IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-876

TERRANCE TYRONE PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

Guilt Phase

In his Initial Brief, Phillips set forth a very detailed Statement of the Facts, replete with specific record citations and frequent quotations from the trial testimony. In its Answer Brief, the State does not assert at any point in its Statement of the Case and Facts that Phillips' Statement of the Facts was inaccurate. Instead, the State sets forth its own recitation of the facts that is in a form that approximates a summary of the trial testimony. However, in doing so, the State omits many important facts that had been set forth in Phillips' Initial Brief. By omitting these facts from its Statement of the Case and Facts, the State as it did below seeks to present an inaccurate picture of what occurred on December 24, 2009, and the testimony of the witnesses to those events.

In the opening paragraph of the Statement of the Case and Facts, the State discusses the meeting at the convenience store at around 3:00 PM on December 24, 2009, between the two groups: 1) Aurelio Salgado, Manuel Ton Hernandez, Mateo Hernandez-Perez, and 2) Barbara Anders, Shanise Bing, and Tanequa Dwight. In its discussion of the meeting, the presence of 17-year-old Shanise Bing is omitted from the State's brief (7 R 376). The State also omits the ages of Salgado (48 years old)and Hernandez-Perez (26

years old) (10 SR 1325). And the State omits reference to Bing's observation of Dwight providing the men with contact information for the girls (7 R 376).

The State makes no mention of why the men wanted a phone number for the girls. Salgado testified that 26-year-old Hernandez-Perez wanted to have sex with the girl from the store in exchange for money - the girl who he believed "was 16 years old" (7 R 340-41).[1]

The State makes no mention of Anders' testimony that before Antonio Baker was contacted and brought into the events, Anders and Dwight had already hatched a plan to rob the three Mexicans from the convenience store:

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

[1]The closest the State comes to addressing this is a sentence asserting "Salgado called [Anders] back relaying the message that Hernandez-Perez was interested in sex" (AB at 2). There is no acknowledgment in the Answer Brief that Hernandez-Perez was seeking to pay for sex with a minor - a second degree felony under Florida law.

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

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

(8 R 467).

Ignoring Anders' testimony that she and Dwight had devised a plan to rob the Mexicans before Dwight had contacted Baker, the State asserts in its brief that "Anders, Baker, and Phillips decided to rob the Hispanic men" (AB at 2). The State ignores Bing's testimony that "it was Anders' idea to go rob somebody" (8 R 404).[2] Bing testified that she did not know whether Phillips made any "statement [indicating] that he was going to rob anyone" (8 R 404) ("I can't deny it because I don't know.").

As to what happened once Anders and Bing entered the apartment where the Mexican men were, the State ignores that the three witnesses gave differing accounts. The State cites

[2]In her testimony at Baker's trial, Bing confirmed that Anders was the "mastermind amongst the four of you" (5 SR 763).

Salgado's account that after the girls entered, the door to the apartment was left open (AB 3). However, Bing testified that when subsequently there was a knock on the door, Anders "answered the door" (7 R 384). On the other hand, Anders testified that when there was a knock on the door, "and the Mexicans asked me to open the door, and I said no" (8 R 439).[3]

The State also cites Salgado's account asserting that "Hernandez-Perez offered to pay $20 for sex, but Anders asked for $100" (AB at 3). Bing in her testimony agreed that Anders asked for $100 (8 R 405), but Anders testified that she simply refused to have sex with Hernandez-Perez for $20 (8 R 438). She testified that she did not say that she wanted $100 to have sex with him (8 R 472).[4]

After seemingly citing Salgado's account as the definitive account, suddenly the State switches and treats Bing's conflicting account as the definitive one:

> It took 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.

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[3]If the State is crediting Salgado's testimony on this point as the truth, then neither Bing nor Anders gave truthful testimony as to how Baker and Phillips entered the apartment.

[4]If the State is crediting Salgado's testimony and Bing's testimony on this point as the truth, then Anders did not give truthful testimony as to whether she indicated that she would have sex with Hernandez-Perez.

(AB at 3). However, Salgado testified that the door was "halfway open" (7 R 324). While Anders was asking for more money, "[t]wo black guys entered" through the open door (7 R 325). According to Salgado, there was no knock on the door, no invitation for the men to enter, and no request for Anders to open the already opened door. Yet Anders in her testimony stated: "the Mexican asked me to open the door, and I said no" (8 R 440).

Indeed, throughout the State's Statement of the Case and the Facts, it simply ignores the fact that the testimony of the three testifying witnesses (Salgado, Bing and Anders) to the events in the apartment often conflicted. But even more importantly, the State glosses over what these three witnesses agreed upon - that they did not see what was happening in the apartment when the three shots were fired. All three had already fled the bedlam in the apartment.

Instead, the State resorts to semantic gamesmanship, asserting: "Phillips put the gun to the head of Hernandez-Perez (T. 7:327)" (AB at 3). The citation is to Salgado's testimony, who indicated that "the gun [was put] on my friend's head" (7 R 327). No one else testified to this, and Salgado **did not testify that Phillips was the person who put the gun on his friend's head**. Salgado was not able to identify Phillips as the man with

the gun. Det. Don Slayton testified that Salgado was never able to identify the man who was armed with a gun (9 R 673).[5]

The State also includes this assertion: "Both Salgado and Anders testified that when they exited the apartment Phillips still had the gun in his hand (T. 7:329; 8:442)" (AB at 4). Again, **Salgado never identified Phillips and never testified that Phillips had the gun in his hand when he, Salgado, fled the apartment.** And while Anders did testify that when she left the apartment, Phillips "was fighting with it in his hand" (8 R 442), she previously told the police that it was Baker who was armed with a gun and by the time of her testimony at Phillips' trial she had realized that she was still in love with Baker, a fact that was omitted from her testimony (11 SR 1543).

None of the three testifying witness (Salgado, Bing and Anders) "saw who fired the weapon" (9 R 674). This was according

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[5]While Bing testified that when Phillips entered the apartment, he had a gun in his right hand (7 R 385), she also testified that he told her afterwards that he dropped the gun (7 R 387). She did not testify to seeing Phillips place the gun on anyone's head.

For her part, Anders first told the police that Baker came into the apartment with the gun (8 R 506). However, by the time of her testimony, she was claiming that it was Phillips who came into the apartment with a gun (8 R 443). She explained the change in her testimony was because she had been mad at Baker when she first talked to the police (8 R 511). What she omitted from her testimony which the prosecutor was aware of was the fact that prior to Phillips' trial she had realized that she still loved Baker (11 SR 1543). While vacillating as to who she saw enter the apartment armed with a gun, Anders did not testify to seeing the gun put against anyone's head (8 R 441).

to their testimony and according to the detective called by the State who had investigated the case. Yet despite the undisputed evidence that no one saw who was in possession of the gun when it was fired, the State indicates otherwise in its brief:

> 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).

(AB at 5). The record citation is Anders' testimony. And, **most assuredly Anders did not testify that "it was Phillips who shot" the victims**. Anders was not in the apartment when the shots were fired. She had left after the men began fighting. When asked "[h]ow many Mexicans were fighting [Phillips] that you saw," Anders testified "[t]hree." (8 R 441). She testified that she tried to help Phillips by hitting one of them "in the head with a bottle" (8 R 441).[6] At that point, a "Mexican was trying to fight [Anders]" (8 R 441). Baker then jumped in to help Anders. Anders testified that she then "left out of the house." (8 R 441). During her testimony on direct examination, Anders said it was when she was outside the apartment going down stairs that she heard two gunshots (8 R 441-42). However during cross-examination, Anders testified that she had gone all the way down

[6]In her tape recorded conversation with Dwight, Anders said that Phillips was "getting his ass whooped" and that Baker was letting Phillips "get beat up" (8 R 527-28).

the steps and was "[s]tanding by the pool" when she "hear[d] the first shot" (8 R 491).

The only evidence as to what happened to the gun after Bing, Anders and Salgado had left the apartment was Bing's testimony that Phillips told her he had dropped the gun before it was discharged (7 R 387).

Penalty Phase

In its summary of the mitigation testimony presented by Phillips, the State woefully understates the mitigating evidence that was presented. Phillips generally relies upon the description provided in his Initial Brief of the testimony as to the mitigation that he presented.

However, Phillips must respond to the State's assertion that "Dr. D'Errico determined that Phillips was not intellectually disabled and indeed competent to stand trial" (AB at 10). First, intellectual disability and competence to stand trial are separate and distinct issues. One can be intellectually disabled and competent to stand trial, and one can be incompetent to stand trial and not intellectually disabled. The State's effort to link these two separate inquiries reflects a fundamental misunderstanding of them. Certainly, Dr. D'Errico did not link these separate inquiries in his testimony.

Second, Dr. D'Errico did not use the phrase intellectual disability. He used the phrase mental retardation in his testimony.

Third, the issue of mental retardation was introduced by Phillips' trial counsel when he stated to Dr. D'Errico: "And I'm going to get these three items out of the way, because in Florida retardation - - retarded people don't get the death penalty" (11 R 1056). Following this introduction to the topic by trial counsel, Dr. D'Errico testified that "where your mentally retarded is if you score on a test below a 70" (10 R 1056). Clearly, Dr. D'Errico employed the unconstitutional standard set forth in Cherry v. State, 959 So. 2d 702 (Fla. 2007). Thus, Dr. D'Errico's conclusion was premised upon an unconstitutional standard which precluded consideration of the Standard Error of Measure and the Flynn Effect.

Finally, omitted from the State's discussion of Dr. D'Errico's testimony is any reference to the fact that Phillips' trial counsel waited until the eve of his trial to have a mental health expert examine him for intellectual disability.

ARGUMENT IN REPLY

ARGUMENT I

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

In its Answer Brief, the State chooses to ignore the Eighth Amendment jurisprudence from the United States Supreme Court that

Phillips set forth in his Initial Brief regarding the requirement that death sentences must be proportionate. See Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State"); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution.'").

Instead, Appellee's argument that Phillips' death sentences are proportionate rests on the erroneous premise that this case is amongst the most aggravated of crimes because according to the State, Phillips and his codefendants made an elaborate plan to rob the victims that eventually culminated in the deaths of Mateo Hernandez-Perez and Reynaldo Antunes-Padilla (AB at 22).

Appellee's argument in this regard ignores the fact that whatever plan existed, it was certainly not orchestrated by Phillips. As Bing testified, it was Anders' idea to commit a robbery (8 R 404-05). Indeed, Anders was the leader who set everything up that night (8 R 411). Moreover, it was Anders and Bing who were first in contact with the victims and then later first entered their apartment to orchestrate the robbery (7 R 319-20; 322, 343, 381; 8 R 436, 438). And as Anders herself admitted, before the initial phone call to Antonio Baker, she

knew she was going to meet the "Mexicans" and that she was going to do something "nefarious" when she got there (8 R 467).

Appellee further asserts that this Court upheld a death sentence in McLean v. State, 29 So. 3d 1045 (Fla. 2010), under similar circumstances (AB at 26). Thus, according to Appellee, based on a similarly situated case, Phillips' death sentences are proportional (AB at 27).

Appellee's reliance on McLean is misplaced. While that case also involved a home invasion, the factual similarities end there. Unlike in Phillips' case, in McLean there was ample evidence of how the shootings occurred, there was no struggle, and there was direct testimony that McLean intended to commit the shootings. Indeed, a surviving victim, Theothlus Lewis, testified at trial "that he sensed danger from the look in McLean's eyes, so he dove to the floor, crawling toward the back of the apartment." McLean, 29 So. 3d at 1048. McLean shot at Lewis, hitting him once in the back, and then fired several more shots at another individual, Jahvon Thompson, hitting him three times in the chest. Id. When McLean was asked by a codefendant why he fired shots during the robbery, McLean replied that he "**wanted to feel like what it feels like to shoot and kill somebody.**" Id. at 1049 (emphasis added).[7]

[7]McLean also instructed his codefendant to "shoot the female next door if he saw her." Id.

Appellee also fashions an argument on behalf of Phillips based on the notion that contemporaneous convictions cannot be used to support a finding of a prior violent felony aggravator (AB at 27).[8] However, contrary to Appellee's assertion, Phillips never contended that "death will be upheld only when the prior violent felony is not committed contemporaneously." (AB at 27). Rather, Phillips maintained, as this Court has found, that a contemporaneous conviction is a factor that can be taken into consideration during a proportionality analysis:

> In support of its proportionality argument, the State compares this case to *Phillips v. State*, 39 So.3d 296 (Fla.), *cert. denied*, ___ U.S. ___, 131 S.Ct. 520, 178 L.Ed.2d 384 (2010), *Hayward v. State*, 24 So.3d 17 (Fla. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 2385, 176 L.Ed.2d 777 (2010), *Bryant v. State*, 785 So.2d 422 (Fla. 2001), and *Jackson v. State*, 502 So.2d 409 (Fla. 1986). However, the *Phillips* and *Bryant* cases were more aggravated and **involved prior violent felony aggravators established by qualitatively different offenses, which were committed at times separate from the murder**. *See Phillips*, 39 So.3d at 301 & n. 7 (finding aggravators that crime was committed during robbery and prior violent felony established by two violent felonies occurring at times separate from murder (shot aunt in legs with sawed-off shotgun and armed robbery wherein defendant discharged gun thirteen times at someone attempting to thwart crime) along with additional aggravator that the murder was committed for purpose of avoiding lawful arrest or effecting escape from custody); *Bryant*, 785 So.2d at 436-37 & n. 12

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[8]Not surprisingly, Appellee proceeds to disagree with the argument it created, an argument that Phillips did not make (AB at 28). See en.wikipedia.org/wiki/Straw_man ("A straw man is a common form of argument and is an informal fallacy based on giving the impression of refuting an opponent's argument, while actually refuting an argument which was not advanced by that opponent.").

> (finding same three aggravators as in *Phillips* and prior violent felony aggravator established by previous convictions for "sexual battery, grand theft, robbery with a weapon, and aggravated assault with a mask"). Likewise, in both *Hayward* and *Jackson,* the Court considered similar aggravators to those found by the trial court in this case, but the prior violent felony aggravators were qualitatively more compelling. *See Hayward,* 24 So.3d at 27, 46-47 (prior violent felony aggravator established by *three* prior violent felonies for *second-degree murder* and *two counts of armed robbery,* to which trial court assigned "extremely great weight"); *Jackson,* 502 So.2d at 410-11 (prior violent felony aggravator established by conviction for *previous attempted armed robbery*). Therefore, the State's reliance on the aforementioned cases is misplaced.

Scott v. State, 66 So. 3d 923, 935-36 (Fla. 2011)(emphasis added).

Appellee also expresses disagreement with Phillips' assertion that this was a "robbery gone bad" case (AB at 30). Rather, according to Appellee, "robbery gone bad" cases do not include crimes which involve multiple murder victims (AB at 32) ("In cases where there are multiple murder victims, this Court has not deemed them robbery gone bad cases and have upheld the death sentences finding them proportionate.") As proof of this assertion, Appellee relies on this Court's decisions in Wright v. State, 19 So. 3d 277 (Fla. 2009) and Hall v. State, 87 So. 3d 667 (Fla. 2012) (AB at 32, 33).

Appellee's argument here simply has no factual or legal basis. Even a cursory review of Wright and Hall reveals that they do not stand for the proposition that a case with multiple

murder victims necessarily excludes a "robbery gone bad" scenario. Rather, the specific facts of these cases demonstrate that the basis for the death penalty was due to a specific intent to murder, the lack of a struggle, and overwhelming aggravation. In Wright, for instance, this Court observed that "[l]astly, there is no evidence that this crime occurred during a 'robbery gone bad,' in which there is little or no evidence of what happened immediately before the victim was shot." 19 So. 3d at 304-05. Indeed, the crimes in Wright were part of a three-day crime spree which the defendant had embarked on. Id. at 283. The aggravation, which was extensive, included the cold, calculated and premeditated (CCP) aggravating circumstance:

> It is clear that the aggravating factors here support the imposition of the death penalty. In total, Wright was convicted of contemporaneous capital felonies for the double murders, five violent felonies for the carjacking, armed robberies, and kidnappings, three violent felonies from the drive-by shooting, and two violent felonies from the prison batteries. Additionally, the CCP aggravator is one of the most serious aggravators provided by the statutory sentencing scheme.

Id. at 304. Moreover, rather than there being any sign of a struggle, there was evidence that Wright murdered the victims execution-style:

> R.R., a juvenile who also lived at the Providence Reserve Apartments, testified that Wright informed him that Wright and Pitts drove the victims ten miles from the abduction site to a remote orange grove in Polk City. When the victims insisted that they had nothing to give the assailants, Wright exited the car. One of the victims also exited, possibly by force, and Wright

> shot him. The other victim then exited, and Wright shot him as well. **While one of the men continued to crawl and moan, Pitts retrieved the shotgun from the trunk and handed it to Wright, who then shot this victim in the head execution-style.** Wright and Pitts abandoned the bodies and drove away in the Chrysler.[6]

Id. at 287 (emphasis added)(footnote omitted).

Similarly, in Hall v. State, the evidence established that the defendant intentionally murdered the victims in a deliberate fashion, there was no struggle, and one of the murders was heinous, atrocious, or cruel (HAC):

> Eyewitness testimony established that Hall was the first to fire a gun and that Hall did most of the talking. In order to stop the shooting and distract the gunmen, partygoer Keson Evans stated that there was a box of money in the back room. **Hall went to the back room but found the door locked; he returned to the living room and fired his gun again, fatally shooting Evans in the head.**
>
> The four gunmen were in the house for ten minutes or less. During that time, Willie "Jay" Shelton, William Robinson, Joshua Daniel, Keson Evans, and Anthony Blunt were each shot. Daniel was the first to be shot, and he suffered several gunshot wounds to his hands, thighs, abdomen, and torso. Later, after being rushed to the hospital, Daniel spent eighteen hours in surgery to remove the bullets and treat his approximately twenty entrance and exit wounds, which were very severe but ultimately nonfatal. Shelton was shot once in the stomach and once in the forearm. His injuries caused him to be hospitalized for two years. Robinson was shot in the stomach and in the shoulder. Blunt was fatally shot in his chest, right thigh, and left hand. Evans was shot in the face and the right thigh and died as a result.

87 So. 3d at 669 (emphasis added).

* * * *

> The circumstances of this case reveal murder by shooting, committed during the course of a robbery.

> Evidence established that the shooting occurred in a room containing at least thirteen people, that at least twenty shots were fired, that four people suffered multiple gunshot wounds, and that two attendees were fatally wounded. **And evidence was presented that Blunt was killed in a manner involving unnecessary agony and that Hall was indifferent to Blunt's suffering.** Hall was also subject to the prior violent felony aggravator based for his contemporaneous convictions for armed burglary, armed robbery, two counts of attempted felony murder, and first-degree murder. Of these four aggravators, the trial court gave "great weight" to Hall's prior violent felony convictions, "great weight" to the committed for pecuniary gain aggravator, "great weight" to the great risk of death to many people aggravator, and "great weight" to the HAC aggravator.

Id. at 673 (emphasis added).

* * * *

> **Here, there was evidence supporting the HAC aggravator for the murder of Anthony Blunt.** Blunt was attending a party when Hall stormed in and demanded money with the threat that he was going to start firing his AK-47. After Hall made good on his threat and Blunt was shot multiple times, Blunt was left groaning, breathing heavily, sweating, begging for help, and indicating that he was in severe pain. Blunt was aware that he had been shot and remained conscious for as long as it took emergency medical responders to arrive at the scene and throughout much of the time that paramedics were providing aid. Blunt was also conscious and nearby when a fellow partygoer was shot to death in the face for mentioning additional money that the intruders could not locate. A medical examiner testified that none of Blunt's wounds would have rendered him immediately unconscious and each would have caused serious bleeding and pain. Emergency medical responders classified Blunt as being "critical" and "in serious distress" because of his wounds. Blunt eventually went into cardiac arrest and had to be intubated, monitored, and given CPR. While he was bleeding to death, Blunt repeatedly said, "I don't want to die, I don't want to die."

Id. at 672 (emphasis added).

Taking another tact, Appellee asserts that Phillips was the more culpable party as the evidence showed he was the actual shooter (AB at 33). Relying on this Court's decision in Hernandez v. State, 4 So. 3d 642 (Fla. 2009), Appellee maintains that "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." (AB at 36).

Ignored by Appellee is the fact that there was no evidence of intent by Phillips to shoot the victims. Simply being the shooter does not automatically make a defendant more culpable than the other participants. Moreover, unlike in Phillips' case, the murder committed by the defendant in Hernandez was not a result of a struggle, but was committed in a heinous, atrocious, or cruel fashion. Id. at 671. Indeed, a review of this Court's decision in Hernandez reveals that it was the circumstances of the crime, and not solely the fact that Hernandez inflicted the fatal injuries, that made him the more culpable party:

> Although the record reveals that Arnold was a participant in the crimes, it does not support Hernandez's claim that Arnold was equally culpable in the victim's murder. While Arnold may have had the original idea for going to the Everett house for crack cocaine or money, may have encouraged and actively participated in the robbery and burglary, and may have inflicted nonfatal injuries to the victim by smothering her with a pillow with Hernandez's assistance, the record reflects that **Hernandez, not Arnold, inflicted the fatal injuries by breaking the victim's neck and slashing her throat**. Moreover, the record suggests that

> after attempting to suffocate the victim, Arnold expressed reluctance to complete the attack and gave the victim a bag to breathe in to calm her down. **The record further reflects that Hernandez consequently pushed Arnold aside and then broke the victim's neck and cut her throat.**

4 So. 3d at 671.

The case cited by the State simply do not show what the Eighth Amendment requires, i.e. that Phillips is more culpable than the average murderer (Atkins, 536 U.S. at 319), or that his "extreme culpability" makes him among the most deserving of execution (Simmons, 543 U.S. at 568).

Based on the foregoing as well as the arguments set forth in his initial brief, Phillips submits that a life sentence must be imposed.

ARGUMENT II

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

In opposition to this issue, Appellee takes the position that there was nothing improper about Wilmer Antunes-Padilla's statement to the jury (AB at 38). According to Appellee, "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." (AB at 38). Citing to this Court's decision

in Franklin v. State, 965 So. 2d 79, 88 (Fla. 2007), Appellee notes that this Court held that statements by the victim's family and coworkers "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." (AB at 40).

Appellee's argument is misplaced in that it overlooks the fact that Wilmer Antunes-Padilla invoked God to provide the wisdom and knowledge for the judge and jury to give Phillips the death penalty for his assassination of the victim. This statement did not contain evidence regarding the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death, which is what this Court's decision in Franklin concerned:

> In this case, the testimony of the victim's family members and coworker did not exceed the proper bounds of victim impact evidence as provided in both section 921.141(7) and *Payne.* Lawley's sister Linda Paulette testified that Lawley was the second oldest child in a family of six children; he took over the role of "father" at age eighteen when his father died and he helped support the family; he was a member of the Army for twenty-five years and served in Vietnam; he allowed two of his sisters to live with him in Leesburg; he planned to retire to Alabama in order to be near the rest of his family; he was a loving and generous person who helped family, friends, and neighbors; and his death had devastated his family. Lawley's coworker and friend Edward Ellis testified that he had known Lawley for at least twelve years; Lawley was a "good guy" who would help others; he had no enemies; and over half of the employees of the crate factory were friends with Lawley and were "hurt pretty bad" by his death. Lawley's sister-in-law Kay Lawley testified that Lawley served two tours of duty in Vietnam; he helped his neighbors by cutting their grass and doing odd jobs for

> them; he bought clothes, school supplies, and glasses for neighborhood children; his family misses him; and Lawley's sister Carolyn, who had been living with him, has been left without a home or income. **This evidence is within the purpose of section 921.141(7), which allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.**" *See, e.g., Huggins v. State,* 889 So.2d 743, 765 (Fla. 2004) (finding statements presented during the penalty phase by the victim's husband, mother, and best friend regarding their relationship with the victim and the loss they suffered due to her murder were appropriate victim-impact evidence under the statute), *cert. denied,* 545 U.S. 1107, 125 S.Ct. 2546, 162 L.Ed.2d 280 (2005); *Farina v. State,* 801 So.2d 44, 52 (Fla. 2001) (finding no error in admitting testimony by twelve of the victim's friends and family members about the impact of her murder because it came within parameters of *Payne*). Thus, we conclude that Franklin is not entitled to relief on this claim.

965 So. 2d at 97-98 (emphasis added).

As an additional matter, Appellee claims that Phillips' standing objection did not preserve this issue (AB at 41). According to Appellee, "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." (AB at 41).

Phillips disagrees with Appellee's assertion. As noted in his Initial Brief, Phillips filed a motion prior to trial to require a proffer and to limit the admissibility of victim-impact evidence (1 R 186). During Phillips' penalty phase, the State proffered the victim impact testimony of Wilmer Antunes-Padilla (10 R 919). Following the proffer, defense counsel objected to

Antunes-Padilla's testimony on the basis that it constituted improper victim impact testimony (10 R 924). Defense counsel's objection was overruled and the testimony was allowed (10 R 927). The defense requested and was granted a standing objection to the victim impact (10 R. 944). Given these facts, Phillips submits that he adequately preserved the issue for this Court's consideration.

However, in the event it is determined that defense counsel's objections were insufficient, Phillips submits that the introduction of Wilmer Antunes-Padilla's statement amounts to fundamental error. Such error occurs when the conduct "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000), quoting McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

Here, Phillips was not the mastermind of the robbery, nor was there any intent to commit the murders. Rather, this was a "robbery gone bad" case in which the murders occurred during the course of a struggle. Given that Phillips was only two votes shy of life recommendations, it is clear that he would not have been sentenced to death absent the inflammatory and improper statement. Phillips' death sentences must be reversed.

ARGUMENT III

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

In opposition to Argument III, Appellee posits that there was sufficient evidence of premeditation. Appellee's arguments in this regard, however, are based on pure speculation and gross distortions of the record. For instance, Appellee claims that the murders of Hernandez-Perez and Antunes-Padilla occurred when Phillips shot both victims without any provocation (AB at 45). Appellee further asserts that "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." (AB at 43). Moreover, according to Appellee, "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." (AB at 46).

Appellee's arguments here are simply unworthy of belief. There is extensive evidence in the record demonstrating that a fierce struggle occurred in the apartment, and that the shootings occurred during the course of that struggle.[9] Further, the

[9]As Phillips previously asserted, the gunshot wounds were haphazard and randomly placed, again indicative of a struggle. Hernandez-Perez's wounds were in the hip and thigh, and given the stippling on his body, were fired at close range (9 R 714, 716-17, 720). Similarly, the very oblique angle of the bullet that

evidence makes it clear that Phillips did not have the opportunity to simply walk out of the apartment, as Appellee claims. Indeed, Aurelio Salgado acknowledged that Phillips was in a struggle when he left the apartment:

> Q Okay. What did you do next?
>
> A I run, looking for the door.
>
> Q **Before you left to go look for the door, what was going on with your other two friends, Reynaldo Antunes-Padilla and Mateo Hernandez-Perez?**
>
> A **They were fighting.**
>
> Q With who?
>
> A With the black guy.
>
> Q The one with the gun or without the gun?
>
> A The one with the pistol.

(7 R 327-29). Barbara Anders likewise testified that before she left the apartment, Phillips was fighting with the gun in his hand (8 R 441-42).

Continuing on the wholly unfounded theme that Phillips had the opportunity to leave but chose not to, Appellee cites to this Court's decision in Miller v. State, 42 So. 3d 204, 228 (Fla. 2010), stating that "[t]his Court found that the defendant's decision to stab Smith after an initial break in their struggle

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killed Hernandez-Perez indicates a frantic shot, and there was also stippling from the gun, suggesting that Phillips shot him while they were fighting (9 R 732, 734-35).

shows his consciousness of the act he was about to commit." (AB at 46). However, the facts in Miller are quite distinct from those in the instant case:

> We conclude that the record contains competent, substantial evidence to support Miller's conviction for the first-degree murder of Jerry Smith under either the premeditated or felony-murder theory. Miller confessed to law enforcement that he walked several miles to Smith's house with the intent to rob her and carried a sharp filet knife with him. He confessed that as he attempted to steal Smith's jewelry, Haydon interrupted this attack. In response, Miller stabbed Haydon directly in the chest. **While Miller and Haydon struggled, Smith fled out the backdoor into her backyard. Miller deliberately followed Smith out the back door and stabbed her several times rather than ending the encounter by fleeing from the house.**

42 So. 3d at 227-28 (emphasis added). Contrary to the facts in Miller, Appellee points to no break in the struggle in the instant case. Further, the only person who followed a victim to the door of the apartment was Antonio Baker, not Phillips.[10] Appellee's arguments here have no basis in fact.[11]

In a case where the evidence of premeditation is entirely circumstantial, as was the case here, "not only must the evidence be sufficient to support the finding of premeditation, but the

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[10]Baker followed Aurelio Salgado to the back door of his bedroom (7 R 329, 357).

[11]The fact that Phillips "got beat out of his shoe" (8 R 531) demonstrates that there was no break in the struggle or time for reflection. The shoe was left behind (11 SR 1538) ("It was a stroke of luck in this particular case that Terrance Phillips left behind that shoe.").

evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference." Twilegar v. State, 42 So. 3d 177, 190 (Fla. 2010). Contrary to Appellee's assertion, there is no evidence to indicate an anticipated killing, and all of the evidence is equally and reasonably consistent with the theory that the victims were shot while resisting the robbery. See Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991). Given the circumstances of this case, Phillips submits that relief is warranted.

ARGUMENT IV

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

In opposition to Phillips' Brady/Giglio claim, Appellee submits that since the events in question occurred after Phillips' trial, the trial court did not have an opportunity to address this issue and it is now appearing on appeal for the first time (AB at 51). Therefore, according to Appellee, this claim is appropriately raised in a postconviction motion, as it "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." (AB at 51).

Phillips submits that the basis for relief is evident in the record before this Court. However, to the extent that this Court agrees with Appellee's apparent belief that that the presentation of evidence and testimony is necessary to resolve this issue, this Court should stay the proceedings and remand the issue for a full and fair hearing before the trial court. See Way v. State, 630 So. 2d 177 (Fla. 1993) (holding direct appeal in abeyance while remanding for evidentiary hearing on claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963)).

As to the merits, Appellee asserts that Phillips has confused the standard for Brady and Giglio violations (AB at 52). Appellee appears to be arguing that they are not to be evaluated cumulatively (AB at 52).

Phillips submits that it is Appellee who has confused the appropriate standard, which perhaps stems from the fact that Appellee cites to this Court's decision in Guzman v. State, 868 So. 2d 498 (Fla. 2003) on numerous occasions (See AB at 52, 53, 55, 56), despite the fact that its determination was ultimately found by the Eleventh Circuit Court of Appeals to constitute an unreasonable application of clearly established federal law. See Guzman v. Sec'y Dep't of Corrs., 663 F.3d 1336, 1351 (11th Cir.

2011).[12] As the Eleventh Circuit explained in its decision, the appropriate analysis requires a cumulative review:

> **But we must also consider the cumulative effect of the false evidence for the purposes of materiality**. *Kyles*, 514 U.S. at 436-37 n. 10, 115 S.Ct. at 1567 n. 10; *Smith*, 572 F.3d at 1334. "Considering the undisclosed evidence cumulatively means adding up the force of it all and weighing it *against the totality of the evidence that was introduced at the trial.*" *Id.* (emphasis added). Thus, we must also consider the fact that Rogers was a seven-time convicted felon and recanted before trial, providing an affidavit under oath on August 26, 1992, stating that Guzman "had never confessed to me about the case." Significantly, Rogers was aware of and had access to Guzman's court records about the case in his cell. Also, as explained above, Guzman admitted to possessing and selling Colvin's ring, but testified he got if from Cronin. **Further, although the Florida Supreme Court viewed the medical examiner's testimony as important, we must also consider that "the medical examiner also testified that the victim's wounds were 'consistent with *any* knife three to four inches at least in length or knife-like object' and that he was unable to identify the 'exact weapon that may have inflicted a particular wound.'"** *See Guzman*, 698 F.Supp.2d at 1335.

Guzman, 663 F.3d at 1351 (emphasis added).

Based on the arguments set forth herein and in his initial brief, Phillips submits that relief is warranted.

ARGUMENT V

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[12]In Guzman v. State, 868 So. 2d 498 (Fla. 2003), this Court affirmed the denial of relief on all claims but for the one raising a Giglio violation. The Giglio standard was clarified by this Court and the claim was remanded to the circuit court for further consideration. Following the remand, this Court affirmed the denial of the Giglio claim. Guzman v. State, 941 So. 2d 1045 (Fla. 2006).

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

In opposition to this issue, Appellee submits that Phillips' arguments lack any merit as this Court has repeatedly and recently rejected identical claims (AB at 62). Of course, as Phillips explained in his initial brief, the United States Supreme Court recently granted certiorari in the case of Hurst v. Florida, 135 S.Ct. 1531 (2015), to consider whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of Ring v. Arizona, 536 U.S. 584 (2002).[13]

Appellee alternatively claims that Phillips' issue does not implicate the issues raised in Hurst v. State because "[u]nlike the instant case, Hurst, did not involve the contemporaneous felony aggravator, which this Court's precedent clearly establishes does not implicate Ring." (AB at 63).

Overlooked by Appellee's argument is the fact that while the applicability of Ring is at issue in Hurst in the context of the Sixth Amendment, Hurst is also a case about the Eighth Amendment. In fact, the recent oral argument in Hurst highlights the United States Supreme Court's concern about whether Florida's capital sentencing scheme is consistent with the Eighth Amendment. During oral argument, Justice Sotomayor asked whether a unanimous

[13]Oral argument was held in this cause on October 13, 2015.

verdict or a verdict that is functionally equivalent to a unanimous verdict is required in capital cases under the Eighth Amendment. See Tr. at 10-11, 25-26, 43-44, 45. Justice Scalia also posed questions as to whether unanimity was a requirement. See id. at 12. Justice Ginsburg asked whether a 7-5 death recommendation was the equivalent of a unanimous verdict. See id. at 45. Justice Kagan asked whether the jury's findings underlying a death recommendation are part of the record and available for review by the appellate courts. See id. at 49-50.[14]

Finally, Justice Ginsburg directly raised concerns about whether Florida's capital sentencing scheme comports with the Eighth Amendment principle set forth in Caldwell v. Mississippi, 472 U.S. 320 (1985). See id. at 36-37. Immediately thereafter, Justice Scalia expressed skepticism as to Florida's compliance with Caldwell. See id. ("I'm talking about what responsibility the jury feels. If the jury knows that if - if we don't - if - if we don't find it an aggravator, it can't be found; or if we do find an aggravator, it must be accepted. That's a lot more responsibility than just, you know, well, you know, if you find

[14]Meaningful appellate review is an aspect of Eighth Amendment jurisprudence. See Parker v. Dugger, 498 U.S. 308, 321 (1991)("The Constitution prohibits the arbitrary or irrational imposition of the death penalty . . . We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e.g. Clemons, *supra*, at 749 (citing cases); Gregg v. Georgia, 428 U.S. 153 (1976).").

an aggravator and you - you weigh it and provide for the death penalty, the judge is going to review it anyway.").[15]

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposing the death penalty. § 921.141(3), Fla. Stat. Phillips' jury was instructed as to this requirement under Florida law:

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

(11 R 1126).

Accordingly, in order for Phillips to be eligible for a death sentence, the jury had to find not just the presence of an aggravating circumstance, but whether sufficient aggravating circumstances existed to justify a sentence of death. See Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) (finding that the "in course of a felony" aggravating circumstance did not justify the imposition of a death sentence because "[t]o hold, as

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[15]This Court, in contrast, believes that Florida's capital sentencing scheme - a scheme that permits the jury to return a death recommendation by a majority vote after being instructed that it will "render an advisory sentence" - poses no constitutional problem under the Eighth Amendment.

argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty."). Yet despite the statutory requirement that the jury must find "sufficient aggravating circumstances," Phillips' jury was instructed that the verdict would be "advisory" in violation of Caldwell v. Mississippi.

Contrary to Appellee's assertion, the Eighth Amendment concerns at issue in Hurst and raised here by Phillips have yet to be resolved. Moreover, as explained his Initial Brief, Phillips submits that the Sixth Amendment concerns have been decided erroneously by this Court. Relief is warranted.

ARGUMENT VI

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

In opposition to this issue, Appellee faults Phillips for not raising his intellectual disability prior to trial (AB at 64, 66). In making this argument, Appellee ignores the fact that at the time of Phillips' penalty phase proceeding, this Court had imposed a strict cutoff IQ score of 70 in order to be eligible for a determination of mental retardation. See Cherry v. State, 959 So. 2d 702 (Fla. 2007). Further, Appellee ignores Phillips' argument that to the extent trial counsel failed in his

obligation to raise the issue of Phillips' intellectual disability, counsel rendered ineffective assistance.

Appellee further claims that Phillips' IQ score of 76 does not fall within the range that would allow him to present evidence to establish intellectual disability (AB at 66). Of course, Appellee's argument is exactly what the United States Supreme Court in Hall v. Florida, 134 S.Ct. 1986 (2014) forbade, a strict cutoff score. Moreover, Appellee fails to acknowledge that it is unknown as to what type of IQ test Dr. D'Errico administered. Thus, it is unclear as to whether Phillips was tested with an appropriate instrument.[16] Moreover, even if a proper test was utilized, Appellee fails to address the fact that under the well recognized Flynn effect, scores on an IQ test should be reduced for each year that had passed since it was normed. Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010) ("The Flynn effect acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all

[16]The staff analysis preceding Fla. Stat. §921.137 states that the Department of Children and Family Services had established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests.

test subjects on a level playing field. The parties in this case agree that the Flynn effect is an empirically proven statistical fact."). Thus, even assuming that it was the WAIS-IV that Dr. D'Errico administered on January 16, 2012, four years had passed since it was normed before its release in 2008. Phillips' recalibrated IQ score would be 75 or below. Similarly, if Dr. D'Errico had used the Stanford-Binet-V when testing Phillips, the recalibrated IQ score would fall even further since it was normed six years back in time, prior to its 2003 release. Thus when properly evaluated in light of recognized scientific principles, Phillips IQ score must be re-calibrated and reduced to 75 or lower. Under Brumfield v. Cain, 135 S. Ct. 2269, 2281 (2015), an intellectual disability evidentiary hearing is required when an IQ score is 75 or lower. See Lane v. Alabama, No. 14-10065, 136 S. Ct. ___ (U.S. Oct. 5, 2015) (the U.S. Supreme Court granted certiorari, vacated judgment, and remanded Lane v. Alabama to the Court of Criminal Appeals of Alabama "for further consideration in light of Hall v. Florida.").

Finally, Appellee asserts that Phillips has not presented any evidence that he is intellectually disabled (AB at 67). According to Appellee, "As Dr. D'Errico made clear, there was no evidence of mental retardation and Phillips has not presented any evidence of its existence." (AB at 68).

Phillips disagrees with this assertion. During the penalty phase proceeding, Dr. D'Errico actually concluded that Phillips has significantly subaverage intelligence and he falls in the borderline range of intellectual functioning (11 R 1056). Dr. D'Errico reiterated that Phillips' historical intellectual functioning coupled with his current intellectual functioning qualifies him with a diagnosis of borderline intellectual functioning according to the diagnostic manual (11 R 1059). And Dr. D'Errico further stated that Phillips is not slightly below the normal range of intelligence; he is significantly below (11 R 1064-65).

Contrary to Appellee's assertion, Phillips has sufficiently raised this issue as to warrant an evidentiary hearing. See Brumfield v. Cain, 135 S. Ct. 2269, 2281 (2015) ("It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing."). Certainly, Phillips has been denied the "fair opportunity to show that the Constitution prohibits [his] execution." Hall v. Florida, 134 S.Ct. at 2001. See also Hooks v. Workman, 689 F.3d 1148, 1185 (10th Cir. 2012) (the Sixth Amendment right to effective representation extends to

proceedings to determine whether a defendant is intellectually disabled under the Eighth Amendment). This means that Phillips was entitled to not only effective representation and the assistance of a mental health expert, but notice of what the Eighth Amendment test for intellectual disability required. Phillips, his counsel and his mental health expert were not on notice that the 70 cutoff set forth in Cherry v. State was unconstitutional and did not govern. Because Phillips, his counsel and his mental health expert were misled by this Court's decision in Cherry v. State and were unaware that an IQ score of 76 did not disqualify him from the Eighth Amendment protection from a death sentence. Indeed, Hall had received an IQ score as high as 80 and yet the United State Supreme Court held that the 80 IQ score was not decisive. Hall v. Florida, 134 S. Ct. at 1992. Simply put, Phillips did not receive what the Eighth Amendment guaranteed - a fair opportunity to demonstrate that the Constitution precludes the State of Florida from executing him.

For the reasons set forth herein and in his initial brief, Phillips submits that relief is warranted.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by electronic service to Berdene Beckles, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 2nd day of November, 2015.

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

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