IN THE SUPREME COURT OF FLORIDA

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-876

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA
CAPITAL CASE
ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

BERDENE B. BECKLES
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 27481
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Berdene.Beckles
@myfloridalegal.com
(850) 414-3300 Ext. 3606
(850) 487-0997 (FAX)
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE #

TABLE OF CITATIONS

Cases

Other Authorities

PRELIMINARY STATEMENT

This brief will refer to Appellant, Terrance Tyrone Phillips, as Appellant, or by proper name, e.g., "Phillips." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on direct appeal will be cited throughout this brief as "R" followed by the appropriate volume and page number. (R. V#:page#).

The transcript of the jury trial and penalty phase will be cited throughout as "T" followed by the appropriate volume and page number. (T. V#:page#).

The supplemental record on appeal will be cited as "Supp." Followed by the appropriate part and page number. (Supp. V#:page#).

Appellant's initial brief in this proceeding will be cited as "IB" followed by the appropriate page number. (IB:page#).

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

OVERVIEW

This is a direct appeal in a capital case. A Grand Jury in Duval County, Florida, indicted Terrance Tyrone Phillips for the first-degree murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez. (R. 1:30). A total of five charges were filed by way of indictment: (count one) first-degree murder of Reynaldo Antunes-Padilla; (count two) first-degree murder of Mateo Hernandez-Perez; (count three) armed burglary; (count four) attempted armed robbery; and (count five) conspiracy to commit armed robbery. (R. 1:27-30, 74-77). The jury found Phillips guilty as charged on all counts. (R. 3:556-562).

The penalty phase was conducted on January 27, 2012. (T. 10:918). The jury returned an advisory sentence of death by a vote of eight-to-four for the murder of Reynaldo Antunes-Padilla. (R. 3:582). The jury also returned an advisory sentence of death by a vote of eight-to-four for the murder of Mateo Hernandez-Perez. (R. 3:583). The trial court held a Spencer[1] hearing on March 2, 2012. (R. 5:890). On April 20, 2012, the trial court imposed the following sentences: (count one) first degree murder Reynaldo Antunes-Padilla – death; (count two) first-

[1] Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

degree murder Mateo Hernandez-Perez – death; (count three) armed burglary – life imprisonment; (count four) attempted armed robbery – life imprisonment; and (count five) conspiracy to commit armed robbery – fifteen years' prison. (R. 4:629-638). Phillips filed a notice of appeal on April 26, 2012. (R. 4:668-669). The Florida Supreme Court relinquished jurisdiction for the supplementation of the record on the codefendant's case. The record was supplemented on July 30, 2014, April 16, 2015, and June 8, 2015. This appeal follows.

STATEMENT OF THE CASE AND FACTS

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

Guilt Phase

On December 24, 2009, Aurelio Salgado, Mateo Hernandez-Perez, and Manuel Ton-Hernandez were off from work. (T. 7:318). They decided to go to the Century 21 Convenience Store, close to their home at the Lighthouse Bay Apartments, to purchase beer and soda. (T. 7:318-319). While there, they were approached by Barbara Anders and Tanequa Dwight asking for change for a $5 bill so they could take the bus. (T. 7:319). Anders and Dwight were accompanied by Shanise Bing who was outside of the store waiting for them. (T. 8:428). Salgado gave them five $1 bills and went about purchasing beer while Hernandez-Perez exchanged numbers with Dwight. (T. 7:320; 8:429). After purchasing beer, the men went back to their apartment and were joined by Reynaldo Antunes-Padilla. (T. 7:318, 321).

While the men went back to their apartment Anders, Dwight, and Bing took the bus over to Pearl Street. (T. 7:377; 8:430). After hanging for a while, Anders called her boyfriend, Antonio Baker, to come and pick them up. (T. 7:377; 8:431). Baker arrived in a rental car and Terrance Tyrone Phillips, Appellant, was with him in the passenger seat. (T. 7:377). Anders and Bing got into the car with Baker

and Phillips, while Dwight got into another car with Phillips's brother, Tim. (T. 7:378; 8:433).

While in the car, Anders received a phone call from Hernandez-Perez but she could not understand him. (T. 8:431). However, Salgado called her back relaying the message that Hernandez-Perez was interested in sex. (T. 7:321, 340-341; 8:435-436). During the phone call, Anders found out that she lived in the same apartment complex as Hernandez-Perez and Salgado. (T. 7:378). Anders, Baker, and Phillips decided to rob the Hispanic men. (T. 7:379-380; 8:436). The plan was for Anders and Bing to go into the apartment together and Anders would ask for money for prostitution. (T. 8:405, 436). Then Baker and Phillips would come in and rob the men. (T. 7:380-381; 8:436-437). According to Bing, Anders was the one who came up with the idea to rob the men. (T. 8:404). But Anders said the plan was only for robbery and there was no actual intention of sleeping with the men. (T. 8:437).

When they arrived, Bing and Anders were let in to the apartment and sat close to the door on a cot. (T. 7:322; 8:438). In the apartment was Salgado, Hernandez-Perez, Ton-Hernandez, and Reynaldo Padilla, who joined the men in the apartment after they returned from the store. (T. 7:321, 382; 8:438). The men were drinking the beer they purchased from the convenience store where they met the girls. (T. 7:320, 341-342). Two men were sitting on a sofa, one was on a single person

chair, and one was standing over by the table, with Anders and Bing sitting on a cot or couch. (T. 7:322-323, 382-383). After having the girls enter, the door to the apartment remained slightly open. (T. 7:342). Hernandez-Perez offered to pay $20 for sex, but Anders asked for $100. (T. 7:324; 8:438-439). Hernandez-Perez said he did not have the money. (T. 8:405).

While haggling the price, Anders made a phone call to Baker and Phillips. (T. 7:324; 8:439). It took about two minutes and then Baker and Phillips knocked on the door. (T. 7:324; 8:439). Anders answered the door and Phillips and Baker came into the apartment. (T. 7:325, 344, 384). When Phillips entered the apartment, he was brandishing a gun in his right hand. (T. 7:325-326, 384-385, 440). Baker did not enter with a weapon. (T. 7:328, 385; 8:440). As soon as the men entered the apartment, Bing left through the front door and went down the stairs. (T. 7:385; 8:441). Phillips put the gun to the head of Hernandez-Perez. (T. 7:327). Hernandez-Perez pushed the gun away and Antunes-Padilla came to help, while Ton-Hernandez ran into the bathroom. (T. 7:327). Salgado got up and hit Phillips to try and get him to lose the gun, but Baker hit Salgado in the head with a bottle. (T. 7:327).

Anders testified that she also hit one of the Hispanic men with a bottle when she saw the men fighting and then she ran out of the apartment through the front door. (T. 8:441). While she was going down the front stairs she heard gunshots.

(T. 8:442). Salgado also ran out the back door of the apartment after he was hit in the head and Baker began to chase him. (T. 7:329). When he got midway down the stairs Salgado heard three gunshots. (T. 7:329). Both Salgado and Anders testified that when they exited the apartment Phillips still had the gun in his hand. (T. 7:329; 8:442).

While Bing was waiting downstairs she heard gunshots and then saw Anders, Phillips, and Baker running. (T. 7:386). They all got into the car and Phillips said "don't say anything and everything will be okay." (T. 8:442). In reference to the gunshot, Phillips said he got hit upside the head with a beer bottle, dropped the gun, and it went off. (T. 7:387). Anders witnessed Phillips with the gun after they got into the car. (T. 8:443). After they left the scene, they went to Baker's house. (T. 7:389). Upon arriving at Baker's home, another young lady came up to the car. (T. 8:443). Anders found out that Baker was cheating on her, and broke up with him. (T. 8:443).

When Fire and Rescue arrived, they transported Hernandez-Perez and Antunes-Padilla to the hospital. (T. 8:552-553, 560-561). Salgado was also treated for his injuries and taken to the hospital. (T. 8:565). At the scene, the police were able to recover three shell casings with one lodged in the couch. (T. 8:583-586). The police recovered one of the victim's cell phones with a call history that connected them to Anders. (T. 9:636-637). The police obtained a

subpoena for the cell phone records, which led them to the Century 21 convenience store. (T. 9:637). From there, the police obtained surveillance video from the store and made contact with Anders and Bing. (T. 9:638).

On December 28, 2009, the police detained Bing for questioning. (T. 9:638). Bing was interviewed regarding the incident and stated that she and Anders went into the apartment and when Baker and Phillips entered, Phillips was armed with a gun. (T. 9:642). She told the police that she left at that point but heard gunshots a few minutes later. (T. 9:642, 644). Anders was also taken to the police station and questioned about the incident. (T. 8:444). Initially, when asked about the events that occurred on December 24, 2009, Anders told the police "Antonio shot them," referring to Baker. (T. 8:446; 9:647). But at trial Anders testified she lied in her original statement because she learned that Baker was cheating on her. (T. 8:446-447). In fact, it was Phillips who shot Hernandez-Perez and Antunes-Padilla. (T. 8:447).

The Medical Examiner, Dr. Aurelian Nicolaescu, testified that Hernandez-Perez died on December 24, 2009, from two gunshot wounds both located on the left side of his lower body. (T. 9:713-714). One of the wounds on his left hip was considered fatal because it hit a major vessel in the body. (T. 9:716). Further, there was stippling on the body indicating that the firearm used was in close to

intermediate range – about 2-3 feet away – at the time of the shooting. (T. 9:717). The second wound on his left thigh was not considered fatal. (T. 9:718).

Dr. Jesse C. Giles, also a Medical Examiner, testified that Reynaldo Antunes-Padilla died on December 24, 2009, of a gunshot wound to the chest. (T. 9:735, 737). The gunshot was through his chest entering his right breast, moving through his right lung, his spine, and his aorta. (T. 9:732). It bruised his left lung, broke a couple of ribs, and passed out his left back. (T. 9:732). Further, there was gunshot stipples found on his body. (T. 9:734). Antunes-Padilla also suffered from very minor blunt force injuries above his left eyebrow. (T. 9:736).

The State rested its case and a defense motion for judgment of acquittal was denied. (T. 9:740-749). The Defense argued there was no evidence Phillips acted in a premeditated manner, with a period of time to allow reflection, to bring about the death of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez. (T. 9:740). The defense also argued the State did not provide any evidence it was Phillips who actually shot Reynaldo Antunes-Padilla and Mateo Hernandez-Perez. (T. 9:742). The trial court denied the motion. (T. 9:748).

Phillips did not testify after an inquiry by the judge. (T. 9:750-751). Defense counsel put on the record that Phillips was advised not to testify because of his speech impediment and the negative affect it might have on the jury. (T. 9:752-753). The jury found Phillips guilty of first-degree murder on counts one and two,

finding that the killings were done with premeditation, during the attempted commission of a burglary and/or robbery, and that Phillips discharged a firearm. (T. 10:909-910). The jury also found Phillips guilty of armed burglary (count three); attempted armed robbery (count four), discharging a firearm during the commission of both; and also guilty of conspiracy to commit armed robbery (count five). (T. 10:910-911).

Penalty Phase

The penalty phase began on January 27, 2012. (T. 10:918). The State presented four witnesses, three of which were for purposes of victim impact. Wilmer Antunes-Padilla, testified that he was the brother of Reynaldo Antunes-Padilla, and stated that he was downstairs in the apartment they shared at the time he heard the gunshots. (T. 10:946). He also went to the hospital where he later learned that his brother was dead. (T. 10:947). Augustine Hernandez-Perez gave a victim impact statement on behalf of his brother Mateo Hernandez-Perez. (T. 10:953). Aurelio Salgado stated that he was friends with both men and that their death put him in fear of even going outside. (T. 10:955).

A stipulation was read to the jury that Phillips had previously been convicted of a felony and was on probation at the time of the subject crimes in support of aggravation. (T. 10:958). The State called Sandy Manning as its only aggravation witness who confirmed Phillips's probationary status at the time of the crime. (T.

10:959-960). Ms. Manning pointed out the conditions of Phillips's probation, which included that Phillips could not "… possess, carry, or own any firearm." (T. 10:961). Ms. Manning noted that Phillips went over and signed the conditions of probation on November 9, 2009, 45 days before the robbery and killings. (T. 10:959).

After a stipulation, regarding Phillips being 18 years old at the time of the offense, the Defense called eight witnesses in mitigation. (T. 10:963). Denise Thornton, Phillips's sister, indicated that her brother was very helpful, treated people well, was kind, and respectful. (T. 10:964-965). His father was gunned down when he was very young, but because she was also young at the time, she did not know all of the details. (T. 10:966). Priscilla Jenkins, Phillips's grandmother, testified that her grandson was a kind hearted person, helped around the house, was respectful, went to church, and played football. (T. 10:974-975). She acknowledged that he was about four or five when his father was murdered and she noticed that he struggled with his speech. (T. 10:976). Michael Hogg, Phillips's grandfather, testified that he was not always in Phillips's life when he was a child but he noticed that Phillips was always respectful, very kind, and had a positive attitude. (T. 10:983-985). Velecia Douglas, Phillips's aunt, stated that she

was very involved with Phillips as he hung out with her children.[2] (T. 10:990-995). She also noticed that Phillips had a speech impediment and struggled in school. (T. 10:993-994).

Kamilla Jenkins, Phillips's aunt, stated that Phillips helped her with her children, he was quiet around everyone else, and he was very respectful. (T. 11:1009-1011). She recognized that after his father died, he became quiet and more withdrawn, but as he got to high school age, he started to hang around the wrong people. (T. 11:1012-1013). She also confirmed that Phillips had a speech impairment and he received speech therapy at school. (T. 11:1015). Terrance Douglas, Phillips's cousin, stated that Phillips was more than a cousin to him. Phillips acted as a brother and best friend. (T. 11:1020). Phillips was kind and would help the neighbors in the neighborhood with their trash cans. (T. 11:1022). Phillips would also keep him out of trouble, would pull him to the side and talk to him. (T. 11:1024). Lastly, Nathaniel Thomas, Phillips's godfather, testified on his behalf. He stated that he tried to be there for Phillips after his father was killed and would take him for visits. (T. 11:1032-1033). He also took Phillips to church with

[2] Velecia Douglas, Phillips's aunt, is also the mother of Antonio Baker, the co-Defendant in this case. (T. 10:996).

him, but Phillips was living in a bad neighborhood and started hanging with the wrong people. (T. 11:1038-1040).

For their last witness, the defense called Dr. Michael Thomas D'Errico, a licensed psychologist. (T. 11:1053-1054). Dr. D'Errico performed an evaluation on Phillips and an Intellectual Assessment Standardized Intelligence Test. (T. 11:1055). He also reviewed Phillips's school records, which indicated that he had been involved in speech therapy between first and fourth grade. (T. 11:1056, 1060). Dr. D'Errico found that Phillips's intelligence was significantly subaverage. Specifically, Dr. D'Errico stated that Phillips scored a 76 on his IQ test, which placed him in the bottom five percent of test takers. (T. 11:1057).

Nevertheless, Dr. D'Errico determined that Phillips was not intellectually disabled and indeed competent to stand trial. (T. 11:1058). In Dr. D'Errico's experience people who function within the borderline range are typically easily influenced by their peers. (T. 11:1058-59). Also in explaining an incident in 2002 that involved Department of Children and Families, Phillips informed the doctor that in order to determine if an iron was hot, he put his face to it and burned himself. (T. 11:1060). Dr. D'Errico testified that Phillips having to go to speech therapy and special education classes would have made him more vulnerable and wanting to appear like he fit in better with his peers. (T. 11:1063).

After the defense rested, Phillips waived his right to testify as a witness in the penalty phase of his case. (T. 11:1076-77). On January 27, 2012, the jury recommended a sentence of death by a vote of eight-to-four for the murder of Reynaldo Antunes-Padilla and a sentence of death by a vote of eight-to-four for the murder of Mateo Hernandez-Perez. (T. 11:1134).

Spencer Hearing

The Spencer hearing was held on March 2, 2012. (R. 5:890). The State and Defense Counsel both submitted memorandums of law with their arguments. (R. 4:600-609, 610-624). The State made oral arguments supporting imposition of the death sentence. (R. 5:892-902). The Defense confirmed on the record that Phillips would not testify at the Spencer hearing and made oral arguments for the court to override the jury's death recommendation and give Phillips life without the possibility of parole. (R. 5:902-911).

Sentencing

The trial court held a hearing on April 20, 2012, to announce findings and Phillips's sentence. The court denied Phillips's motion for a new trial. (R. 5:917-918). The trial court found the following aggravating circumstances and supported each with findings of fact:

1. Phillips was previously convicted of another capital felony for the contemporaneous murders of Mr. Antunes-Padilla and Mr. Hernandez-Perez. (**great weight**) (R. 4:651-652).
    a. "The jury's verdict in the guilt phase finding the Defendant guilty of Counts One and Two for the contemporaneous First Degree Murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez, proves this aggravating circumstance beyond a reasonable doubt." (R. 4:652).
    b. "In addition, the Court independently finds this aggravating circumstance was proven beyond a reasonable doubt based on evidence introduced during the guilt phase of trial that was set forth by the Court in the 'Fact' section *supra*." (R. 4:652).
2. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (**great weight**) (R. 4:652-653).
    a. The stipulation of the parties, read by the court to the jury: "Ladies and Gentlemen, the State of Florida, the defendant and his attorneys hereby stipulate to the following: The defendant, Terrance Phillips, was convicted of a felony and placed on probation at the time of the subject crimes." (R. 4:652).

b. "Officer Manning, a probation officer with the Department of Corrections, testified that the Defendant was placed on probation on November 9, 2009." (R. 4:652-653).

3. The capital felony was committed while the defendant was engaged in the commission, or attempt to commit, any robbery or burglary. (**great weight**) (R. 4:653-654).

   a. "The jury's verdict in the guilty phase, finding the Defendant guilty of Count Three (Armed Burglary) and Count Four (Attempted Armed Robbery), proves this aggravating circumstance beyond a reasonable doubt." (R. 4:653).

   b. "The Defendant, armed with a firearm, entered the apartment of Aurelio Salgado without permission and with the intent to commit robbery." (R. 4:653).

The trial court found that only one of the two statutory mitigators was established and given corresponding weight. (R. 4:654-656). The trial court also found nine non-statutory mitigators and they were also given corresponding weight.

1. The Defendant acted under extreme duress or under the substantial domination of another person. (**no weight**) (R. 4:656).

2. The age of the Defendant at the time of the crime. (**considerable weight**) (R. 4:656-657).

3. Non-Statutory (R. 4:657-662).

    a. The Defendant has a borderline low IQ (**moderate weight**), a severe speech impediment (**slight weight**), and learning disability (**moderate weight**).

    b. The Defendant is easily influenced by others. (**slight weight**)

    c. The Defendant was impacted by the murder of his father. (**little weight**)

    d. The Defendant was a loving and caring family member, steadfast friend, and good neighbor. (**some weight**)

    e. The Defendant was a good sportsman. (**slight weight**)

    f. The Defendant grew up in a neighborhood with a high crime rate. (**some weight**)

    g. The Defendant was neglected/abused as a child and did not receive the professional mental help he needed as a child. (**some weight**)

    h. The Defendant was/is reverent and God-fearing. (**slight weight**)

    i. The Defendant was respectful during court proceedings. (**slight weight**)

The trial court sentenced Phillips to life imprisonment on counts three and four and to fifteen years prison on count five, to run concurrently. (R. 4:663). The trial court then concluded the aggravating circumstances outweighed the mitigating circumstances in this case. (R. 4:663). The trial court sentenced Phillips to death on counts one and two. (R. 4:663).

Co-Defendants

Antonio Baker

From February 7-8, 2012, trial commenced for co-defendant Antonio Baker. (Supp. 5:651). The jury found Baker guilty of count one first-degree murder of Reynaldo Antunes-Padilla and count two first-degree murder of Mateo Hernandez-Perez. (Supp. 6:1031). Baker was also found guilty of armed burglary of a dwelling, attempted armed robbery, and conspiracy to commit armed robbery. (Supp. 6:1031-1032).

The Penalty phase was held on February 17, 2012. Wilmer Antunes-Padilla, the brother of Reynaldo Antunes-Padilla, and Augustin Hernandez-Perez, the brother of Mateo Hernandez-Perez, presented victim impact testimony. (Supp. 16:34-44). Baker called six witnesses in the penalty phase. Dr. Harry Krop, a psychologist who conducted a battery of tests; interviewed Baker; and reviewed police reports, school records, and medical records. (Supp. 16:50-51). Dr. Krop testified that there was no evidence of any type of diagnosable mental illness on

the part of Baker. (Supp. 16:51). He was sent for an evaluation because of his underachievement in school and there was some hearing impairment and speech delay. (Supp. 16:51-52). The records reflected an IQ in the low average range. (Supp. 16:52). A major area of concern for Dr. Krop was marijuana abuse and dependence of Baker. Dr. Krop found that Baker's mental age was at 16 years and 8 months. (Supp. 16:68).

Defense also called Carlton Baker, Baker's father, who testified that Baker was a good boy, well behaved, and respectful growing up. (Supp. 16:75-83). Stacey Poole, Baker's school principal, stated that Baker was a good boy who was introverted and quiet. (Supp. 16:83-94). Brandon Baker, Baker's brother, stated that he learned from his brother's mistakes. (Supp. 16:95-97). Marlene Simmons, Baker's neighbor, took Baker on a trip and she stated that he was respectful and she taught him about the Lord. (Supp. 16:97-101). Lastly, Baker's mother, Velecia Douglas testified that Baker was respectful and she taught him right from wrong. (Supp. 16:102-109). She also is the aunt of Phillips. (Supp. 16:105). After a colloquy with the court, Baker declined to testify during the penalty phase. (Supp. 16:110-111).

The jury recommended life imprisonment on for the murders of Hernandez-Perez and Antunes-Padilla. (Supp. 16:165-166). On February 17, 2012, the trial court then sentenced Baker to life. (Supp. 16:167-170). Baker also received

fifteen years for the crimes of attempted armed robbery and conspiracy to commit armed robbery, all to run concurrently. (Supp. 16:170-171).

Barbara Anders

Codefendant Anders was originally charged with two counts of first-degree murder, armed burglary, attempted armed robbery, and conspiracy to commit armed robbery. (Supp. 10:1353-1356). On July 13, 2010, she entered a guilty plea to armed burglary, attempted armed robbery, and conspiracy to commit armed robbery, and the State nolle prossed the two counts of first-degree murder, subject to her testimony at all subsequent trials. (Supp. 10:1375-1376). After a sentencing hearing, on May 17, 2012, Anders was sentenced to one-year jail to be followed by two years probation. (Supp. 10:1420-1426).

Shanise Bing

Codefendant Bing was originally charged with two counts of second-degree murder, conspiracy to commit armed robbery, armed burglary, and attempted armed robbery. (Supp. 12:1551-1553; 13:1663-1664). On June 3, 2010, Bing entered a guilty plea to one count of armed burglary and one count of conspiracy to commit armed robbery. (Supp. 12:1576-1577; 13:1701-1702). She was sentenced on June 28, 2012, to six months jail to be followed by one-year probation. (Supp. 12:1583-1587; 13:1711-1715).

SUMMARY OF ARGUMENT

Argument I: Phillips's sentences of death are proportionate when compared to similar cases. The trial court found three aggravators including prior violent felony for the contemporaneous murders of Hernandez-Perez and Antunes-Padilla. The prior violent felony aggravator was correctly applied in this case and it is one of the weightiest of aggravators in Florida's statutory scheme. The trial court afforded all three aggravators great weight finding that they outweighed the mitigating circumstances presented.

The mitigation in this case was not substantial. The trial court only found one statutory mitigator- Phillips's age at the time of the crime. The remaining mitigators included a low IQ, severe speech impediment, and a learning disability. This Court has found the death sentence proportionate in similar cases, even cases with more mitigation. Further, Phillips is more culpable as he was the triggerman. Therefore, the murders of Hernandez-Perez and Antunes-Padilla are among the most aggravated and least mitigated.

Argument II: The victim impact statements presented did not taint the penalty phase of Phillips's trial. The statements made by Wilmer Antunes-Padilla the brother of one of the victim's did not arouse the passions of the jury and lead to their recommendation of death. Wilmer Antunes-Padilla informed the jury of what the loss of his brother meant to his family and asked the jury to impose a sentence

that appropriately fit the crime committed. It is clear from the record that the letter of Wilmer Antunes-Padilla was reasonable and followed the guidelines of victim impact statements. Further, Phillips made a general standing objection and did not preserve this issue for appeal.

Argument III: In this case, the evidence is sufficient to sustain a conviction of first-degree murder for the death of Hernandez-Perez and Antunes-Padilla. The evidence is consistent with Phillips having a fully formed conscious purpose to kill. The nature of the murder weapon that he bought to the robbery, a gun, the absence of any provocation of the victims, and the killing of two victims, is sufficient to support the jury's finding of premeditation and the jury's verdict should not be disturbed.

Phillips entered the victims' home brandishing a gun, which he placed to Hernandez-Perez's head. Hernandez-Perez in defense of his life pushed Phillips's hand from his head. After hitting the other victims in the head with beer bottles, the other codefendants left the apartment. However, Phillips alone remained as well as the unarmed Hernandez-Perez and Antunes-Padilla. Instead of leaving with his codefendant's, Phillips shot and killed Hernandez-Perez and Antunes-Padilla.

As to premeditation, there were two victims shot at close range and one of the victim's was shot twice. Although it is not clear in which order the victims were

shot, after shooting the first victim, Phillips intentionally turned the gun on the second victim shooting and killing him. Accordingly, sufficient evidence was presented that there was time for Phillips to leave with the other codefendant's prior to killing the victims.

Argument IV: Phillips asserts that a Brady and Giglio violation occurred during the trial, through the testimony of Bing and Anders. However, his assertions of a Giglio violation are misplaced and there is no evidence of a Brady violation. At trial, Bing correctly testified as to the charges she was facing and the sentences she would receive for testifying truthfully. In addition, Bing testified as best as she could to what occurred in the planning of the robbery. Anders also testified correctly as to the offer and sentence presented to her by the State. She never hid that she loved codefendant Baker at Phillips's trial and Baker's subsequent trial. The information or the alleged inconsistencies argued by Phillips are not exculpatory evidence and they would not have changed the outcome of the proceedings. Moreover, the prosecutor did not present any false information. Therefore, neither a Brady nor Giglio violation occurred.

Argument V: Phillips's sentences of death do not violate the Sixth Amendment to the United States Constitution as interpreted by Ring v. Arizona, 536 U.S. 584 (2002). This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring.

Phillips urges this Court to revisit the issue but his arguments lack merit. Because Phillips has not presented any new issue this Court has previously declined such requests. Further, Ring does not apply to Phillips's case as the trial court found the aggravating circumstance of prior violent felony for the contemporaneous murders.

Argument VI: Phillips asserts that he is intellectually disabled and his sentences of death violate the Eighth and Fourteenth amendment. At trial, Dr. D'Errico the defendant's witness testified that Phillips has an IQ of 76. He also testified that Phillips was not intellectually disabled. Because of Phillips's IQ score of 76, Hall does not apply to his case. In addition, Phillips has not presented any additional evidence of intellectual disability or lack of adaptive functioning.

ARGUMENT

ARGUMENT I: TERRANCE PHILLIPS'S SENTENCES OF DEATH ARE PROPORTIONAL WHEN COMPARED TO SIMILAR CASES WITH COMPARABLE AGGRAVATORS AND MITIGATORS AND WHEN COMPARED TO CODEFENDANT BAKER'S LIFE SENTENCE WHERE THERE IS EVIDENCE THAT PHILLIPS WAS MORE CULPABLE.

In his brief, Phillips contends that his case is neither the most aggravated nor the least mitigated of crimes. (IB:51). However, the record reveals that Phillips and his codefendant's made an elaborate plan to rob the victims that eventually culminated in the death of Hernandez-Perez and Antunes-Padilla.

Phillips, Baker, Anders, and Bing agreed that the two girls would pretend to offer sex and then Phillips and Baker would enter and rob the victims. (T. 7:379-381; 8:436-437). Upon entering the apartment, Phillips alone was carrying a gun that he put to the head of Hernandez-Perez. (T. 7:326-327, 384-385). Hernandez-Perez pushed the gun off his head and a fight ensued between the intruders and the victims. (T. 7:327-328). Baker chased Salgado out of the apartment, leaving Phillips in the apartment with Hernandez-Perez and Antunes-Padilla. (T. 7:329). Salgado and Anders both testified that when they left the apartment they saw Phillips with the gun still in his hand. (T. 7:329; 8:442). Phillips shot Hernandez-Perez in the upper thigh and abdomen area and Antunes-Padilla in the chest, killing both men. (T. 9:713-714, 735-737).

A. The Standard of Appellate Review.

"A trial court's ruling on a pure question of law is subject to de novo review." Demps v. State, 761 So. 2d 302, 306 (Fla. 2000). In determining whether death is a proportionate penalty in a given case, this Court conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence." Bright v. State, 90 So. 3d 246, 262 (Fla. 2012) (quoting Williams v. State, 37 So. 3d 187, 205 (Fla. 2005)). A direct-appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating facts. Phillips v. State, 39 So. 3d 296, 305 (Fla. 2010). As this Court explained in Woodel v. State, 985 So. 2d 524, 532 (Fla. 2008):

> In weighing the aggravating circumstances against the mitigating factors, the court understands that the weighing process is not simply an arithmetic exercise. The court's role is to consider the quality of the factors to be weighed, not the quantity of those facts. Accordingly, the court considers the nature and quality of the aggravators and mitigators that it has found to exist.

In reviewing the trial court's determination of the factual foundation for its death-penalty decision, [this] Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." See e.g., Allred v. State, 55 So. 3d 1267, 1277-78, 1281 (Fla. 2010).

B. Phillips's Death Sentence is Proportional to Other Death Cases as it is the Most Aggravated and Least Mitigated of First-Degree Murders.

The death penalty has long been reserved for only those cases that are the most aggravated and least mitigated of first-degree murders. Smith v. State, 139 So. 3d 839, 847 (Fla. 2014) (quoting Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998)). Here, because Phillips was the actual shooter of multiple victims, his crime is proportional among the most aggravated and least mitigated of first-degree murders.

In reviewing proportionality, this Court has cited the prior violent felony conviction as providing significant weight. Silvia v. State, 60 So. 3d 959, 974 (Fla. 2011); Allred v. State, 55 So. 3d 1267, 1284 (Fla. 2010) (HAC, CCP, and prior capital felony conviction are three of the most serious aggravating factors); Hodges v. State, 55 So. 3d 515, 542 (Fla. 2010) (HAC and prior violent felony are among the weightiest). Even where mitigation is not substantial but a prior murder is involved this Court has affirmed the death penalty in a single-aggravator case, as the prior violent felony conviction aggravator is among the weightiest of aggravators. Bevel v. State, 983 So. 2d 505, 524 (Fla. 2008); see also Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002).

Here, the jury recommended Phillips receive a sentence of death by a vote of eight-to-four for the murder of Reynaldo Antunes-Padilla and recommended a sentence of death by a vote of eight-to-four for the murder of Mateo Hernandez-

Perez. (T. 11:1134). The trial court found three aggravators: (1) Phillips was previously convicted of another capital felony (contemporaneous murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez); (2) the capital felony was committed by a person previously convicted of a felony and on felony probation; (3) the capital felony was committed while Phillips was engaged in the commission or attempted commission of any robbery or burglary. (R. 4:651-654). The trial court afforded each of these aggravators great weight. (R. 4:651-654).

The trial court found one statutory mitigator, Phillips's age of eighteen at the time of the offense, and gave it considerable weight. (R. 4:656-657). The trial court also found and weighed several non-statutory mitigators: (1) Phillips has a borderline low IQ, a severe speech impediment, and a learning disability (moderate weight); (2) Phillips is easily influenced by others (slight weight); (3) Phillips was impacted by the murder of his father (little weight); (4) Phillips was a loving and caring family member, steadfast friend, and good neighbor (some weight); (5) Phillips was a good sportsman (slight weight); (6) Phillips grew up in a neighborhood with a high crime rate (some weight); (7) Phillips was neglected/abused as a child and did not receive the professional mental help he needed as a child (some weight); (8) Phillips was/is reverent and God-fearing (slight weight); and (9) Phillips was respectful during the court proceedings (slight weight). (R. 4:657-662).

This Court upheld a sentence of death in McLean v. State, 29 So. 3d 1045 (Fla. 2010) under similar circumstances. McLean and two other codefendants, Jaggon and Lewin, went to the teenage victim's home armed with guns with the intent to rob him. Id. at 1047. After McLean entered the home, a neighbor came to see what the commotion was about and was held at gunpoint. Id. When the robbery concluded, McLean told Jaggon to leave. McLean, 29 So. 3d at 1048. McLean shot the neighbor when he dived to the floor and then pointed the gun at the teenage victim sitting on the couch and shot him as well. Id. The teenager died but the neighbor survived. Id. The trial court found three aggravators: felon on probation, prior violent felony for contemporaneous conviction for attempted first-degree murder, and crime committed during the course of a robbery. Id. at 1049. The trial court also gave little weight to McLean's statutory mental mitigators and to his non-statutory mitigators of substance abuse, family problems, brain injury, and miscellaneous factors. Id. Both codefendants entered into guilty pleas: Jaggon pled guilty to second-degree murder and attempted home invasion robbery and was sentenced to twenty-three years and Lewin pled guilty to burglary of a dwelling and attempted home invasion robbery and was sentenced to twenty years. McLean, 29 So. 3d at 1053 Fn2.

In upholding the death sentence, this Court looked at the similarity of McLean's case to other cases where the prior violent felony aggravator was found

and the death sentences were upheld. McLean, 29 So. 3d at 1052. And even though McLean contained a statutory mental mitigator, this Court still found it to be proportional to other death cases. Id. McLean is similar to this case as it involves the prior violent felony aggravator. Id. In Phillips's case, he committed a contemporaneous murder that resulted in the death of two people. (R. 4:644). These murders occurred during the course of a robbery and the trial court found three aggravators including prior violent felony. (R. 4:651-654). In this case, Phillips's mitigators are minimal and not as substantial as in McLean. Therefore, based on a similarly situated case, Phillips's sentences of death are proportional. Accordingly, this Court should uphold the death sentence imposed on Phillips.

1. Contemporaneous Convictions Can be Used to Support a Finding of Prior Violent Felony Aggravator.

In support of his argument that the death penalty is not proportionate, Phillips cites to numerous cases to show that his is not the most aggravated or least mitigated of cases. Phillips asserts that although his prior violent felony is a weighty aggravator it is "tempered by the fact that it is based on the contemporaneous murder in this case" and did not happen in an unrelated crime. (IB:52). He relies on Scott v. State, 66 So. 3d 923, 936 (Fla. 2011) to assert that death will be upheld only when the prior violent felony is not committed contemporaneously.

Phillips's assertions regarding Scott are misplaced. Scott and two other codefendants planned to rob a coin laundry. Scott, 66 So. 3d at 926. Scott entered the laundry and hit one of the men inside, Koci. Id. Another man, Binjaku, who was working on a broken machine, stated that they did not have any money and Scott shot and killed him. Id. This Court held that because the prior violent felony was a contemporaneous aggravated assault it did not carry the weight that a prior violent felony normally would. Id. Therefore, this Court vacated the death sentence. Id. at 937.

This Court also stated that the prior violent felony in Scott's case was qualitatively different from cases where the death penalty was upheld for a contemporaneous criminal act. Scott, 66 So. 3d at 937. In those cases, where death is upheld for a contemporaneous criminal act, the prior violent felony is usually very violent, i.e. murder. Id. See Frances v. State, 970 So. 2d 806, 820-21 (Fla. 2007) (finding death sentence proportionate as to victim Mills where aggravation was based on prior violent felony from a contemporaneous conviction for murder of another victim and that the murder was committed during the course of a robbery.); Kormondy v. State, 845 So. 2d 41, 48 (Fla. 2003) (finding death sentence proportionate where two aggravating factors were present, but prior violent felony aggravator was established by robbery of two victims and a sexual battery of one of the victim's during the attempted burglary.). In this case, Phillips

killed two victims during the course of a robbery, whereas Scott's contemporaneous crime was for an aggravated battery. Scott, 66 So. 3d at 936. Therefore, Scott is different from Phillips's case as the prior violent felony in this case was for a murder. See Johnson v. State, 720 So. 2d 232, 237 (Fla. 1998) (finding that life threatening crimes where the defendant comes into contact with a human victim supports the prior violent felony aggravator).

Additionally, this Court has held repeatedly that the death penalty is proportional when it involves multiple murders even where the only aggravator is a prior violent felony and the mitigation is minimal. See Smith v. State, 139 So. 3d 839, 847 (Fla. 2014) (holding that the sentence of death was proportional based on the two aggravators of prior capital felony based on two contemporaneous murders and murder in the course of attempted armed robbery merged with pecuniary gain); Hall v. State, 87 So. 3d 667, 673 (Fla. 2012) (upholding death sentence as proportional where the aggravators included prior violent felony for the contemporaneous murders of victims during the robbery.). Therefore, when there are multiple victims and the aggravators are weighty, this Court has upheld the imposition of a death sentence.

In this case, Phillips murdered two victims and the trial court found three aggravators: prior violent felony for the contemporaneous murder, under sentence of imprisonment and on probation, and during the course of a robbery. (R. 4:651-

654). Consequently, contemporaneous convictions for murder can be used to support a sentence of death and Phillips's sentence of death is proportional.

2. This Case is Not 'Robbery Gone Bad' case.

Phillips also classifies this case as a "robbery gone bad" and relies on this Court's decisions in Yacob v. State, 136 So. 3d 539, 550 (Fla. 2014); Jones v. State, 963 So. 2d 180, 188-89 (Fla. 2007); and Urbin v. State, 714 So. 2d 411 (Fla. 1998) to support his claim. (IB:57). However, each of these cases are distinguishable from the facts presented in Phillips's case.

In Yacob v. State, 136 So. 3d 539, 550 (Fla. 2014), this Court held that Yacob's sentence was not proportionate because it involved only a single aggravator of murder committed in the course of a robbery for pecuniary gain. The victim threatened Yacob's escape after the robbery had already been completed and Yacob reacted by shooting and killing him. Yacob, 136 So. 3d at 541. Here, Phillips committed a contemporaneous murder prior to the completion of the robbery. (R. 4:649-650). In addition, the trial court found the aggravators of prior violent felony, felon on probation, and murder committed during attempted robbery, which supports the imposition of the death sentence. (R. 4:651-654). Therefore, the second victim and the significant aggravation in this case negates the argument of a robbery gone bad.

In Jones v. State, 963 So. 2d 180, 188-89 (Fla. 2007), this Court held that based on the single aggravator of murder committed in the course of a robbery for pecuniary gain, the death sentence was not proportionate. Once again, Jones is different from this case as Phillips has a contemporaneous conviction for two murders and the trial court found three aggravators. (T. 10:909-910; R. 4:651-652).

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), this Court held that the death sentence was not proportionate for Urbin who was 17-years-old at the time of the crime. Urbin and two other codefendants planned to commit armed robbery against anyone coming out of a bar. Id. at 413. They waited outside of a bar and then Urbin followed Jason Hicks, shooting and killing him before running away. Id. When he returned to the car Urbin told his codefendant's that the victim resisted the robbery and that was why he shot him. Urbin, 714 So. 2d at 416. In negating the death sentence, this Court noted that the prior violent felony in Urbin's case occurred approximately two weeks after the initial murder. Id. at 418. This Court held that Urbin's substantial statutory mitigation of seventeen years old at the time of the crime and his non-statutory mitigation, differentiated Urbin's case and the death sentence was a disproportionate penalty. Id. at 417.

Yet, Urbin is distinguishable from this case. The trial court in Phillips's case found his age of eighteen as mitigation but that it did not outweigh the three

aggravators found by the trial court. (R. 4:656-657, 663). See Blake v. State, 972 So. 2d 839, 848 (Fla. 2007) ("This case is unlike Urbin and Livingston. First, the defendants in both of those cases were minors at the time of the murders.). Furthermore, Phillips was convicted of two murders and the trial court found that the three weighty aggravators of prior violent felony for the contemporaneous murder, felon on probation, and murder committed during an attempted robbery outweighed the weak mitigation. (R. 4:644-664). Therefore, as Urbin had only two aggravators and relatively strong mitigation, it is not comparable to Phillips's case with a contemporaneous killing and substantially weak mitigation.

Despite Phillips's arguments, it is clear that this is not a robbery gone bad case and his sentence of death is proportionate to other cases where the prior violent felony aggravator is supported by another murder. See e.g., Melton v. State, 638 So. 2d 927, 928 (Fla. 1994); Freeman v. State, 563 So. 2d 73, 75 (Fla. 1990); and Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989). In cases where there are multiple murder victims, this Court has not deemed them robbery gone bad cases and have upheld the death sentence finding them proportionate. See Wright v. State, 19 So. 3d 277, 304 (Fla. 2009) ("This Court has previously determined that the death penalty is a proportionate sentence in cases that involved multiple murders and extensive aggravation."). As this Court stated in another robbery and murder case, "the circumstances of this case reveal murder by shooting, committed

during the course of a robbery" which was sufficient to find the death sentence proportionate. Hall v. State, 87 So. 3d 667, 673 (Fla. 2012) (holding that the death sentence was proportional when the trial court correctly considered the circumstances, weighed the aggravating and mitigating factors and compared it to other cases).

Here, Phillips entered the victim's home with a gun and during the course of the robbery, Phillips made the conscious decision to shoot Hernandez-Perez and then shoot Antunes-Padilla.[3] The trial court correctly found the aggravator of prior violent felony and determined that it alone being the weightiest of aggravators was sufficient to support the death penalty. (R. 4:652).

C. Phillips was the More Culpable Party as the Evidence Showed He was the Actual Shooter.

Where more than one codefendant is involved in the commission of a crime, this Court considers the relative culpability of the codefendants in determining the proportionality of the death sentence imposed. Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002); Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994) (A codefendant's

[3] The State acknowledges that the sequencing of the shots could not be determined, and therefore, it cannot be said with certainty which victim was shot first. Nevertheless, as each victim was shot individually Phillips had to point and fire at one victim, and then turn the gun on the second victim.

sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable.).

The evidence presented at trial was that Phillips entered the apartment carrying a firearm. (T. 7:384-385). He then proceeded to place that gun at Hernandez-Perez's head and when Hernandez-Perez pushed at his hand, a fight ensued. (T. 4:327). Baker hit Salgado on the head with a beer bottle and then chased him out of the apartment. (T. 4:329). While Salgado was running down the stairs, with Baker on his heels, three gunshots were heard. (T. 4:329). Then there was testimony from Anders that she saw Phillips enter the car with the gun still in his hand. (T. 5:443). It is clear from the record that Phillips was the shooter of the two victims in the apartment. No one testified that anyone else possessed the gun other than Phillips and the trial court in its order specifically declined to find that as a statutory mitigator, Phillips was dominated by any of his codefendant's. (R. 4:654-656).

This Court has held that when there is more than one codefendant involved in a crime, the culpability of each codefendant determines the proportionality of the death sentence imposed. Wade v. State, 41 So. 3d 857, 868 (Fla. 2010) (quoting Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002)). In order to have the same degree of blame or fault the codefendant must at a minimum be convicted of the same degree of the crime. Id. Furthermore, "where the codefendant's lesser sentence

was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing." Id. at 868 (quoting Kight v. State, 784 So. 2d 396, 401 (Fla. 2001)). Both Anders and Bing entered into guilty pleas for lesser-included offenses for testifying against Phillips at trial. (Supp. 10:1375-76; 12:1576-77; 13:1701-02). In addition, the murder was not a part of the codefendants' plan and neither was the gun that Phillips bought into the apartment. (T. 7:379-381; 8:436-37). Therefore, Anders and Bing are not equally culpable with Phillips for the crime and his death sentences cannot be compared to their sentences.

Moreover, even when a codefendant is convicted of the same offense but receives a lesser sentence by a jury it does not mean the Defendant's sentence is not proportional. In Wright v. State, 19 So. 3d 277, 304 (Fla. 2009), this Court held that although there was no eyewitness to definitely determine that the defendant was the triggerman and the State advanced theories that both defendants were equal participants, the evidence still supported that Wright was the actual shooter so there was no disproportionate sentence with the codefendant's life sentence. Id. There was physical evidence of fingerprints and blood of the victim on Wright's shoe allowing the jury to make a finding that Wright used, possessed, and discharged the firearm resulting in the victim's death. Id. In this case, although there was no eyewitness to who actually shot the victims, we do have

Phillips seen entering with the firearm and exiting after the shootings with the firearm. (T. 8:440, 443). Therefore, the jury's recommendation of life imprisonment and the trial court sentencing Baker accordingly, does not make Phillips's sentences disproportionate.

On many occasions, this Court has upheld the death sentence as proportional for a defendant who was the triggerman or the one who dealt the death blow. Blake v. State, 972 So. 2d 839, 849 (Fla. 2007) ("We have rejected relative culpability arguments where the defendant sentenced to death was the 'triggerman.'"). In Kormondy v. State, 845 So. 2d 41, 48 (Fla. 2003), this Court held that Kormondy was the triggerman so his death sentence was proportional to his codefendants sentences of life. In Hernandez v. State, 4 So. 3d 642, 671 (Fla. 2009), this Court found the death sentence proportional because although the codefendant may have been the one to plan, encourage, and actively participate, the record reflected that Hernandez was the one who actually inflicted the fatal injury. Therefore, even if a defendant does not plan the crime or recruit others, once he is the one who actually commits the act that takes the lives of others, he is eligible to receive a death sentence, even if his other codefendant's do not.

In this case, Phillips's other codefendant's did not receive death as two of them entered into plea agreements. Further, the jury recognized that Baker was not the

triggerman and sentenced him accordingly. (Supp. 16:165-66). Phillips's sentences of death are proportional because he was the triggerman.

ARGUMENT II: TERRANCE PHILLIPS'S PENALTY PHASE WAS NOT TAINTED BY THE VICTIM IMPACT STATEMENT OF WILMER ANTUNES-PADILLA.

Phillips asserts his penalty phase was tainted by the victim impact statement made in particular by Wilmer Antunes-Padilla (Wilmer) the brother of Reynaldo Antunes-Padilla. (IB:65). Phillips maintains the improper statement aroused the passions of the jury by invoking God to provide wisdom and knowledge for the judge and jury to give Philips the death penalty for the assassination of the victim. (IB:68). However, the statements made by Wilmer did not taint the penalty phase and did not arouse the passions of the jury. Wilmer informed the jury of what the loss of his brother meant to his family and asked the jury to impose a sentence that appropriately fit the crime committed. Wilmer also forgave Phillips for the crime he committed.

A. The Standard of Appellate Review.

The admission of victim impact testimony is reviewed for abuse of discretion. Deparvine v. State, 995 So. 2d 351, 378 (Fla. 2008) (citing Zack v. State, 911 So. 2d 1190 (Fla. 2005)). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." Armstrong v. State, 73 So. 3d 155, 173 (Fla. 2011) (quoting White v. State, 817 So. 2d 799, 806 (Fla. 2002)). The trial court's ruling will not be

disturbed on appeal absent a clear showing of abuse. Schoenwetter v. State, 931 So. 2d 857, 869 (Fla. 2006).

B. Phillips's Penalty Phase was not Tainted by the Trial Court Allowing the Victim Impact Statement of Wilmer Antunes-Padilla to be Presented to the Jury.

Florida Statutes section 921.141(7) states that victim impact evidence is to be heard in considering capital felony sentences. Windom v. State, 656 So. 2d 432, 438 (Fla. 1995). This evidence is allowed to show how each victim is unique and so the jury can know there is loss to the community from this death. Payne v. Tennessee, 501 U.S. 808, 827 (1991); Deparvine v. State, 995 So. 2d 351 (Fla. 2008). Here, the victim impact statement made by Wilmer falls within the constraints of what is allowed under Payne v. Tennessee, 501 U.S. 808, 827 (1991).

During the penalty phase, Wilmer's letter was read to the jury through an interpreter. Phillips claims the following tainted the jury by stating:

> What I do ask 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.

(T. 10:949). Yet, there was nothing improper about this statement. In this portion of the victim impact statement, it is clear that Wilmer was merely asking the members of the jury to show wisdom when they decided on how to punish Phillips. He was forgiving Phillips as well. This statement did not arouse the passions of

the jury as Phillips maintains. The testimony of Wilmer focused on him being home when his brother was killed, how the brothers came to America to send money home for their family, and now only one brother remains to do that. (T. 10:920-922). Further, the trial court had the victim impact statements proffered prior to presenting it to the jury and despite defense counsel's objection, found that there was no error with the testimony. (T. 10:927).

In Franklin v. State, 965 So. 2d 79, 88 (Fla. 2007), the defendant argued that improper victim impact evidence was presented to the jury. The victim's family and coworkers testified about how the victim supported and took care of his family and now they were left without a home or income. Id. at 97. His coworkers also testified that they were all friends with him and were devastated by his death. Id. This Court held that these statements allowed the jury to consider the uniqueness of the victim and were not improper victim impact statements or exceeded the bounds of what was allowed. Franklin, 965 So. 2d at 97-98.

In this case, Wilmer commented on how his brother helped their family back home in Mexico and now Wilmer would be the only one to support them. Wilmer's letter was not improper as he was merely asking the jury to use their wisdom when they made their decisions. In addition, the statement made by Wilmer in the letter did not present any additional or unknown evidence that would have swayed the jury to recommend a death sentence. Phillips has not been able to

show that these statements made by Wilmer aroused the jury or made a difference to Phillips's sentence. Therefore, Phillips's penalty phase was not tainted by the testimony of Wilmer.

C. Phillips's Standing Objection did not Preserve his Objection Regarding Wilmer Antunes-Padilla's Victim Impact Testimony Preservation.

This Court has held that failure to make a specific objection to any portion of the testimony, despite a general objection, is not sufficient to preserve the issue. Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009). Prior to the start of the penalty phase, Wilmer's testimony was proffered with an interpreter and defense counsel objected. (T. 10:919). The trial court overruled the objection and allowed the testimony. (T. 10:927). Then before Wilmer's testimony, defense counsel made a standing objection to all victim impact testimony. (T. 10:944). Importantly, defense counsel did not specifically object to any part of Wilmer's letter that he is now raising in this motion and therefore, this issue was not properly preserved.

The failure of counsel to make a contemporaneous objection to a comment that he believes is improper victim impact testimony means the claim is not preserved, absent fundamental error. Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009) ("It is well established that for a claim 'to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.'") (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)). If an error is not preserved, only a review for fundamental error may grant the defendant

relief. Wheeler, 4 So. 3d at 607. Fundamental error is an error that reaches all the way down into the validity of the trial to the extent that the jury recommendation could not have been obtained without the error. Id. In this case, the letter read by Wilmer affected neither the validity of the penalty phase, nor the jury's recommendation of death. The weight of the evidence against Phillips was overwhelming. Phillips shot and killed two men and the jury, regardless of Wilmer's statement, would have given a sentence of death.

Furthermore, the trial court found the aggravators of prior violent felony, felon on probation, and murder committed during attempted robbery. (R. 4:651-654). Phillips's mitigators were not substantial and did not outweigh the aggravators. Therefore, with this substantial aggravation presented to the jury and his minimal mitigators, the complained of testimony was harmless beyond a reasonable doubt. See Windom v. State, 656 So. 2d 432, 439 (Fla. 1995) (holding that in a triple murder case, where the defendant did not present mitigation, only the aggravating circumstances were before the jury and so the testimony was harmless beyond a reasonable doubt.).

The statements made by Wilmer were not prejudicial and did not arouse the passions of the jury to the point of recommending a death sentence. Rather the evidence presented throughout trial and the death of not one but two victims led the jury to recommend death. Therefore, this issue should be denied.

ARGUMENT III: THE EVIDENCE WAS SUFFICIENT TO SUPPORT TERRANCE PHILLIPS'S CONVICTIONS FOR THE FIRST-DEGREE MURDER OF MATEO HERNANDEZ-PEREZ AND REYNALDO ANTUNES-PADILLA.

Phillips alleges that the evidence was not sufficient to sustain a conviction for first-degree murder. (IB:68). In particular, Phillips argues that there was no evidence of premeditation. (IB:70). He asserts that while there was a gun involved, it was being used as part of the planned robbery, as there was no anticipated killing. (IB:70). Additionally, Phillips claims the evidence demonstrates the shooting occurred during a struggle and the gunshots were haphazard and randomly placed. (IB:70). However, the evidence shows there was time for Phillips to reflect and flee with his other codefendant's but instead he chose to shoot and kill two unarmed men. It is clear there was sufficient evidence to convict Phillips of not only premeditated murder, but also felony murder.

A. The Standard of Appellate Review.

This Court applies a de novo standard of review when examining the sufficiency of the evidence to sustain a conviction for first-degree murder. See Jones v. State, 790 So. 2d 1194, 1197-98 (Fla. 1st DCA 2001); see also Fisher v. State, 715 So. 2d 950 (Fla. 1998). "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." Gregory v. State, 118 So. 3d 770, 785 (Fla.

2013) (quoting Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006); Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001)).

B. Sufficient Evidence Exists to Prove Premeditation.

To prove the crime of first-degree murder the State must prove that: (1) victim is dead; (2) the death is caused by the criminal act of the defendant; and (3) there was a premeditated killing of that victim. See Fla. Std. Jury Instr. (Crim.) 7.2. Here, Phillips has challenged premeditation and that Phillips was the triggerman. (IB:68-71).

"Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable results of that act." Asay v. State, 580 So. 2d 610, 612 (Fla. 1991). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence of guilt is wholly circumstantial, it must be inconsistent with any other reasonable hypothesis of innocence. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989), see Twilegar v. State, 42 So. 3d 177, 188 (Fla. 2010).

Evidence of premeditation may be shown by "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 v. State, 715 So. 2d 940, 943 (Fla. 1998)

(quoting Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)). Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury. Asay v. State, 580 So. 2d 610, 612 (Fla. 1991).

In this case, evidence of premeditation was shown by Phillips bringing a gun to the robbery, the absence of any provocation on the part of the victims, and Hernandez-Perez sustaining two gunshots to his body and Antunes-Padilla having one gunshot wound. When Phillips entered the apartment, he entered with a gun in his hand as stated by various witnesses. (T. 7:325-326, 384-385; 8:440). Moreover, the murders of Hernandez-Perez and Antunes-Padilla occurred when Phillips shot both victims without any provocation. When Phillips entered the apartment, he put the gun directly to Hernandez-Perez's head. (T. 7:327). Hernandez-Perez then pushed the gun off his head and Reynaldo Antunes-Padilla came over to help. (T. 7:327). Hernandez-Perez's action of pushing the gun from his head was him getting out of the way of the gun and shows the absence of provocation on the part of the victims.

In Miller v. State, 42 So. 3d 204, 228 (Fla. 2010), this Court upheld a conviction for first-degree murder when the defendant killed the victim without provocation. Miller went to rob Jerry Smith and took a knife with him. Id. at 227. As he was attempting to steal her jewelry, Haydon interrupted him. Id. The defendant stabbed Haydon in the chest and then went after the fleeing Smith. Id.

He deliberately followed her out the back door and stabbed her several times rather than leave the house. Miller, 42 So. 3d at 228. This Court found that the defendant's decision to stab Smith after an initial break in their struggle shows his consciousness of the act he was about to commit. Id.

Likewise, in this case, Phillips entered the victims' apartment with a gun and put it directly to the head of Hernandez-Perez. Hernandez-Perez pushed the gun away from his head. (T. 7:327). Anders testified that she hit one of the men over the head with a beer bottle and ran out. (T. 8:441). Salgado testified that Baker hit him over the head with a beer bottle and then chased Salgado out of the apartment. (T. 7:327). Thus leaving Phillips and the two victims, Hernandez-Perez and Antunes-Padilla, in the apartment. Although there is no testimony as to what occurred after the other participants exited the apartment, Phillips was the only one with a gun and Hernandez-Perez and Antunes-Padilla were both shot. It is clear that Phillips also could have taken the opportunity to leave with his codefendant's from the scene and his decision to remain is where his consciousness of the nature of the act he was going to commit is formed.

In count one, the jury found Phillips guilty by special verdict of premeditated first-degree murder for the death of Antunes-Padilla. (R. 3:556-557). Antunes-Padilla sustained two types of injuries, a single gunshot wound and a minor blunt force injury. (T. 9:735-737). The blunt force wound is consistent with Anders's

testimony that she hit one of the men with a beer bottle before running out of the apartment. (T. 8:441). The medical examiner testified that Antunes-Padilla's skin was lacerated just above his left eyebrow. (T. 9:736). The gunshot wound went through his chest and the bullet traveled through his body and exited from his back. (T. 9:732). There is sufficient evidence to show that immediately after hitting Antunes-Padilla, Anders ran out of the apartment and then she heard gunshots. (T. 8:441). Clearly, there was an opportunity for Phillips to also leave the premises. Instead, he stayed in the apartment shooting Antunes-Padilla.

In count two, the jury found Phillips guilty by special verdict of the premeditated first-degree murder of Hernandez-Perez. (R. 3:558-559). The eyewitnesses testified that as soon as Phillips entered the apartment he put the gun to Hernandez-Perez's head, threatening him. (T. 7:327). Hernandez-Perez pushed Phillips's hand off his head and a fight ensued. Phillips then shot Hernandez-Perez two times, in the left thigh and left hip. (T. 9:715). This is clear evidence of premeditation as Phillips intentionally formed the intent necessary to shoot Hernandez-Perez twice. The nature and manner of the wounds inflicted reflect that there was premeditation.

Although there was no evidence presented regarding who was shot first, Phillips fired three shots at two unarmed individuals hitting the human targets each time. His shots were obviously not "haphazard or random" as Phillips suggests.

(IB:70). He shot Hernandez-Perez two times after holding the gun to his head and he also shot Antunes-Padilla. There was time before the shootings where Phillips could have reflected on what he was about to commit and the probable results. Phillips could have left the premises with the other codefendant's during this time of premeditation. However, he stayed and engaged with the victims shooting them both and killing them.

As to the hypotheses of innocence of premeditation, based on a claim that the gun dropped and went off, there is no evidence to support this. At trial, the only evidence presented was by Bing who testified that when Phillips got back in the car he claimed that he dropped the gun and it went off. (T. 7:387). However, this is not consistent with three bullets being fired and hitting their intended targets. Phillips shot Hernandez-Perez in the upper thigh and abdomen area and Antunes-Padilla in the chest. (T. 9:713-714, 735-737). Therefore, it is plausible for the jury to believe the State's version of events and there was enough evidence presented to support the jury's finding of premeditated murder. Consequently, the evidence of premeditation is clear.

C. The Jury also found Phillips Guilty of First-Degree Felony Murder.

In this case, the jury found Phillips guilty of both premeditated murder and felony murder. (R. 3:556-559). Since there is a special verdict form, any flaw in one theory does not undermine the validity of the other theory. United States v.

Najjar, 300 F.3d 466, 480 & n.3 (4th Cir. 2002) (explaining that a special verdict as opposed to a general verdict, obviates any Yates v. United States, 354 U.S. 298, 312 (1957) problem and thus any error was harmless); Tenner v. Gilmore, 184 F.3d 608, 612 (7th Cir. 1999) (explaining that "[s]pecial verdicts avoid the Yates problem, because the court then can be confident that the facts as the jury believed them to be are a legally proper basis of conviction."). Therefore, when there is a special verdict, the law regarding general verdict does not apply. [4] Accordingly, neither Griffin v. United States, 502 U.S. 46 (1992) nor Yates applies to this case.

Consequently, the evidence presented to the jury was sufficient to support their finding of first-degree felony murder. Phillips and his codefendants planned a robbery. (T. 7:379-381; 8:436-437). In execution of the plan, Bing and Anders entered the victims' apartment under a pretext of sex and called Phillips and Baker. (T. 7:324; 8:439). Phillips arrived at the apartment and immediately put the gun to the head of Hernandez-Perez. (T. 7:327). After Hernandez-Perez pushed the gun from his head, Phillips fired three shots that did not miss their targets. (T. 9:713-

[4] The United States Supreme Court has clarified that a general verdict based on multiple theories of guilty, one of which is legally invalid, is not a structural error. Rather, such errors are subject to harmless error analysis. Hedgpeth v. Pulido, 555 U.S. 57 (2008) (agreeing with a concession that harmless error applies); see also Skilling v. United States, 561 U.S. 358 (2010).

714, 735-737). Accordingly, there was sufficient evidence for the jury to also find Phillips guilty of felony murder.

ARGUMENT IV: THE STATE DID NOT COMMIT A GIGLIO VIOLATION WHEN THE JURY WAS AWARE OF THE WITNESSES BIASES IN TESTIFYING AT TERRANCE PHILLIPS'S TRIAL.

Phillips alleges the State committed a Brady and Giglio violation when two codefendants, Barbara Anders and Shanise Bing, were allowed to testify untruthfully regarding their plea deals and the circumstances of the case. (IB:71). At the outset, the State notes that this claim is not properly before this Court as it was not raised below. Phillips was found guilty by a jury on January 20, 2012, and sentenced to death on April 20, 2012. Anders was sentenced on May 17, 2012, and Bing was sentenced on June 28, 2012. However, Phillips had already filed his notice of appeal on April 26, 2012, by the time Anders and Bing were sentenced. Consequently, the trial court no longer had jurisdiction over Phillips's case at the time of the codefendant's sentencing and defense counsel did not request that this Court relinquish jurisdiction. Therefore, the trial court did not have an opportunity to address this issue and it is now appearing on appeal for the first time. This claim is appropriately raised in a post-conviction motion. As in other cases, this claim can be better addressed when the prosecutor, the defense counsel of both codefendants, and the codefendants themselves are able to address the issue under oath and on the stand. Nevertheless, in an abundance of caution, the State will address the merits of this argument.

A. The Standard of Appellate Review.

Brady and Giglio claims present mixed questions of law and fact and this Court defers to the "factual findings made by the trial court to the extent they are supported by competent, substantial evidence," but review de novo the application of the law to the facts. Guzman v. State, 941 So. 2d 1045, 1049-50 (Fla. 2006).

B. Phillips confuses the standard for Brady and Giglio violations.

In his initial brief, Phillips asserts that he was "deprived of his due process rights 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." (IB:71). He also states that due process violations under Brady and Giglio must be evaluated cumulatively. (IB:77). This is an incorrect statement of law and confuses the standards and tests for violations of Brady v. Maryland, 373 U.S. 83, 86-87 (1963) and violations of Giglio v. United States, 405 U.S. 150, 153-154 (1972). See Guzman v. State, 868 So. 2d 498, 505-506 (Fla. 2003) (noting that trial courts have confused and improperly merged the materiality prong of Brady and Giglio).

In confusing the standards for Brady and Giglio, Phillips has confused the proper test to evaluate this claim. A Brady claim asserts that the State withheld evidence from the defense. Brady, 373 U.S. at 86-87. A Giglio claim asserts the State knowingly presented false testimony and allowed it to go uncorrected before

the jury. Giglio, 405 U.S. at 153-154. Although a Brady claim is easier for a defendant to prove, its standard for materiality is much more difficult as the defendant bears the burden to show a reasonable probability that the undisclosed evidence would have produced a different result. Guzman, 868 So. 2d at 506 (citing Strickler v. Greene, 527 U.S. 263, 281 n. 20, 289 (1999)).

By contrast, a Giglio violation is more difficult to prove because it is based on the "prosecutor's knowing presentation at trial of false testimony against the defendant." Giglio, 405 U.S. at 154-55. However, Giglio's materiality standard is more defense friendly. Once it is proven the prosecutor used or failed to correct false testimony, the question becomes whether there is any reasonable likelihood that the false testimony could have affected the verdict. Guzman, 868 So. 2d at 507-508. It is the State's burden under Giglio to prove that any false testimony was harmless beyond a reasonable doubt, and there is no cumulative analysis. Guzman, 868 So. 2d at 508. Here, Phillips claims that the codefendants who testified in his case presented false testimony and the State knowingly allowed that testimony to go uncorrected. Therefore, Phillips is presenting a claim of a Giglio violation. As a result, any references to Brady are improper.

C. The testimonies of Shanise Bing and Barbara Anders do not constitute a Giglio violation.

1. Shanise Bing

In his brief, Phillips asserts that during trial, Bing and the State failed to comply with the requirements of Brady and Giglio. (IB:72). First, he asserts that Bing did not clarify that two counts of second-degree murder were filed against her and were still pending. Second, Phillips maintains that Bing's testimony at his trial was false because it failed to show that Baker and not Phillips helped Anders mastermind the plan to rob.[5] (IB:74). However, Bing's testimony at trial was

[5] In his final assertion, Phillips maintains that Bing's testimony differed between Phillips's and Baker's trial. At Phillips's trial, when asked if she overheard Phillips participating in the plan to rob anyone, Bing proffered that she heard the conversation in the car but that she was not tuned in and so she could not give information on what was said. (T. 7:367). At Baker's trial, when asked if Baker was the person in the car making the plan to rob, Bing agreed. (Supp. 5:766). Phillips attempts to take these two different answers given by Bing at trial out of context. Nevertheless, when they are properly read it is clear that Bing was answering two very different questions. In Phillips's trial, Bing was answering whether she heard Phillips participating in the conversation, to the contrary in Baker's trial she was answering that Baker was in the car when the plan was occurring. Her testimony was not false or misleading and the State committed no error by allowing this testimony on the stand. Moreover, this information was not exculpatory nor would it have changed the outcome of the proceeding because even if Baker was the mastermind, Phillips still was the triggerman and killed two people. Therefore, Phillips cannot meet the test for a Giglio violation.

correct and any failure to specify the degree of murder does not render her testimony false or misleading. Further, even if Baker helped Anders mastermind the crime, it was Phillips alone who was the triggerman killing Hernandez-Perez and Antunes-Padilla.

Under Giglio, 405 U.S. at 153-54, a defendant must show: (1) the State presented or failed to correct false testimony; (2) the State knew that the testimony was false; (3) and the false evidence was material. Once the first two prongs are established, the false evidence is deemed material if there is any reasonable probability that it affected the jury's verdict. Davis v. State, 26 So. 3d 519, 532 (Fla. 2009). However, Phillips cannot establish that the State presented or failed to correct false testimony or that a Giglio violation occurred in this case.

In Guzman v. State, 868 So. 2d 498, 503 (Fla. 2003), this Court considered the merits of a Giglio violation. Cronin, the State witness, was taken to a motel room instead of jail and given $500 in exchange for her testimony against Guzman. Id. At trial, Cronin denied ever receiving a benefit. Id. Further, the police officer who gave Cronin the money also denied giving her any benefit. Id. This Court found that the testimony from both Cronin and the officer was false because Cronin had in fact received a benefit for her testimony. Guzman, 868 So. 2d at 505. This Court held that the first two prongs from the Giglio test was satisfied because both Cronin and the officer testified falsely at trial. Guzman, 868 So. 2d at 505. Both

Cronin and the officer lied about the benefit Cronin received for testifying against Guzman. Id.

Here, Phillips has not shown the testimony presented by Bing was false or that the prosecutor knowingly presented any false testimony. During trial, Bing testified:

> Q. And you were charged in reference to this case; is that correct?
> A. Yes, ma'am.
> Q. Okay. In fact, you were charged with two counts of murder, one count of armed burglary, one count of attempted armed robbery, and one count of conspiracy to commit robbery; is that correct?
> A. Yes, ma'am.
> Q. And did you end up entering a plea to the Court on the conspiracy to commit robbery and the armed burglary?
> A. Yes, ma'am.
> Q. And is it your understanding that you face a maximum of life in prison on the armed burglary; is that correct?
> A. Yes, ma'am.
> Q. And you face a maximum of 15 years in prison on the conspiracy to commit armed robbery; is that correct
> A. Yes, ma'am.
> Q. Has anybody promised anything for your testimony here today?
> A. No, ma'am.
> Q. And you understand that at a later date that you will have a sentencing hearing in front of the Judge; is that correct?
> A. Yes, ma'am.
> Q. And the counts of murder and the attempted armed robbery, were they dropped or are they still pending against you?
> A. Still pending.
> Q. So you still face those charges as well; is that correct?
> A. Yes.

(T. 7:389-91). Nothing in Bing's testimony was false or mislead the jury about her motivations for testifying.

Bing was originally charged with two counts of second-degree murder, conspiracy to commit armed robbery, armed burglary, and attempted armed robbery. (Supp. 12:1551; 13:1675). On June 3, 2010, at her plea hearing, she entered a plea to conspiracy to commit armed robbery and armed burglary. (Supp. 12:1576; 13:1701). Bing was sentenced to these charges on June 28, 2012, and received six months' jail to be followed by one-year probation. (Supp. 13:1711-1715; 12:1583-1588). Moreover, at the end of Bing's sentencing hearing, the State nolle prossed the remaining counts including the two charges for second-degree murder. (Supp. 14:1772). Therefore, when Bing was asked if she was charged with murder she correctly answered yes, even though she did not specify the degree of the charge. Further, Phillips has not shown that the prosecutor presented any false testimony as the evidence shows that Bing testified correctly regarding what she was promised by the State. Consequently, as to the first allegation, Phillips has not satisfied the first two prongs of Giglio.

Phillips is also incorrect that Bing testified falsely regarding where she was in the process. Prior to Phillips's trial, Bing only entered a plea to two of the charges against her and the remaining charges were still pending at the time that she testified. (Supp. 12:1576; 13:1701). Those counts were not nolle prossed until after Bing was sentenced on June 28, 2012. (Supp. 14:1772). Therefore, Bing did

not present false testimony regarding what her charges were and what was still pending at the time of trial. (T. 7:389-91).

2. Barbara Anders

In his brief, Phillips asserts that the State also violated Giglio with the testimony of Anders. (IB:74). Phillips argues that at his trial Anders stated she lied about who had the gun because she was mad at Baker and wanted to get him in trouble. (IB:74). He asserts that at Baker's trial, Anders testified that she lied because she did not want to get anyone in trouble. (IB:75). However, Phillips's assertions regarding Anders's testimony lack merit. Semantics regarding answers to questions are not Giglio violations as Phillips is attempting to assert. Anders made her feelings regarding Baker clear at Phillips's trial and explained her reasoning for giving the police a false statement. (T: 8:445). Further, she fully explained to the jury her motivation in giving testimony at Phillips's trial. (T. 8:423-425).

"The thrust of Giglio and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." Routly v. State, 590 So. 2d 397, 400 (Fla. 1991) (quoting Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir. 1983)). At Phillips's trial, Anders testified she was indicted for two counts of

murder and the State sought the death penalty against her. (T. 8:423-424). The testimony was as follows:

> Q. And did the State of Florida at the age of 18 seek the death penalty against you?
> A. Yes, ma'am.
> Q. Did you then make a decision to enter a plea of guilty to some of those charges and cooperate with the State of Florida?
> A. Yes, ma'am.
> Q. Did you, um - - even with the charges that you pled guilty to, are you still looking at life in prison?
> A. Yes, ma'am.
> Q. Did the State of Florida agree not to seek the death penalty against you because of your cooperation?
> A. Yes, ma'am.
> Q. And besides that agreement, has there been any sort of promise made to you, ma'am, regarding the sentence that you will ultimately receive for this case?
> A. No, ma'am.
> Q. What is - - who is the person that is going to be in charge of what sentence you get?
> A. The Judge.
> Q. Why are you testifying?
> A. Because I was wrong and I'm here to tell the truth and hope the Judge will show mercy on me.

(T. 8:424-425). Further, on cross Anders testified that she was hoping to get a break on her sentence by testifying for the State. (T. 8:481). Pursuant to her plea agreement, the State agreed to nolle prosse the two murder counts if Anders agreed to testify truthfully at all subsequent proceedings and she pleads guilty to the remaining charges. (Supp. 10:1375-1376). After sentencing was complete on May 17, 2012, counts one and two for first-degree murder were nolle prossed. (Supp.

10:1549). Therefore, Anders's testimony at Phillips's trial was not false and the State did not put up any false information.

Anders also testified at Phillips's trial that she still had feelings for Baker. She stated:

> Q. What about Antonio Baker, even though he did you wrong back on December 24th, as you sit here today do you have any hard feelings against him?
> A. No, sir.
> Q. Have you moved on?
> A. No, ma'am.
> Q. I mean, have you moved on with your life, your feelings for him?
> A. No, ma'am.
> Q. You still care about him?
> A. Yes, ma'am.

(T. 8:506-507). Anders revealed her motivation for testifying in Phillips's trial and the jury was aware of it all. She did not hide at either trial that she still loved Baker or her involvement with the crime. (Supp. 5:715-716). Therefore, the prosecutor's statement at Anders's sentencing was based on Anders's own testimony given at Phillips's trial. Phillips cannot show the State put on any false testimony and therefore, there was no Giglio violation regarding Anders's sentence and her motivation to testify.

Further, the differing testimony between Anders, Bing, and Salgado does not mean that a Giglio violation occurred. Phillips cannot "establish a Giglio violation by showing merely that the State put on witnesses whose testimony conflicted with another person's version of events." Ferrell v. State, 29 So. 3d 959, 978 (Fla.

2010). Phillips is merely arguing the small, differing details of the testimony of these witnesses. He fails to show the prosecutor presented false testimony or the prosecutor knew the testimony was false and therefore fails to prove the first two prongs of Giglio. Moreover, the amount that was bargained for and what happened on Pearl Street are not material or exculpatory pieces of evidence that would warrant a reversal or new trial.

Phillips's allegations that the State put on false testimony is incorrect. All of the alleged errors that Phillips points to show that the testimony of both Bing and Anders was not false. Both witnesses freely let the jury know the benefits they were receiving for their testimony at trial. The record evidence of what they eventually plead to and the sentence they received reflects the truth of their testimony at Phillips's trial. Moreover, Phillips attempt to draw a distinction between different parts of their testimony shows that no errors were made and Phillips was not prejudiced. As such, this Court should deny any relief on this issue.

ARGUMENT V: THIS COURT HAS REPEATEDLY REJECTED CLAIMS THAT FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA.

Phillips asserts that the trial court imposed a death sentence in violation of the Sixth Amendment to the United States Constitution in light of the United States Supreme Court holding in Ring v. Arizona, 536 U.S. 584 (2002). (IB:78). This is a facial challenge to the constitutionality of Florida Statute §921.141, which governs Florida's capital sentencing procedures. Phillips's arguments lack any merit as this Court has repeatedly and recently rejected identical claims.

Phillips was convicted of first-degree murder with the jury finding premeditation and felony-murder. (T. 10:909-910). The jury voted eight-to-four for a death sentence for the murder of Hernandez-Perez and the jury voted eight-to-four for the murder of Antunes–Padilla. (T. 11:1134). The trial court found three statutory aggravators including Phillips was previously convicted of another capital felony (contemporaneous murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez); the capital felony was committed by a person previously convicted of a felony and on felony probation; and the capital felony was committed while Phillips was engaged in the commission or attempted commission of any robbery or burglary. (R. 4:651-654).

The constitutionality of a statute is reviewed de novo. Scott v. Williams, 107 So. 3d 379 (Fla. 2013). This Court has repeatedly rejected a claim that Ring

invalidated Florida's capital sentencing statute. Gonzalez v. State, 136 So. 3d 1125, 1168 (Fla. 2014); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (noting this Court had rejected Ring claims in over fifty cases); Gudinas v. State, 879 So. 3d 616, 617 (Fla. 2004). Moreover, the jury unanimously found Phillips guilty of the contemporaneous first-degree murders, armed burglary, conspiracy to commit armed robbery, and attempted armed robbery, making him independently eligible for a death sentence under Florida law. Gonzalez, 136 So. 3d at 1168; Frances, 970 So. 2d at 822; Gudinas, 879 So. 2d at 617-18. This satisfies any right to jury sentencing that Phillips reads into Ring. This claim is therefore without merit and does not implicate the issues raised in Hurst v. State, 147 So. 3d 435 (Fla. 2014), cert. granted, Hurst v. Florida, 135 S. Ct. 1531 (2015). Unlike the instant case, Hurst, did not involve the contemporaneous felony aggravator, which this Court's precedent clearly establishes does not implicate Ring. See e.g., Zack v. State, 911 So. 2d 1190, 1202 (Fla. 2005) (holding that a "defendant is not entitled to relief under Ring where the aggravating circumstance that the murder was committed during the course of a felony was found and the jury unanimously found the defendant guilty of that contemporaneous felony"). This claim should be denied.

ARGUMENT VI: TERRANCE PHILLIPS IS NOT INTELLECTUALLY DISABLED AND THERE IS NO NEED TO ASSESS HIM FOR ADAPTIVE FUNCTIONING.

In his brief, Phillips asserts that his death sentences violate the Eighth and Fourteenth Amendments because he is intellectually disabled. (IB:82). Phillips maintains that subsequent to the penalty proceedings in his trial, the United States Supreme Court decided Hall v. Florida, 134 S.Ct. 1986 (2014) and he was not given a fair opportunity to establish his intellectual disability. (IB:89). However, Phillips's allegations lack merit as Hall does not apply to Phillips because he failed to raise the claim under Rule 3.203, which provided him with the opportunity to fully present his claim. Further, the record reflects that his IQ score was a 76, which excludes him from the class of cases that Hall addressed.

A. The Standard of Appellate Review.

The standard of review is de novo as this Court reviews the legal conclusions of the lower court. State v. Herring, 76 So. 3d 891, 895 (Fla. 2011); see also Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). "We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we do not reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses." Franqui v. State, 59 So. 3d 82, 91 (Fla. 2011). However, to the extent that the circuit court decision

concerns any questions of law, this Court should apply a de novo standard of review. Dufour v. State, 69 So. 3d 235, 246 (Fla. 2011).

B. Hall does not apply to Phillips's Case as he Scored a 76 on his IQ test.

The recent decision of the United States Supreme Court in Hall v. Florida, 134 S.Ct. 1986 (2014), does not entitle Phillips to a hearing to determine intellectual disability. The decision in Hall "squarely holds that it is 'the Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." In re Henry, 757 F.3d 1151, 1162 (11th Cir. 2014) (quoting Hall, 134 S.Ct. at 2000). Phillips is attempting to allege that a deviation from his registered IQ score would have him fall under the purview of Hall and allow him to present evidence of intellectual disability. However, such a tactic has already been rejected by this Court and the United States Court of Appeal for the Eleventh Circuit.

In In re Henry, 757 F.3d 1151 (11th Cir. 2014), the Eleventh Circuit rejected an emergency habeas petition on procedural grounds, but also decided the issue on the merits of Henry's petition. The Eleventh Circuit took notice of Henry's IQ score of 78 and his assertion of significant deficiencies in adaptive functioning. Id. at 1162. Relying on Hall, the Eleventh Circuit stated that even if Henry's habeas petition was not procedurally barred, he would not be able to benefit from the

decision in Hall because his IQ score was outside of the range the Supreme Court found could show intellectual disability. Id. at 1163. Henry attempted to avail himself of the benefit of having a standard deviation applied to his IQ score of 78, which would give him a presumptive score of 73, and then place him within the range of the decision in Hall; however, such a tactic ignores and insults the decision in Hall. Simply stated, pursuant to Hall any IQ score above 75 does not fit into the +/-5 range of 70 for being able to establish intellectual disability. In Phillips's case, he received an IQ score of 76. (T. 11:1057). Based on his score, Phillips does not fall within the range that would allow him to present evidence to establish intellectual disability.

Furthermore, Hall is not applicable as it merely provides that defendants must be afforded an opportunity to present evidence on all three prongs when their IQ scores fall between 70-75. Phillips did not attempt to present this information to the trial court prior to trial. Phillips did not file a motion for determination of intellectual disability as a bar to execution. See Florida Rule of Criminal Procedure 3.203. Pursuant to rule 3.203(d) such a motion should be filed 90 days prior to trial. Phillips was not precluded by the State or the trial court from filing such a motion and presenting his evidence of intellectual disability. Consequently, he cannot now allege that he should be allowed to present something when he was not barred. As such, Hall is not applicable.

C. Phillips has not presented any evidence that he is Intellectually Disabled.

Florida law sets forth a three-prong test to determine intellectual disability: (1) significantly subaverage general intellectual functioning as evidenced through IQ scores, with an IQ score of 70 as the cut-off; (2) concurrent deficits in adaptive behavior; and (3) manifestation by age 18. Hurst v. State, 147 So. 3d 435, 440 (Fla. 2014). In Florida law, "adaptive behavior" explicitly includes the individual's capacity to conduct activities "expected of his or her age, cultural group, and community," which necessarily includes everyday activities. §921.137(1), Fla. Stat. A defendant must meet the intellectual-functioning and adaptive-skills criteria for retardation before age 18. See Jones v. State, 966 So. 2d 319, 325 (Fla. 2007). A defendant must establish all three elements to be declared intellectually disabled. Dufour v. State, 69 So. 3d 235, 246 (Fla. 2011).

First, Phillips's own mental health expert said he is not intellectually disabled. (T: 11:1056-1058). On cross-examination, Dr. D'Errico admitted that Phillips was really in a regular classroom and pulled out for special services and his behavior was a contributing factor to his learning disability. (T. 11:1067-1069). Dr. D'Errico asserts that he looked at all of Phillips's school records and they all matched his determination that Phillips was not intellectually disabled. (T. 11:1056).

Further, Phillips scored an IQ of 76. (T. 11:1057). A score of 76 is above the average score of 70 needed to establish "significantly subaverage general intellectual functioning" and outside the range. See Dufour, 69 So. 3d at 246. Phillips attempts to argue that after Hall his score of 76 should be viewed with a +/- 5 range which he asserts will bring him close to the target number of 70 and allow the presentation of adaptive functioning. However, as previously stated, Hall only looks at the average of scores within a range of +/- 5 of an IQ score of 70. Therefore, Phillips does not satisfy the first prong of the analysis.

Based on the testimony of Dr. D'Errico it does not appear that Phillips would have passed the second prong of the test. Dr. D'Errico testified that he did not administer an adaptive behavior scale because it is usually given to individuals whose IQ score is below a 70 which was not the case with Phillips. (T. 11:1064). In Henry v. State, 141 So. 3d 557, 560 (Fla. 2014), this Court held that the evidence of the defendant's ability to drive a car, develop personal relationships, participate in financial transactions, and his pro se pleadings and oral advocacy refutes his claim of deficits in adaptive functioning. As Dr. D'Errico made clear, there was no evidence of mental retardation and Phillips has not presented any evidence of its existence. (T. 11:1056, 1064). Consequently, Phillips also fails the second prong. Phillips has an IQ of 76 and Dr. D'Errico reviewed all of his school and medical records to reach a determination that Phillips is not intellectually

disabled. Phillips's reliance on Hall is misplaced, as there is no need for him to present any evidence of lack of adaptive functioning because his IQ score is a 76. Accordingly, this claim should be denied.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Terrance Phillips's convictions and sentences.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on September 18, 2015: Martin J. McClain, Esq. at martymcclain@earthlink.net.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ *Berdene B. Beckles*
By: BERDENE B. BEKLES
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 27481
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
Primary E-Mail:
capapp@myfloridalegal.com
Secondary E-Mail:
Berdene.Beckles@myfloridalegal.com
(850) 414-3300 Ext. 3606
(850) 487-0997 (FAX)