>
> For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " Roper, supra, at 568, 125 S.Ct. 1183 (quoting Atkins, supra, at 319, 122 S.Ct. 2242). Though the death penalty is not invariably unconstitutional, see Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), **the Court insists upon confining the instances in which the punishment can be imposed**.

Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (emphasis added).

In Atkins, the Supreme Court wrote:

> With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since Gregg, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), **we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder**." Id., at 433, 100 S.Ct. 1759. If **the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State**, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to **our narrowing jurisprudence**, which **seeks to ensure that only the most deserving of execution are put to death**, an exclusion for the mentally retarded is appropriate.

536 U.S. at 319 (emphasis added).

And in Roper, the Supreme Court explained:

> Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or

> blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

543 U.S. at 571.

Under the Eighth Amendment and Florida law, this Court has an independent obligation to review each case where a sentence of death is imposed to determine whether death is the appropriate punishment. See Morton v. State, 789 So. 2d 324, 335 (Fla. 2001). The standard of review in determining whether a death sentence is proportional is de novo. See Larkins v. State, 739 So. 2d 90 (Fla. 1999).

As this Court has long recognized, the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"). See also Clark v. State, 609 So. 2d 513, 516 (Fla 1992); Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999); Crook v. State, 908 So. 2d 350, 357 (Fla. 2008).

In deciding the proportionality of a death sentence for a particular case, this Court has stated:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the

> circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So. 3d 187, 205 (Fla. 2010), quoting Offord v. State, 959 So. 2d 187, 189 (Fla. 2007)(emphasis in original).

Moreover, in cases where codefendants are involved in the commission of a crime, this Court performs an additional analysis of relative culpability. Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002). It has long been established that equally culpable codefendants should receive equal punishment. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000); Jennings v. State, 718 So. 2d 144 (Fla. 1998); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Thus, "When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate." Larzelere v. State, 676 So. 2d 394 (Fla. 1996), citing to Downs v. State, 572 So. 2d 895 (Fla. 1990), and Slater v. State, 316 So. 2d 539 (Fla. 1975).

B. PHILLIPS' CASE IS NEITHER THE MOST AGGRAVATED NOR THE LEAST MITIGATED OF CRIMES

A review of Phillips' case demonstrates that it is not amongst the most aggravated and least mitigated of crimes. Two of the weightiest aggravators in Florida's sentencing scheme, CCP and HAC, Morton v. State, 995 So. 2d 233, 243 (Fla. 2008), were

neither sought by the State nor found by the court. While three other aggravators were found and given great weight by the trial court, the facts on which these aggravators were premised do not support a finding that this case falls into the most aggravated of first degree murders nor that Phillips is among the worst of the worst. Roper, 543 U.S. at 569.

There is no question that the first aggravator, Phillips' previous conviction of a capital felony, is often considered to be a particular weighty aggravator. However, Phillips submits that this aggravating circumstance is tempered by the fact that it is based on the contemporaneous murder in this case and it did not occur during a prior, unrelated crime. See Scott v. State, 66 So. 3d 923, 936 (Fla. 2011)("In fact, the circumstances of this case stand in stark contrast to other robbery-murder cases in which this Court has upheld the sentence of death as proportionate where the prior violent felony aggravator was predicated upon crimes that *did not occur* contemporaneously with the murder.")(emphasis in original). See also Melton v. State, 638 So. 2d 927, 929, n2 (1994) (prior violent felony aggravator established by unrelated armed robbery and first degree murder).

The second aggravating factor relied upon by the trial court was that Phillips was on probation at the time of the murders. This factor is not disputed, but it also is important to note the nature of the crime for which Phillips was on probation. Through

stipulation between the State and defense, the trial court informed the jury only that Phillips was convicted of a felony and placed on probation at the time of the subject crimes (10 R 958). The conviction was for possession of a controlled substance, ecstasy (3 R 419; 4 R 605; 5 R 885). This Court should take into consideration that this conviction was for a non-violent crime and when Phillips was barely 18. Certainly, Phillips' case is distinguishable from those defendants who are on supervision from prior prison sentences or for violent offenses against persons. Being on probation for the possession of ecstasy, a common well known party drug, simply cannot be a significant aggravator that is relevant to whether Phillips is an offender who committed "a narrow category of the most serious crimes" and whose extreme culpability makes him among "the most deserving of execution." Atkins, 536 U.S. at 319

The third aggravator in this case was that the murders were committed while Phillips was committing a burglary or attempted armed robbery. Phillips again does not dispute the existence of this aggravator. However, he notes that by the very nature of the offense, this aggravating circumstance will exist in every felony/murder case. In a felony/murder case, this aggravator is not particularly weighty and cannot itself justify a death sentence. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) ("This is a classic example of a felony murder, and very little,

if any, evidence of premeditation exists."). See also Menendez v. State, 368 So. 2d 1278 (Fla. 1979). Further, as will be discussed herein, what distinguishes this case from others in which a death sentence has not been found to be disproportional is the fact that there is clear evidence that Philips was not the ringleader nor was it his idea to commit the robbery.

With regard to mitigation, Phillips was eighteen years of age at the time of the crime, which is as close as one can be to the age at which the death penalty is constitutionally barred.[49] See Urbin, 714 So. 2d at 418 ("[T]he closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes."). See also Bell v. State, 841 So. 2d 329, 338 (Fla. 2002). While Phillips may be eligible for a death sentence because he happened to be eighteen when he committed the crimes, he still has many of the disabilities associated with youth: poor judgment and a lack of experience being key missing character traits. See Roper, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). Indeed, in its sentencing order, the

[49]Phillips was born on July 16, 1991 (1 R 1). The crimes in the instant case occurred on December 24, 2009. As such, Phillips was eighteen years, five months and eight days old at the time of the crimes.

trial court gave this statutory mitigating circumstance significant weight (4 R 657).

Phillips' intellectual functioning likewise places him on the cusp of being ineligible for the death penalty. See American Psychiatric Association, Diagnostic and Statistical Manual, (text rev. 4th ed. 2000) at 48. Phillips has significantly subaverage intelligence and he falls in the borderline range of intellectual functioning (11 R 1056). Phillips was involved in special education classes from the first grade until he quit school in the ninth grade (11 R 1060). His reported IQ score of 76 on an unidentified testing instrument places him in the fifth percentile (11 R 1057).[50] In short, Phillips is intellectually very slow, and 95% of the people in the United States run a faster intellectual race than he does. In its sentencing order, the trial court found as a mitigating circumstance Phillips' borderline IQ and learning disability, giving it moderate weight (4 R 659). The trial court also took Phillips' borderline range of intellectual functioning into consideration when considering his young age of 18 at the time of the murders (4 R 656). The court gave this mitigating circumstance significant weight (4 R 657).

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[50]When the Flynn effect is considered and the IQ score recalibrated accordingly, Phillips' IQ score is 75 or lower. However, the scientifically recognized Flynn effect and the required recalibration of an IQ score that it requires was not discussed or even mentioned in the proceedings below.

Here, Phillips was and is on the cusp of receiving the benefit of both Atkins v. Virginia and Roper v. Simmons.[51] Logically, that fact should make both his age at the time of the offense and his low IQ score particularly weighty mitigators. The two of them together should by themselves outweigh the historically less weighty aggravators found in this case. But, Phillips presented and the trial court found much more mitigation.

The trial court also gave some weight to evidence establishing that Phillips grew up in a high crime neighborhood, that he was neglected and abused as a child, and that he was a loving and caring family member and a steadfast friend and good neighbor. Also, the trial court considered and gave slight or little weight to numerous other mitigating circumstances, including the fact that Phillips has a severe speech impediment, he is easily influenced, he was impacted by the murder of his father, and he was respectful during court hearings. Phillips submits that when considered in the aggregate, this case is not among the least mitigated and is undeserving of a death sentence.

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[51]As explained infra, Brumfield v. Cain mandates that this Court remand for an evidentiary hearing on whether Phillips is in fact entitled to the benefit of Atkins v. Virginia. However, such a remand would be unnecessary if this Court concludes that on the basis of the record, Phillips' death sentence is proportional.

Moreover, in other cases involving circumstances similar to those presented here, this Court has held the death penalty disproportionate. Indeed, Phillips' case fits squarely within the category of cases described by this Court as a "robbery gone bad." See e.g., Yacob v. State, 136 So. 3d 539, 550 (2014); Jones v. State, 963 So. 2d 180, 188-89 (Fla. 2007); Terry v. State, 668 So. 2d 954 (Fla. 1996); Urbin v. State, 714 So. 2d 411 (Fla. 1998). There was at no time a preconceived plan to murder any of the victims.[52] Rather, the entirety of the evidence supports the fact that the four codefendants intended only to commit a robbery under the false pretense of offering sex for money. What no one expected was the resistance that would be encountered. Instead of simply handing over their money, the men in the apartment who were trying to pay for sex with an underage girl put up a fierce fight. Phillips immediately found himself on the defensive, trying to fight off three individuals in what can best be described as a melee.

While there was no eyewitness testimony as to how the shooting occurred, the circumstances surrounding the encounter support the notion that the victims were killed during a wild brawl with beer bottles being used as weapons. This is also supported by the nature of the gunshot wounds. There was no

[52]In Argument III, infra, Phillips specifically asserts that there was insufficient evidence to charge the jury on premeditation or to support a verdict finding premeditation.

execution style headshot. Instead, Hernandez-Perez's two gunshot wounds were in the hip and thigh, the latter not being fatal (9 R 714, 718). The hip wound, however, hit a main artery, which caused him to bleed to death (9 R 716). These shots, obviously, were not deliberately made, but could reasonably be seen as done during the hand to hand fighting. That the medical examiner found stippling on Hernandez-Perez's body (indicating the gun was fired within 2-3 feet of the body) supports this conclusion (9 R. 716-17).

Similarly, the very oblique angle of the bullet that killed Antunes-Padilla indicates a frantic shot, and not one made in the robbery scenario that typically involves an assailant trying to rob a convenience store clerk.[53] Like the wounds that killed Hernandez-Perez, the shot that killed Antunes-Padilla and the stippling from the gun suggests that he was shot during a fight or a brawl.[54] There was nothing premeditated about what occurred. The chaos of a brawl involving numerous people struggling in a small studio apartment, and particularly the

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[53]According to the medical examiner, the gunshot wound to Antunes-Padilla "entered at his right breast just above and to the outside of [] the nipple, passed backward, downward and leftward through his body, went through his right lung, through his spine, through his aorta, the major artery of the body. It bruised his left lung, broke a couple of ribs and it passed out his left back." (9 R 732).

[54]The medical examiner testified that the stippling indicated that firearm was within a few inches from Antunes-Padilla when fired (9 R 734-35).

stiff, considerable resistance to Anders' plan of a simple robbery, prompted the shootings. At the very least, the circumstances surrounding the actual shooting are unclear, thereby necessitating a finding that the death sentence is disproportionate. See Terry, 668 So. 2d at 965.

Further, the fact that there was no prearranged plan to murder anyone has been taken into consideration in similar cases in determining that a death sentence was disproportionate to the crime. In Yacob, 136 So. 3d at 539, for instance, this Court vacated the death sentence after finding that there was no indication that murdering the victim was part of the defendant's original robbery plan. This Court elaborated:

> Moreover, the murder does not appear to have been a part of the pre-arranged robbery plan. Instead, Maida's death resulted from a perceived threat, which can reasonably be inferred from the events surrounding the crime and is supported by Yacob's prior experience working in convenience stores, even though this particular evidence was not presented to the jury, that occurred after Yacob pocketed his gun and headed for the store's exit.

Yacob, 136 So. 3d at 552. See also Scott, 66 So. 3d at 937 (finding that the murder was more a "reactive action in response to the victim's resistance to the robbery" than a "prearranged plan.").

With regard to aggravating and mitigating circumstances, Phillips' case on balance is similar to other robbery-murder cases where this Court found the death penalty to be

disproportionate. In Yacob, while there was only one aggravating factor, there was also very little mitigation. This Court determined that "[a]lthough the mitigation in this case is not substantial, we nevertheless hold that the sentence of death is disproportionate because we conclude that this case is comparable to others in which we vacated the death sentence because it was disproportionate." Yacob, 136 So. 3d at 550.

In Terry, the trial court found two aggravators: (1) prior violent felony or a felony involving the use or threat of violence to the person (conviction for principal to aggravated assault); and (2) capital felony committed during the course of an armed robbery/pecuniary gain. 668 So. 2d at 965. The trial court found no statutory mitigators and rejected Terry's minimal nonstatutory mitigation. Id. In vacating Terry's death sentence, this Court stated, "although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances." Id.

In Phillips' case, significant mitigation has been established. While three aggravating circumstances were present, they are tempered in light of the totality of the underlying circumstances. This was a classic robbery gone bad devoid of any premeditation whatsoever to commit murder. Phillips submits that this Court, in order to fulfill its "obligation to assure that the death penalty is not imposed in an arbitrary or capricious

manner in this state", Robertson v. State, 143 So. 3d 907, 909 (Fla. 2014), must vacate the death sentences and impose life. See Yacob v. State, 136 So.3d at 549 ("we reemphasized that the death penalty is reserved for only the most aggravated and least mitigated of cases.").

C. PHILLIPS' CODEFENDANTS ARE EQUALLY OR MORE MORALLY CULPABLE

One additional aspect of this case that must be considered by this Court is the sentence and relative culpability of Phillips' three codefendants. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("Underlying [Eighth Amendment jurisprudence] is the principle that punishment should be directly related to the personal culpability of the criminal defendant."). In contrast to Phillips' sentence, Baker received a life sentence, Anders was sentenced to one year in the county jail followed by two years of probation (10 SR 1438; 11 SR 1547), and Bing was sentenced to six months in the county jail followed by one year of probation (12 SR 1595, 1658-59). Thus, Phillips was the only one of the four to receive a death sentence. This is despite the fact that it was Anders and Bing who were first in contact with the victims and who went to their apartment to orchestrate the robbery (7 R 319-20; 322, 343, 381; 8 R 436, 438). This is also despite the fact that it was Anders who was the leader who set everything up

that night (8 R 404-05, 411).[55] And, this is despite the fact that Baker was the oldest of the group and was on the phone with Anders immediately before and after the crimes (1 R 4; 9 R 656, 673).[56] It is noteworthy that while Bing was unable to recall any words that Phillips spoke when the four codefendants were in

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[55]Bing at Baker's trial testified that Anders was "the mastermind" (5 SR 763).

[56]During Baker's penalty phase, the prosecution characterized his role in the murders as major:

> And then you have this: It seems simple, doesn't it? Just a photograph of stairs. But it's not. It's because this defendant walked up every single step with Terrance Phillips. And what do you have once he gets in there, inside there? The witnesses say the gun is already out and this defendant is right there.
>
> And Aurelio Salgado says that the moment he walks in, there is no words, Terrance Phillips puts the gun to Mateo Hernandez Perez' head. He tries to get up to help, and during the struggle and the fight he's struck from behind, and then he put his arm up, and he's struck again by this defendant.
>
> If it wasn't for this defendant's participation in it - - he's not it {sic} sitting over somewhere planning it out or watching it go into motion, he's there every single step of the way. Every single step. And when he sees his cousin get into trouble {sic} president, what does he do? He aids in hitting the third man that would have {sic} in that fight but for his participation. That's not minor, that's major. Because guess what? He didn't just hit him on the head, he chased him. He chased him all the way to the top of that - - those stairs, all the way to the end, in that doorway, making Aurelio Salgado jump from the top to the middle and then gunshots {sic} running out. He wasn't minor, he was major.

(16 SR 125-26).

the car together or attribute any specific planning to him, at Baker's trial she testified that she was "positive" that Baker "was the person in that car making a plan to rob these Mexicans" (5 SR 766). Thus, according to Bing, both Anders and Baker were more responsible for the robbery attempt.

Moreover, this is not a situation where Phillips' sentence can be differentiated from that of his codefendants based on the relative strength or weakness of mitigation. Phillips' case featured substantial mitigation. Conversely, while Anders and Bing had no penalty phase proceeding, a review of Baker's penalty phase reveals little mitigation. As acknowledged by Dr. Krop, Baker's penalty phase mental health expert, there was no type of diagnosable mental illness on the part of Baker (16 SR 51). Further, according to Dr. Krop, Baker never had any psychiatric treatment or psychological counseling, and he has an IQ in the low average range (16 SR 51-52).[57] And while there was lay witness testimony from mostly family, it was limited to generic "good" characteristics that Baker possessed, such as the fact that he was obedient and helpful around the house (16 SR 79, 104); he was always polite and respectful (16 SR 87, 99); he listened to his mother and did his chores as asked (16 SR 96, 103, 104); and he was introverted and quiet (16 SR 86).

[57]Dr. Krop diagnosed Baker with marijuana dependence and a learning disability (16 SR 53).

Further, any triggerman status must be viewed with skepticism. While there was testimony that Phillips was seen entering the apartment with the gun, there was no testimony to seeing him fire the gun, nor any physical evidence suggesting that he was the one who fired it. Indeed, the State introduced evidence that he had stated that he dropped the gun before it was fired. With four men struggling for the gun when it was dropped, any one of the four could have latched onto it and fired it wildly and without aiming it as the brawling continued.

Bing did not see Phillips in possession of the gun after the shooting. Only Anders claimed to have seen Phillips with the gun afterwards, but as the prosecutor conceded at her sentencing hearing, she was still in love with Baker and had motive in trying to shift moral culpability to Phillips in an attempt to save Baker's life. In any event, possession of the gun afterwards does not prove possession of the gun through the entirety of the brawl over the gun.[58]

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[58]The evidence is that the brawl lasted a period of time. It began as Bing, the 17 year old, left the apartment. Three men, ages 26, 32, and 48, were attacking Phillips according to Anders. Seeing this she grabbed a bottle and hit Salgado, the 48 year old, over the head. When Baker joined the brawl, Anders testified that she left. After being hit over the head with the bottle, Salgado raised his arm to ward off being struck by a second bottle. As this was happening, the 26 and 32 year old continued to fight Phillips, an 18 year old. That fight continued as Salgado while seeing stars staggered out of the apartment. He got outside and was half way down the stair case when he heard the first gun shot. All this time according to the State's evidence, Phillips was being attacked (8 R 527). It was

Additionally, according Anders, Phillips got "his ass whooped" by the three Mexicans before the gun was fired (8 R 527). She said he got "beat up" (8 R 528). Bing testified that Phillips said he got hit over the head with a bottle and lost his shoe in the struggle over the gun (7 R 387). Clearly, such a struggle during which Anders said Phillips was beaten up shows that Phillips is not among the worst of the worst. Roper, 543 U.S. at 569. He wasn't even the most morally culpable of the four codefendants.

Here, despite not being the leader nor being the oldest or smartest, and despite not having the weakest mitigation, Phillips has been singled out for a death sentence. The disparate treatment of Phillips' codefendants renders his punishment disproportionate. Based on the foregoing, Phillips submits that a life sentence must be imposed.

ARGUMENT II

PHILLIPS' PENALTY PHASE PROCEEDING WAS TAINTED BY IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

Prior to trial, Phillips filed a motion to require a proffer and to limit the admissibility of victim-impact evidence (1 R 186). During Phillips' penalty phase, the State proffered the

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only then that shots were fired.

victim impact testimony of Wilmer Antunes-Padilla (10 R 919).[59] Following the proffer, defense counsel objected to Antunes-Padilla's testimony on the basis that it constituted improper victim impact testimony (10 R 924). Defense counsel's objection was overruled and the testimony was allowed (10 R 927). The defense requested and was granted a standing objection to the victim impact (10 R. 944).

Wilmer Antunes-Padilla testified that his family is from Honduras and he has nine brothers and sisters (10 R 945). Wilmer lived with his brother Reynaldo in December of 2001 (10 R 945). They came to the United States to get ahead and to help their family in Honduras (10 R 946). Wilmer testified that Reynaldo was a good and humble person, and that death had affected their family a lot (10 R 946-47). Wilmer prepared a statement, which was read to the jury (10 R 948-49). Within the statement, Wilmer asked "of this Honorable Judge and jury is for God to illuminate your minds with knowledge and wisdom, and that this Court punish with all the weight of the law this terrible crime and that God forgive the assass - - the person that assassinated my brother." (10 R 949).

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[59]The State did not previously turn over to the defense Antunes-Padilla's statements because they were in Spanish (10 R 919). Thus the State proffered Padilla's testimony with an interpreter present to see if the defense had any objections (10 R 919).

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. See Kalisz v. State, 124 So. 3d 185, 211 (Fla. 2013). Here, Antunes-Padilla's statement to the jury was inflammatory and denied him due process and a fair proceeding. See Payne v. Tennessee, 501 U.S. 808, 825 (1991)("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.").

The State may present victim impact evidence which shows "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla. Stat. (2014); see Wheeler v. State, 4 So. 3d 599, 607 (Fla. 2009). However, the admissibility of victim impact evidence is not limitless. Sexton v. State, 775 So. 2d 923, 932 (Fla. 200); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003). Those witnesses providing victim impact testimony are prohibited from giving characterizations and their opinions about the crime. Sexton, 775 So. 2d at 932, citing to Payne, 501 U.S. at 826-27.[60] Indeed, § 921.141(7) Fla. Stat. states:

[60]The United States Supreme Court in Payne left intact its jurisprudence holding that the Eighth Amendment precluded the introduction of a victim's family member's "opinions about the crime, the defendant, and the appropriate sentence." 501 U.S. at 829 n.2.

> (7) Victim Impact evidence. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and **the appropriate sentence shall not be permitted as a part of victim impact evidence.**

(Emphasis added). See Booth v. Maryland, 482 U.S. 496 (1987).

The statement in the instant case was inadmissible under the standards set forth above. Instead of relating to the victim's uniqueness and the loss to the community's members by the victim's death, Antunes-Padilla invoked God to provide the wisdom and knowledge for the judge and jury to give Phillips the death penalty for his assassination of the victim. The improper statement aroused the passions of the jury, passions which have no place in a capital sentencing determination. Phillips' death sentence must be reversed.

ARGUMENT III

INSUFFICIENT EVIDENCE EXISTED TO SUPPORT A GUILTY VERDICT OF PREMEDITATED FIRST DEGREE MURDER, THEREBY VIOLATING PHILLIPS' CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When a claim on appeal asserts insufficiency of the evidence to support a conviction, the standard of review is whether there is substantial, competent evidence to support the verdict and

judgment. Hodgkins v. State, - So. 3d - , 2015 WL 3767900 (Fla. June 18, 2015); Terry v. State, 668 So. 2d 954, 964 (Fla. 1996).

In Phillips' case, the jury was instructed on both felony murder and premeditated murder. At the end of the State's case, Phillips moved for a judgment of acquittal, arguing in part that there was no evidence presented that Phillips acted in any premeditated manner to bring about the deaths of the victims (9 R 740). The motion was denied (9 R 749), and the jury proceeded to find Phillips guilty of both premeditated and felony murder (3 R 556-62).

"Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill." Green v. State, 715 So. 2d 940, 943 (Fla. 1998). This purpose to kill must exist for such a time before the homicide "to permit reflection as to the nature of the act to be committed and the probable result of that act." Id. at 944. In cases of circumstantial evidence, this Court considers the following factors in determining whether there was premeditation:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Green, 715 So. 2d at 944 (quoting Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)); see also Woods v. State, 733 So. 2d 980, 985 (Fla. 1999).

"In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001) (citing Banks v. State, 732 So. 2d 1065, 1068 n. 5 (Fla. 1999)). Phillips submits that in the instant case, "there is simply an absence of evidence of premeditation." See Terry, 668 So. 2d at 964. While there was a gun involved, the weapon was being utilized as part of a planned robbery. There was never any discussion or plan to murder the victims. Rather, the entirety of the evidence demonstrates that the shooting occurred during a fierce struggle for the gun in close quarters. The gunshot wounds were haphazard and randomly placed, again indicative of a struggle. Hernandez-Perez's wounds were in the hip and thigh, and given the stippling on his body, were fired at close range (9 R 714, 716-17, 720). Similarly, the very oblique angle of the bullet that killed Hernandez-Perez indicates a frantic shot, and there was also stippling from the gun, suggesting that Phillips shot him while they were fighting (9 R 732, 734-35).

Phillips submits that there is no evidence to indicate an anticipated killing, and all of the evidence is equally and reasonably consistent with the theory that the victims were shot while resisting the robbery. See Jackson v. State, 575 So. 2d

181, 186 (Fla. 1991). In other words, a rational trier of fact could not have found the existence of premeditation beyond a reasonable doubt. It was error to instruct the jury on premeditation.

ARGUMENT IV

PHILLIPS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR THE PROSECUTION PERMITTED FALSE AND/OR MISLEADING EVIDENCE TO BE PRESENTED AND GO UNCORRECTED TO HIS JURY AND VIOLATED PHILLIPS'S RIGHT TO DUE PROCESS.

"Truth is critical in the operation of our judicial system."
Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000)

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."
Johnson v. Mississippi, 486 U.S.578, 584 (1988)

Due process requires the State to disclose evidence or information in its possession that is favorable to the defendant. Brady v. Maryland, 373 U.S. 83 (1963). "[E]vidence that could be useful in impeaching prosecution witnesses must be disclosed under Brady." Smith v. Sec'y Dep't of Corrs., 572 F.3d 1327, 1343 (11th Cir. 2009). This includes reasons that the State knows a witness has "to ingratiate himself with the police." Kyles v. Whitley, 514 U.S. 419, 442 n.13 (1995). See Napue v. Illinois, 360 U.S. 264, 269 (1959)("The jury's estimate of the truthfulness

and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Due process precludes the State from presenting either false or misleading evidence and/or false or misleading argument. Giglio v. United States, 405 U.S. 150, 153 (1972)("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"); Alcorta v. Texas, 355 U.S. 28, 31 (1957)("It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship."); Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993)("[The State] may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.").

As the supplemental record in this appeal indicates, the State failed to comply with its due process obligations under Brady and Giglio/Alcorta/Garcia. First, as to Shanise Bing, the prosecutor elicited testimony from her that she had two counts of murder filed against her which were still pending when she testified. However, the two counts of murder were for murder in the second degree. This undisclosed information was favorable to

Phillips because the State had not asserted in the charging document that Bing was a participant in either premeditated murder or felony murder.

As to the assertion that she still faced criminal liability on the two murder counts despite her negotiated plea, the transcript from the plea hearing reveals that Bing was advised by the judge that "because you've entered this plea today, we're not going to go to trial" (12 SR 1621). The judge made it clear that the only thing left to be conducted as to the charges that had been filed against her was the sentencing proceeding which would be delayed until after her codefendants's trials (12 SR 1626-27). The evidence presented by the State at Phillips' trial was either false or misleading. Certainly, the State engaged in obfuscation in violation of due process. Garcia, 622 So. 2d at 1331 ("[The State] may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.").

At Bing's sentencing, the prosecutor recommended six months of jail time on the basis that Bing's testimony was pivotal in prosecuting her codefendants, and unlike Anders she didn't mislead law enforcement (12 SR 1656) ("Barbara Anders was more involved than she initially wanted everyone to believe."). Bing was then given a sentence of six months in the county jail followed by one year of probation.

At Baker's trial, Bing testified that she was positive that "Antonio Baker was the person in that car making a plan to rob these Mexican" (5 SR 766). This was evidence favorable to Phillips, particularly given her testimony at Phillips' trial that she "wasn't tuned in" and didn't remember who said what (7 R 367). This was significant Brady material showing that Baker, and not Phillips, helped the "mastermind" and his girlfriend, Anders, formulate the plan to rob (5 SR 763).

As to Anders, the State specifically did not elicit testimony from her that the first degree murder counts of her indictment had been nolle prosequi by the State as part of the negotiated plea. Since Anders had been relieved of criminal liability for the murders, that information was favorable to Phillips yet was withheld from his jury in violation of Brady.

Moreover, while the agreement was that the State waived the sentencing guidelines and minimum mandatories as to Anders in exchange for truthful testimony, the numerous inconsistencies between Anders' testimony and the testimony provided by Bing and by Salgado demonstrates that the truthfulness of Anders' testimony did not matter to the State as long as the testimony helped the State obtain first degree murder convictions. For example, at Phillips' trial, Anders testified that she originally told the police that Baker had the gun and shot the victims because she was mad at him after finding out that he was cheating

on her. According to this testimony, Anders was trying to get Baker in trouble. Yet at Baker's trial, Anders testified that she originally lied to the police "[b]ecause I didn't want nobody to get in trouble" (5 SR 726). Indeed, she made no mention in her testimony at Baker's trial that she originally told the police that Baker had the gun and shot the victims.

The State did not in fact require truthful testimony from Anders. All Anders had to do was help the State secure convictions of first degree murder. Her contract with the State gave her what amounted to a contingency fee that was paid, not with money, but in a reduction of her loss of liberty.[61] State v. Glosson, 462 So. 2d 1082, 1085 (Fla. 1985) ("We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions."); State v. Hunter, 586 So. 2d 319, 321 (Fla. 1991) ("Gaining or preserving one's liberty could produce as great an

[61]Defense attorneys are precluded from negotiating contingency fees in a criminal case because of the dangers such an arrangement would create that would undermine the reliability of the outcome. See Fla. R. Prof. Con. 4-1.5(f)(3).

interest in the outcome of a criminal prosecution as a financial interest, but that is not the case here."); State v. Williams, 623 So. 2d 462, 465 (Fla. 1993) ("Rather, due process is a general principle of law that prohibits the government from obtaining convictions "brought about by methods that offend 'a sense of justice.' " Rochin v. California, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952).").

Anders' sentence went from a mandatory life to one year in the county jail because she helped the State secure a conviction. The State did not enforce the so-called agreement that to receive a benefit, she was required to testify truthfully. In her testimony, Anders denied having sex with the guy on Pearl Street for money. Yet, Bing swore that was what occurred. Anders denied asking Hernandez-Perez and Salgado for one hundred dollars in exchange for sex. Yet, both Bing and Salgado swore that she did. In Baker's trial, Anders was permitted to say that she didn't tell the police the truth when first interviewed because she didn't want to get anyone in trouble; but, in Phillips' trial she testified that she told the police Baker had the gun and shot the victims only because she was mad at Baker for cheating on her and clearly wanted to get him in trouble.

By not enforcing the alleged provision requiring Anders to testify truthfully, the arrangement with Anders gave her a contingency interest in the State securing convictions. While

that alone violates due process, it was compounded here because Phillips' jury was not made aware of the fact that the State would not in fact require all of Anders' testimony to be truthful. The State did not disclose this in violation of both Brady and Giglio.

Finally, the prosecutor revealed at Anders' sentencing that her appearance as a witness against Baker at his trial was particularly difficult for Anders because she was still in love with him. This was not revealed at Phillips' trial; Phillips' jury did not know this fact which gave Anders a motive for shading her testimony in Baker's favor vis-a-vis Phillips. Napue, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); Smith, 572 F.3d at 1343 ("The United States Supreme Court has clearly held, however, that evidence that could be useful in impeaching prosecution witnesses must be disclosed under Brady.").

Due process violations under Brady and Giglio must be evaluated cumulatively. Kyles v. Whitley, 514 U.S. 419 (1995); Guzman v. Sec'y Dep't of Corrs., 663 F.3d 1336 (11th Cir. 2011). When the proper materiality analysis is conducted to the multiple

due process violations present in Phillips' case, his convictions and/or sentences of death cannot stand, and must be vacated.

ARGUMENT V

THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA AND UNDER THE EIGHTH AMENDMENT.[62]

The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 122 S.Ct. 2428 (2002). Phillips' motions to dismiss the death penalty in this case should have been granted (2 R 197, 223). This Court's standard of review when considering a trial court's ruling on the constitutionality of a Florida statute is de novo. See Miller v. State, 42 So. 3d 204, 215 (Fla. 2010).

Ring v. Arizona held unconstitutional a capital sentencing scheme where eligibility for a death sentence is contingent upon an additional factual determination following the conviction of first degree murder. In Ring, the Arizona statute required a finding of at least one aggravating circumstance to render the defendant eligible for a death sentence. Florida law requires not just a finding of one or more aggravating circumstances, but also a factual determination that the aggravating circumstances

[62]As this Court is aware, the United States Supreme Court recently granted certiorari in the case of Hurst v. Florida, 135 S.Ct. 1531 (2015), to consider whether Florida's death sentencing scheme violates the Sixth Amendment and/or the Eighth Amendment in light of Ring v. Arizona.

found are sufficient to warrant the imposition of a death sentence. Thus, Ring requires that factual determinations that the aggravating circumstances are sufficient to justify a death sentence to by made by a unanimous jury.

Florida's capital sentencing scheme violates the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because it does not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, 122 S. Ct. at 2441 (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas., J., concurring)).

Florida law does provide for the jury to hear evidence and "render an advisory sentence." § 921.141(2), Fla. Stat. (2014). However, the jury's role does not satisfy the Sixth Amendment under Ring. § 921.141(2) does not require a jury verdict, but an "advisory sentence."

Throughout Phillips' trial and penalty phase proceeding, the jury was repeatedly told that their role at the sentencing phase of the trial was to merely "recommend" a sentence to the judge and that their recommendation was only advisory (6 R 39, 40, 177; 10 R 934-25; 11 R 1118, 1119, 1122, 1128-29, 1130). This implied that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder.

Additionally, the Florida statute does not require the jury's vote to be unanimous regarding the existence of an aggravating circumstance, regarding whether "sufficient" aggravating circumstances exist, or regarding whether mitigating circumstances exist which outweigh the aggravating circumstances. The statute requires only a majority vote of the jury in support of its advisory sentence. § 921.141(2), Fla. Stat.

In addition to not requiring jury unanimity of a sentence nor jury unanimity of each aggravator and whether they are sufficient to justify a death sentence, it is not required that the prosecution inform the defendant in the indictment which aggravating factors will be presented. Because the State did not submit to the grand jury and the indictment did not state the essential elements of capital first degree murder, Phillips' rights under the Sixth Amendment were violated.

Further, under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposing the death penalty. § 921.141(3), Fla. Stat. Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear

the burden of proving it beyond a reasonable doubt.[63] Ring, 122 S.Ct. at 2432 ("Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment.").

Phillips' jury was unconstitutionally instructed to determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist." (11 R. 1118-19). The instruction given Phillips' jury violated the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment's right to trial by jury, and the Eighth Amendment right to be free of cruel and unusual punishment because it relieved the State of its burden to prove beyond a reasonable doubt the element that "sufficient

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[63]Phillips' jury was instructed as to this requirement under Florida law:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of [the] death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.

(11 R 1126). The jury was told that it need not be unanimous in determining whether sufficient aggravating circumstances existed to warrant a sentence of death. The verdict returned merely reflected that by a vote of 8 to 4, the jury recommended the imposition of a death sentence (11 R 1134).

aggravating circumstances" exist that outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). See Hurst v. Florida, 135 S.Ct. 1531 (2015) (certiorari review granted as to "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).").

Based on the foregoing, Phillips submits that his death sentence was unconstitutionally imposed and that it must be reversed for imposition of a life sentence.

ARGUMENT VI

PHILLIPS' SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE FACT THAT HE IS INTELLECTUALLY DIABLED.

In June, 2002, the United States Supreme Court found that the execution of a mentally retarded individual constitutes cruel and unusual punishment. Atkins v. Virginia, 536 U.S. 304, 321 (2002). In discussing the rationale behind exempting mentally retarded individuals from execution, the Supreme Court stated:

> Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant

> evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318 (footnotes omitted).

Prior to the decision in Atkins, in 2001 the Florida Legislature promulgated § 921.137, Fla. Stat., which barred the imposition of death sentences on mentally retarded persons. The Legislature defined mental retardation as:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

On October 1, 2004, this Court promulgated Rule 3.203, Fla. R. Crim. P., which sets forth a bar to the imposition of the death penalty for those defendants who are found to be mentally retarded.

In Cherry v. State, 959 So. 2d 702 (Fla. 2007), this Court interpreted the Florida statute and its own rule as constituting

a strict cutoff requirement of an IQ score of 70 in order to establish significantly subaverage intellectual functioning:

> The fundamental question considered by the circuit court and raised in this appeal is whether the rule and statute provide a strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning.
>
> * * *
>
> Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed.
>
> Because we find that Cherry does not meet this first prong of the *section 921.137(1)* criteria, we do not consider the two other prongs of the mental retardation determination. We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

Cherry, 959 So. 2d at 712, 714.

During his penalty phase proceeding, which took place on January 27, 2012, Phillips presented the testimony of Dr. Michael D'Errico, a clinical and forensic psychologist, who administered an Intellectual Assessment Standardized Intelligence Test (11 R 1055). Dr. D'Errico testified that he reviewed a stack of school records, which described Phillips' history in special education classes for specific learning disabilities (11 R 1055-56). Indeed, Phillips was involved in special education classes from the first grade until he quit school in the ninth grade (11 R 1060).

Dr. D'Errico testified that Phillips scored a 76 on the IQ test he administered, which placed Phillips in the fifth percentile (11 R 1057). Dr. D'Errico concluded that Phillips has significantly subaverage intelligence and he falls in the borderline range of intellectual functioning (11 R 1056). Dr. D'Errico reiterated that Phillips' historical intellectual functioning coupled with his current intellectual functioning qualifies him with a diagnosis of borderline intellectual functioning according to the diagnostic manual (11 R 1059). He further reiterated that Phillips is not slightly below the normal range of intelligence; he is significantly below (11 R 1064-65).

Despite Phillips' intellectual limitations, his trial counsel did not file a motion to establish intellectual ability as a bar to execution. While it is certainly possible that trial counsel's omission resulted from his ineffectiveness,[64] there are indications from Dr. D'Errico's testimony that the defense was adhering to this Court's strict cutoff requirement as set forth in Cherry. For instance, Dr. D'Errico testified that a score of

[64]On September 11, 2009, Phillips' trial counsel filed a motion seeking the appointment of Dr. D'Errico to assist the defense with regard to issues of competency, sanity, mental retardation and mental health mitigation (2 R 391-95). The motion was granted on the same day (2 R 400-401). However, the record indicates that Dr. D'Errico did not evaluate Phillips until January 16, 2012, and his report was compiled the following day, January 17, 2012 (4 R 620). Phillips trial commenced that same day, January 17, 2012. His penalty phase proceeding took place ten days later, on January 27, 2012.

70 is required for a determination of mental retardation (11 R 1056-57).[65] Further, Dr. D'Errico did not assess Phillips adaptive functioning, stating that adaptive functioning or adaptive behavior scale is usually given if an individual's IQ is considered to be below 70 (11 R 1064).

Subsequent to Phillips' penalty phase proceeding, the United States Supreme Court determined that Florida's strict cutoff score of 70 is unconstitutional. Hall v. Florida, 134 S.Ct. 1986 (2014). As the Court explained,

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.
>
> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation,

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[65]As Phillips IQ score was over 70, Dr. D'Errico stated that he is not mentally retarded.

> but those experiments may not deny the basic dignity the Constitution protects.

Hall, 134 S.Ct. at 2001.

Phillips did not receive that to which Hall has held he was entitled: "a fair opportunity to show that the Constitution prohibits their execution." 134 S.Ct. at 2001. He did not receive a mental evaluation until the day before his trial began, almost as an after thought. At that time, Dr. D'Errico administered an unidentified IQ test. Under the well recognized Flynn effect, scores on an IQ test should be reduced for each year that had past since it was normed. Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010) ("The Flynn effect acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field. The parties in this case agree that the Flynn effect is an empirically proven statistical fact."). Thus, assuming that it was the WAIS-IV that Dr. D'Errico administered on January 16, 2012, four years had passed since it was normed before its release in 2008. Phillips' recalibrated IQ score would be 75 or below. If Dr. D'Errico had used the Stanford-Binet-V when testing Phillips, the recalibrated

IQ score would fall even further since it was normed six years back in time, prior to its 2003 release.

In explaining the scope of the Eighth Amendment prohibition against the execution of intellectually disabled, it is clear that the majority in Hall held that the execution of one who is intellectually disabled violates the Eighth Amendment, in part due to "a special risk of wrongful execution." Of course, requiring the intellectually disabled to present clear and convincing evidence of onset before the age of 18 means that those who are intellectually disabled, and due to their disability already exposed to "a special risk of wrongful execution," must bear an additional risk of being wrongfully executed, particularly where the passage of time has resulted in the loss of the necessary evidence of the onset before the age of 18. See Hill v. State, 473 So. 2d 1253, 1258-59 (1985) ("The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, see Pate v. Robinson, 383 U.S., at 386-87; Dusky v. United States, 362 U.S., at 403, we cannot conclude that such a procedure would be adequate here."); Mason v. State, 489 So.2d 734, 737 (1986) ("Should the trial court find, for whatever

reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law, the court must so rule and grant a new trial.").

Unless this Court determines that Phillips' death sentences must be vacated and his case remanded for the imposition of life sentences, Phillips must be afforded that which Hall v. Florida dictates - "a fair opportunity" to establish that his intellectual disability precludes the State of Florida from imposing a sentence of death against him. See Brumfield v. Cain, 135 S. Ct. 2269, 2278 (2015)(holding that when accounting for the margin of error, "Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability" and that accordingly he was entitled to an evidentiary hearing on his claim that his intellectual disability precluded the imposition of a death sentence).

In light of the United States Supreme Court's determination in Hall and the decision in Brumfield, it is clear that Phillips' 76 IQ score on an unidentified testing instrument does not mean that he is not intellectually disabled, particularly in light of the Flynn effect and the standard error of measurement. Indeed, there are clear indications in the record that Phillips is mentally retarded, and that he has been prior to the age of 18. Phillips was in special education classes throughout his

educational career, and he has consistently scored low on standardized testing.

Phillips previously filed a motion to relinquish jurisdiction as to this issue, which this Court denied on September 3, 2014, over three dissenting votes. Phillips respectfully argues that under Hall and Brumfield, this Court must reconsider its ruling and remand the case so that Phillips receives "a fair opportunity" to demonstrate that his intellectual disability precludes the State from imposing a death sentence on him. There must be "a fair opportunity" to fully assess and determine his intellectual disability under Rule 3.203, Fla. R. Crim. P.

Further, to be eligible for a sentence of death there must be a finding that Phillips' is not intellectually disabled; thus Phillips is entitled to a jury determination of whether he is eligible for a sentence of death. See Ring v. Arizona.

CONCLUSION

Phillips submits that relief is warranted in the form of a new trial, a new sentencing proceeding, the imposition of a life sentence, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by electronic service to Berdene Beckles, Assistant Attorney General, Office of the

Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 12th day of July, 2015.

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CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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