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IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC17-1150
L.T. NO.: 16-2006-CF-015566

GALANTE ROMAR PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Fourth
Judicial Circuit, in and for Duval County, Florida

Honorable Mallory Cooper
Judge of the Circuit Court, Division CR-G

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

GALANTE ROMAR PHILLIPS will be referred to as "Appellant" or "Mr. Phillips." The State of Florida will be referred to as "Appellee" or "the State."

References to the Record on Appeal will be designated "R" with the volume number, followed by the page number, for instance: (1 R 1).

STATEMENT OF THE CASEAND FACTS

Indictment. On November 29, 2006, Mr. Phillips was charged by indictment with one count of first-degree murder under sections 782.04(1)(a), 775.087(1), and 775.087(2), Florida Statutes (Count One) and one count of armed robbery under sections 812.13(2)(a) and 775.087(2), Florida Statutes (Count Two).

Trial and Judgment. Mr. Phillips was tried on Counts One and Two from April 7, 2008 through April 9, 2008. The jury found him guilty of first-degree murder, with special findings that the killing was premeditated. The jury also found the appellant guilty of robbery, with a special finding that he discharged a firearm during the commission of the offense, as to Count Two.

Sentence. On April 23, 2008, by a vote of 7-5, the jury recommended a sentence of death. On September 19, 2008, the court sentenced Mr. Phillips to death on Count One and to life on Count Two, to run concurrently.

Guilt and Penalty Phase. During the guilt and penalty phases, the trial court found the State had proven the following statutory aggravating circumstances

beyond a reasonable doubt: (1) the appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight); (2) the crime for which the appellant is to be sentenced – first-degree murder – was committed while the Defendant was engaged in the commission of the crime of armed robbery (great weight); and (3) the crime for which the appellant was to be sentenced – first-degree murder – was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody (great weight).

No statutory mitigators were offered. The court considered the following 25 non-statutory mitigators: (1) the appellant experienced frequent moves and changes in homes and schools as a child (slight weight); (2) the appellant suffered from a childhood mental illness [was clinically depressed when he was 10 to 12 years old] (slight weight); (3) the appellant suffered from adult mental illness (not proven, no weight); (4) the appellant suffered from childhood learning disabilities [ADHD and other learning disabilities] (slight weight); (5) the appellant's childhood attention deficit drug, Ritalin, was not administered or taken as prescribed (slight weight); (6) the appellant's birth was difficult and there was a delay in the appellant beginning breathing (slight weight); (7) the appellant was raised in drug and crime-infested neighborhoods (slight weight); (8) the appellant was raised by a mentally ill mother (some weight); (9) the appellant was raised without any stable father

figure (slight weight); (10) the appellant was openly disfavored as a child (slight weight); (11) the appellant was deprived of food and clothing as a child (little weight); (12) the appellant was physically abused as a child (some weight); (13) the appellant was mentally abused as a child (moderate weight); (14) the appellant suffered the loss of his grandmother, the only adult who loved him as a child (moderate weight); (15) the appellant was raised in poverty (slight weight); (16) the appellant suffered a devastating on-the-job injury (slight weight); (17) the appellant is reverent (slight weight); (18) the appellant is trustworthy with family members (not proven, no weight); (19) the appellant is supportive of family members (not proven, no weight); (20) the appellant is protective of family members (not proven, no weight); (21) the appellant respects and helps elderly persons (slight weight); (22) the appellant is kind to animals; (23) the appellant respects the jury and the judicial system (slight weight); (24) the appellant is friendly; and (25) the appellant is remorseful (not proven, no weight).

Direct Appeal. On May 13, 2010, the Florida Supreme Court affirmed Mr. Phillips's conviction and sentence on direct appeal. Phillips v. State, 39 So. 3d 296 (Fla. 2010) (1 R 1-27.) Thereafter, Mr. Phillips petitioned the United States Supreme Court for Certiorari which was denied by Phillips v. Florida, 131 S. Ct. 520 (2010) on November 1, 2010.

Postconviction Motions and Appeal.

At issue is: (1) the appellant's Second Amended Motion to Vacate Judgment of Conviction and Sentence under Rule(s) 3.850/3.851, filed January 12, 2017; (2) the appellant's Motion for Postconviction Relief based on Newly Discovered Evidence, filed May 12, 2015; and (3) the appellant's Motion for Summary Relief, filed March 29, 2017. (1 R 998-1013; 1302-69; 1385-89.)

Postconviction Hearings. The trial court heard Phillips's postconviction motions on September 9,10, and 11, 2014, December 14, 2015, July 10, 2015, January 26, 2016, and April 11, 2016. The testimony is summarized as follows:

Francis Jerome Shea. In 2006, Mr. Shea was appointed as first-chair counsel to represent Mr. Phillips and he requested Mr. Chris Anderson sit second-chair to assist in trying Mr. Phillips's case. (1 R 1738-39.) Mr. Anderson was his mitigation expert, and Mr. Gillespie, a private investigator, was hired to gather mitigation materials. (1 R 1742-43, 45.) They also had "the best clinical forensic psychiatrist in the city," Dr. Miller, as well as Dr. Mandoki, a doctor who had treated Mr. Phillips at age seven or eight years old. (1 R 1743.)

At the time of Shea's appointment, the American Bar Association Guidelines recommended a mitigation specialist be a part of the defense team. (1 R 1746.) Despite this, he and Mr. Anderson chose not to retain a separate mitigation expert because Mr. Anderson was "an expert in the form an attorney

who had skill, had knowledge and experience in mitigation, that would be much more effective than some individual that we could not depend upon." (1 R 1747.) Mr. Shea testified that he has never hired a mitigation specialist for any case he handled. (1 R 1749.)

Mr. Shea could not recall specifics about discussions involving issues or mitigation in the case. (1 R 1754-57.) Mr. Shea stated he and Mr. Anderson were looking for any information indicating mental deficiency, but did not locate anything except information about Mr. Phillips's background and upbringing. (1 R 1758-59.) Mr. Shea testified that while representing Mr. Phillips over a period of a year and a half, Mr. Phillips never "demonstrated any characteristics that he suffered from an intellectual disability." (1 R 1781-82.) In Mr. Shea's opinion, Mr. Phillips "always understood fully what he was facing, what was going on in the case." (1 R 1762-63.) Mr. Shea testified that he recalled Dr. Miller testing Mr. Phillips's IQ and believed he scored in the "85 or 90 range." (1 R 1764-65.)

Mr. Phillips's defense team did not have the Dozier School for Boys records that reflected Phillips's IQ score of 68, although Shea alleged they "did everything" to get these records. (1 R 1765, 66-67.) In fact, Shea testified they had no knowledge of previous IQ tests because Mr. Phillips had not informed his defense team of this. (1 R 1765-66.)

Mr. Shea testified that in his recollection, Mr. Phillips's mother was a prostitute, addicted to drugs, who encouraged her son to buy and sell drugs. (1 R 1769-70.) This subsequently led Mr. Phillips to abusing marijuana and cocaine from an early age until the time of his arrest for this case. (1 R 1770.) Mr. Shea did not know the extent of Mr. Phillips's drug abuse, but Mr. Phillips did not tell Mr. Shea he was a "heavy user." (1 R 1770.)

Mr. Shea testified that he was aware the appellant had grown up in a bad neighborhood, with very poor home conditions, but was unaware whether an expert was consulted about the effects of poverty or environment on an individual. (1 R 1772.) Mr. Shea knew Mr. Phillips was in special education in school, but did not know that in the first grade, Mr. Phillips was diagnosed with "medium mental impairment." (1 R 1779.)

Christopher Anderson. Mr. Anderson was second-chair at Phillips's trial and was primarily responsible for investigating, gathering, and presenting mitigating factors. (1 R 1836-37.) Mr. Anderson testified that he was aware that the American Bar Association guidelines recommend a "mitigation specialist" as part of the defense team, but the rules were not clear as to what qualified one to be a mitigation specialist. (1 R 1845.) He indicated he had never met a "decent" mitigation specialist but had interviewed three mitigation specialists in connection with Mr. Phillips's case. (1 R 1845-46.) Mr. Anderson testified that Dr. Mandoki

and Dr. Miller were the members of the defense team who presented mental mitigation. (1 R 1849.) Dr. Bloomfield was hired only to evaluate Mr. Phillips's competency and sanity. (1 R 1849-50.)

Mr. Anderson had attempted to obtain the Dozier records which reflect an IQ score in the 68 or 69 range, but were told these records had been lost and unavailable, although he used a public records request instead of subpoenas. (1 R 1852-58.) Mr. Anderson did not believe these records would have made a difference, however, because "Phillips is not retarded and ha[d] never been retarded." (1 R 1858.) Moreover, Mr. Anderson testified that there were no facts, which supported while Mr. Phillips committed this crime, he was under the influence of extreme mental or emotional disturbance. (1 R 1866.) As to the organic brain damage claim, Mr. Anderson testified that, in his opinion, there was no evidence that Mr. Phillips suffered from brain damage, due to previous head injuries. (1 R 1918.) The mitigation questionnaire the defense administered to Mr. Phillips revealed that he had hit his head on occasion but there were no clear indications of brain damage, such as dizziness, nausea, disorientation, or forgetfulness. (1 R 1918.) Mr. Anderson corroborated Mr. Shea's opinion that during the police interviews, recorded phone calls and communications with counsel that Mr. Phillips was coherent and understood what was going on. (1 R 1919.)

Mr. Anderson testified that he was not aware that Mr. Phillips had used a significant amount of cocaine a year before the homicide, and only conveyed that he knew Mr. Phillips preferred powder crack cocaine, not crack, marijuana, or alcohol. (1 R 1868-69.) As to why the defense had not presented mitigating evidence about Mr. Phillips's heavy cocaine use, Mr. Anderson testified that he had contacted a neuropsychologist and pharmacologist at the University of Miami to inquire if the defense could benefit from possible effects of cocaine, and the doctor consulted responded that this information is generally not helpful. (1 R 1917-18.)

Evidence of Mr. Phillips's suicide attempts or self-harm, were not presented because Mr. Phillips had confided in Mr. Anderson that he would fake suicide or medical symptoms to be transferred to a different prison or cell. (1 R 1905-06.)

Dr. Stephen Bloomfield. Dr. Bloomfield is a licensed psychologist who evaluated Mr. Phillips for competency and sanity issues on February 27, 2008. Dr. Bloomfield interviewed Phillips about his history, competence issues, and extensively about his state of mind at the time of the incident. (1 R 1959.) Phillips stated, while in school, he had been in special education classes, had not received his GED, he had poor grades, and been in trouble for smoking, skipping school, and fighting. (1 R 1959.)

Mr. Phillips had a significant history of drug and alcohol abuse. (1 R 1961.) He began drinking at age 10, and drinking daily on age 13. (1 R 1961.) He started smoking marijuana at age 10 and smoked daily. (1 R 1961.) He also began using cocaine at age ten and by age fourteen, he was using an ounce of cocaine daily. (1 R 1961.) Mr. Phillips explained that he started using drugs and alcohol around the time his grandmother died. (1 R 1961.) He had a family history of drug use; specifically, his mother was a crack cocaine addict. (1 R 1961.)

Dr. Bloomfield opined he was competent and did not meet the criteria for an insanity defense. (1 R 1962.) However, Dr. Bloomfield recognized issues related to Mr. Phillips's mental health conditions. (1 R 1962.) Dr. Bloomfield did not note any red flags, which would immediately point to Mr. Phillips being intellectually disabled. (1 R 1973.)

Roshan "Shawn" Gordon. Mr. Gordon is Mr. Phillips's maternal cousin; he and Mr. Phillips are the same age and spent a lot of time together. (1 R 1983.) Mr. Gordon testified that Mr. Phillips's mother, Ms. Farns, was an unfit mother, who was addicted to drugs. (1 R 1983.) Ms. Farns's home, particularly after the death of Mr. Phillips's adopted grandmother, was a "disaster." (1 R 1984.) Ms. Farns was rarely at home and the house was frequently broken into. (1 R 1985.) The house never had food and when Phillips told his mother he was hungry, she did not provide food but indicated he needed to fend for himself. (1 R 1985.) Mr.

Gordon testified to seeing Ms. Farns hit Phillips frequently with whatever was in reach. (1 R 1985.)

Mr. Gordon explained that their adopted grandmother, Ruby Hall, was Phillips's only real mother figure, although she was disabled and wheelchair bound. (1 R 1988, 2026.) In 1989, he and Phillips were playing in the neighborhood when someone alerted them that Ms. Hall's house was on fire. (1 R 1988.) Ms. Hall was trapped inside the house, and the boys, being too young to take real action, were only able to watch the house burn, with their grandmother inside. (1 R 1988.) Once Phillips's grandmother passed, Gordon explained that Phillips just gave up. (1 R 1989.)

Inez Gordon. Ms. Gordon is Mr. Phillips's maternal aunt. (1 R 2031-32.) Ms. Gordon testified that her sister, Ms. Farns, "liked to party," and she had asked her sister to "stop partying" because her kids were being affected by it. (1 R 2033.) While his grandmother was alive, Ms. Farns would often drop Mr. Phillips off for weeks at a time; once his grandmother died, Mr. Phillips returned to living with his mother. (1 R 2035.) After his grandmother died, Mr. Phillips started to get into trouble because he had no parental supervision. (1 R 2036.) She later specified that he got into trouble by stealing food from stores on one or two occasions. (1 R 2037-38.)

Carressa Peters. Ms. Peters is Mr. Phillips's cousin and Ms. Inez Gordon's daughter. (1 R 2054.) Ms. Peters testified that Ms. Farns's home never had food, was dirty, had an odor, and was infested with cockroaches. (1 R 2055-56.) Ms. Peters described Ms. Farns as a "mean" person, who did not adequately care for her children and was gone a lot. (1 R 2056.) Ms. Peters testified that she witnessed Ms. Farns beating her children with anything within arm's reach. (1 R 2057.) Ms. Peters testified that after the death of his grandmother, Ruby Hall, Mr. Phillips began getting into trouble. (1 R 2058.) She also witnessed Mr. Phillips rocking back and forth and hitting his head against the wall. (1 R 2059.)

Dr. Stephen Gold. Dr. Gold is psychologist who evaluated Mr. Phillips and diagnosed him with posttraumatic stress disorder ("PTSD"). Dr. Gold testified that when someone is traumatized as a child, especially repeatedly, it severely affects brain development, to support adjustment and to support psychological development. (1 R 2217-18.) In short, repeated trauma as a child, "makes the brain develop in a way in general that the person has a lot more likelihood of acting impulsively because they have much less control over their emotions than someone who doesn't grow up with trauma." (1 R 2218.)

Dr. Gold testified that dissociative disorders are often related to trauma. (1 R 2219.) Dissociation is characterized as a subject being disconnected and not being aware of their surroundings. (1 R 2219-2220.) Dr. Gold explained that there

is a strong relationship generally between trauma and dissociation subsequent to this trauma. (1 R 2220.) Specifically in cases of post traumatic stress disorder ("PTSD") the fight-flight reflex is sensitized so a person is constantly on edge and the body will react accordingly, even if there is no real danger. (1 R 2221.) In diagnosing PTSD, Dr. Gold testified that first, there had to be a traumatic event or events in the subject's history, and second, the person cannot stop thinking about the trauma, even though it is difficult to think about. (1 R 2224.)

Dr. Gold first met Mr. Phillips in October 2013. (1 R 2231.) Dr. Gold spent a total of three or four hours speaking with and evaluating Mr. Phillips. Mr. Phillips self-reported his social history, and Dr. Gold reviewed school records, reports from Dr. Miller and Dr. Mandoki, other medical records, legal records, and also records from the Department of Children and Families ("DCF"). (1 R 2233-34.)

Dr. Gold ultimately diagnosed Mr. Phillips with PTSD and indicated the way the crime was committed was reflective of Mr. Phillips having PTSD. (1 R 2247.) He also diagnosed Mr. Phillips with major depression, bipolar disorder, and ADHD. (1 R 2247-48.) Based upon the all of the previously noted information, Dr. Gold testified that, in his opinion, Mr. Phillips was mentally impaired at the time of the crime. (1 R 2251.)

Dr. Richard Dudley, Jr. Dr. Dudley is a psychiatrist who evaluated Mr. Phillips in November 2013. (1 R 2427-28.) Dr. Dudley found that Mr. Phillips had multiple psychiatric difficulties, including PTSD from childhood trauma . (1 R 2467.) Dr. Dudley testified that Mr. Phillips had developed PTSD from his childhood trauma. (1 R 2468.) Further, Dr. Dudley found that because Mr. Phillips had not experienced any parental nurturing or support, his brain did not develop fully resulting in him being physiologically hyper alert. (1 R 2470.) Moreover, the lack of adequate parenting resulted in mood reactivity, in which his response to life situations is exaggerated and impulsive. (1 R 2470.) In addition to PTSD, Dr. Dudley diagnosed Mr. Phillips with depressive disorder. (1 R 2471.) Dr. Dudley could not definitely say, however, whether Mr. Phillips suffers from bipolar disorder because his cocaine use could have caused similar manic or hypomanic episodes. (1 R 2471.) Finally, Dr. Dudley explained that because Mr. Phillips had substance abuse problems, particularly related to his cocaine use, it likely affected his intellectual and cognitive abilities, as found by Dr. Ouaou. (1 R 2474.)

Dr. Robert Ouaou. Dr. Ouaou is a neuropsychologist who specializes in traumatic brain injuries. (1 R 2097.) In July 2013, Mr. Phillips's postconviction defense counsel contacted Dr. Ouaou to evaluate Phillips for mental and/or intellectual disabilities. (1 R 2100-01.)

On September 27, 2013, Dr. Ouaou administered the Wechsler Adult Intelligence Scale Fourth Edition ("WAIS-IV") on Mr. Phillips. (1 R 2114-15, 2634-35; 2 R 2949.) At the September 11, 2014 evidentiary hearing on Appellant's postconviction motions, Dr. Ouaou reported that Mr. Phillips's "absolute intelligence score was 79, which place[d] him at the eighth percentile and in a borderline range" for intellectual functioning. (1 R 2114-15, 16-17.) Dr. Ouaou also administered several tests for malingering, and found that "there was no evidence whatsoever of psychiatric or cognitive embellishment or malingering." (1 R 2114.) Overall, Dr. Ouaou concluded the testing reflected evidence of neurocognitive defects, likely related to head injuries and development. (1 R 2121-22.) At that time, Dr. Ouaou testified that he did not have enough data to find Mr. Phillips intellectually disabled. (1 R 2150.)

On November 17, 2015, Dr. Ouaou conducted an additional test once he became aware an adult from Mr. Phillips's childhood could attest for his development, in this case, Mr. Phillips's aunt, Inez Gordon. This test, known as the Vineland II Adaptive Behavior Scale, measured adaptive behaviors retrospectively with someone who knew Mr. Phillips in his developmental period. (1 R 2633.) In short, the test required Inez Gordon to think back and recall her impressions of how Mr. Phillips developed as a child. (1 R 2634, 2717-18.)

At the December 14, 2015 evidentiary hearing on Appellant's postconviction motions, Dr. Ouaou, revisited his previous testimony that Mr. Phillips was not intellectually disabled, and explained that his professional opinion had changed since he was able to administer the adaptive function part of the test. (1 R 2646, 2660.) In short, Dr. Ouaou concluded that Mr. Phillips is intellectually disabled and further explained his conclusions.

IQ. As noted previously, in 2013, Dr. Ouaou found Mr. Phillips's full-scale IQ score to be 79. In 2014, however, the United States Supreme Court held that a finding of intellectual disability would not automatically be precluded if a defendant tested above the bright-line score of 70. *See* Hall v. Florida, 134 S. Ct. 1986, 1993 (2014). Thereafter, in 2015, Dr. Ouaou was able to gather Ms. Inez Gordon's input on Mr. Phillips's adaptive development, and Dr. Ouaou concluded Mr. Phillips is borderline intellectually disabled. (1 R 2633-39; 2 R 2949-50.)
Dr. Ouaou further explained that the IQ score of 79, with a confidence interval of plus or minus five, his true score would fall between 75 and 83 at a 95 percent confidence interval, meaning "95 percent of the time it will fall between 75 and 83." (1 R 2635-36.) Mr. Phillips's index scores were as follows: (1) verbal comprehension – 78 (placing him in the 7th percentile and the borderline impaired range; (2) perceptual reasoning – 84 (placing him in the 14th percentile and the low average range); (3) working memory – 95 (placing him in the 37th percentile

and the average range); and processing speed – 76 (placing him in the 5th percentile and the borderline range). (1 R 2633-39; 2 R 2949-50.)

Dr. Ouaou recalled that Mr. Phillips's IQ test scores, prior to age 18, ranged from 68 to 89. (1 R 2681.) According to the American Association of Intellectual and Developmental Disabilities, an IQ test score around 70, or as high as 75, meets the first prong of the intellectual disability test, so an IQ score of 79 is considered a true score between 75 and 83. (1 R 2682-83.)

Adaptive Functioning. Mr. Phillips's adaptive behavior was significantly impaired, based upon Inez Gordon's input in the Vineland II Adaptive Behavior Scale, academic performance and standardized testing, as well as the onset of the intellectual disability occurs prior to age 18. (1 R 2683-84.)

Manifestation prior to Age 18. Dr. Ouaou found that the onset of Mr. Phillips's intellectual disability occurred prior to age 18, based upon Mr. Gordon's input, Mr. Phillips deficits in communication, daily living skills, socialization, and academic performance in school. (1 R 2683-84; 2 R 2950-51.)

Dr. Greg Prichard. The State called Dr. Prichard, a licensed clinical psychologist, in response to Dr. Ouaou's testimony that Mr. Phillips is intellectually disabled. (1 R 2788-89.)

Dr. Prichard's intellectual disability assessment considered three data points. (2 R 2961.) The first test occurred when Mr. Phillips was 6 years old, on April 8,

1986. (2 R 2961.) The Stanford Binet L-M was utilized and the full-scale IQ score was 80. (2 R 2961.) The second test occurred when Mr. Phillips was 7 years old, on July 9, 1986 resulted in a full-scale score of 89. (2 R 2961.) The third test occurred when Mr. Phillips was 34 years old, in September 2013. (2 R 2961.) The WAIS-IV was administered and Mr. Phillips's full-scale IQ score was 79. (2 R 2961.) Accounting for these three scores, Mr. Phillips scores ranged between 79 and 89. (2 R 2961-62.) Dr. Prichard surmised that considering the standard error of measurement ("SEM"), "it is most probable that Mr. Phillips's intellectual functioning falls within the range of 80 to 90," and therefore, Mr. Phillips would not qualify as being intellectually disabled. (2 R 2961-62.) Instead, Dr. Prichard believed Mr. Phillips should have been diagnosed with antisocial personality disorder, to account for his adaptive deficits. (1 R 2842-43; 2 R 2963-64.)

In short, Dr. Prichard found that Mr. Phillips is not intellectually disabled "because the IQ prong is not satisfied" and the manifestation prong "is not satisfied clearly." (1 R 2825.) Dr. Prichard testified that the DSM measures intellectual disability beginning with an IQ score "up to a 75, which is taking into account the standard error of measurement . . . so any score above 75, it doesn't -- it can't be the 70 or below, even when you take into account the measurement error." (1 R 2829-30.) Dr. Prichard explained that his assessment considered "generally when someone is examining IQ, if there's determination or indication that the IQ is

subaverage, 70 or below, *then* you embark on the adaptive testing." Dr. Prichard referred to Mr. Phillips's adaptive functioning and manifestation as "moot," because he had IQ scores of "80, 89, and 79." (1 R 2835-36.)

Dr. Prichard's report reflects his analysis that any data available from the adaptive behavior testing is "moot and not relevant with respect to the issues at hand," because the IQ prong had not been met. (1 R 2862-63; R 2962-63.)

Finally, Dr. Prichard testified that although he generally preferred to complete his own testing, he found that Dr. Ouaou's testing produced "valid data" to review, although he did not believe that Ms. Gordon provided reliable data because "the characterization of [Mr. Phillips's] skill level is far too low to consider it reliable data." (1 R 2852-54.)

Order Granting Motion to Vacate Judgment and Sentence under Rules 3.850/3.851 in part and denying in part.

- ***Grounds Granted: Claim One, Seven, and Motion for Summary Relief.***

Following evidentiary hearings, the trial court granted Claim One, Subclaims A, B, and D, finding trial counsel ineffective for failing to: (A) investigate and provide sufficient background information to his mental health expert; (B) investigate and call witnesses at the penalty phase; and (D) present any known mitigation at the Spencer Hearing. The trial court also granted claim seven, which argued that pursuant to Mosley v. State, 209 So. 3d 1248 (Fla. 2016), Mr. Phillips was entitled to a new penalty phase as the jury recommendation was 7

to 5 for death, and violated Hurst v. Florida, 136 S. Ct. 616, 619 (2016). Finally, the trial granted Defendant's Motion for Summary Relief, to the extent that Mr. Phillips is entitled to a new penalty phase, but denied summary relief from his death sentence in light of Hurst v. Florida and Hurst v. State.

- ***Postconviction Grounds for Relief Denied*: *Motion for Postconviction Relief based on Newly Discovered Evidence; Motion to Vacate Judgment and Sentence, Claim One, Subclaim C, Claim Two, Claim Three, Claim Four, Claim Five, and Claim Six.***

The trial court denied Appellant's Motion for Postconviction Relief Based on Newly Discovered Evidence which argued the appellant meets the subaverage intellectual functioning announced in Hall v. State, so a death sentence is in violation of the Eighth Amendment to the U.S. Constitution. The trial court also denied the following grounds raised the appellant's Motion to Vacate Judgment and Sentence:

- ***Claim One, Subclaim C***. Counsel failed to discover and argue that Mr. Phillips is intellectually disabled and therefore barred from execution.

- ***Claim Two.*** Trial Counsel was ineffective for failing to argue Mr. Philips is intellectually disabled and therefore is ineligible for the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (1 R 1339.)

- ***Claim Three.*** Phillips's Counsel rendered ineffective assistance for

failing to object to prosecutor's misstatement of the law and for allowing the jury to be given improper instructions to use in returning its recommendation in violation of the fifth, sixth, eighth and fourteenth amendments of the US Constitution and corresponding provisions of the Florida Constitution. (1 R 1354-58.)

- ***Claim Four***. Trial counsel was ineffective for failing to properly object to instances of prosecutorial misconduct in the penalty phase of Phillips's trial resulting in prejudice to Philips and a violation of Phillips's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Corresponding provisions of the Florida Constitution. (1 R 1359-63.)

- ***Claim Five.*** Trial counsel was ineffective for failing to adequately prepare for the "avoid arrest" aggravating circumstance. (1 R 1364.)

- ***Claim Six*.** The State committed prosecutorial misconduct by failing to list the "eliminate witness/avoid arrest" aggravator prior to closing arguments in guilt phase and after being ordered to disclose all statutory aggravators. (1 R 1365.) The State did not disclose its intent to use this aggravator until April 10, 2008, after the jury found the Defendant guilty of first-degree murder in its Amended Listing of Aggravating Circumstances. (1 R 1367.)

On April 18, 2017, the trial court issued its Order Granting Motion to Vacate Judgment and Sentence under Rule(s) 3.850/3.851 in part and denying in part. (1

R 1372-1650.) On May 5, 2017, Defendant filed a Motion for Rehearing and/or Reconsideration, which the trial court denied on May 22, 2017. (1 R 1651-1658.) Thereafter, on June 20, 2017, the Defendant timely filed a Notice of Appeal to the Florida Supreme Court. (1 R 1659-60.) This appeal follows.

SUMMARY OF ARGUMENTS

Claim one. The trial court erred in denying Appellant's Motion for Postconviction Relief based on Newly Discovered Evidence, as the appellant demonstrated he is intellectually disabled, pursuant to Hall v. State. First, the appellant presented evidence that his IQ score of 79, fell within the standard margin of error, allowing for further inquiry into his adaptive functioning and manifestation prior to age 18. Second, the appellant presented extensive evidence of adaptive functioning, exhibited prior to age 18, through family and medical testimony, as well as academic and legal records. For this reason, this Honorable Court should reverse the trial court's finding that the appellant is not intellectually disabled and remand with instructions to commute his death sentence to life, as executing him would violate the Eighth Amendment to the United States Constitution.

Claim Two. The trial court erred in determining Appellant's trial counsel was not ineffective at the guilt and penalty phases of his trial for failing to discover and argue he was intellectually disabled and therefore, barred from execution under the Eighth Amendment to the United States Constitution. At the post-conviction hearing, Phillips presented considerable evidence, both from forensic and lay witnesses that could have precluded the sentence of death.

ARGUMENT

CLAIM I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POSTCONVICTION RELIEF BASED ON NEWLY DISCOVERED EVIDENCE, PURSUANT TO HALL V. STATE, AS APPELLANT MEETS THE SUBAVERAGE INTELLECTUAL FUNCTIONING STANDARD ANNOUNCED IN HALL AND AS SUCH, IS INTELLECTUALLY DISABLED AND THEREFORE, NOT SUBJECT TO CAPITAL PUNISHMENT

Standard of Review. The Court's standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. McLin v. State, 827 So.2d 948, 954 (Fla. 2002). However, the trial court's findings must be supported by competent, substantial evidence. Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997). The trial court's legal conclusions are reviewed *de novo*. Sochor v. State, 883 So.2d 766, 771 (Fla. 2004).

Argument. Mr. Phillips is intellectually disabled and therefore cannot be executed. In Atkins v. Virginia, 536 U. S. 304, 321 (2002), the United States Supreme Court held the Eighth Amendment to the United States Constitution prohibits intellectually disabled persons from being executed. The Atkins Court further recognized that intellectual disability is not only measured by "subaverage intellectual functioning, but also significant limitations in adaptive skills . . . that

became manifest before age 18." Id. at 318. Thereafter, in Hall v. Florida, 134 S. Ct. 1986, 1993 (2014), the Court addressed how "intellectual disability must be defined in order to implement [the] principles and holding of Atkins."

In Hall, the Court noted "the medical community defines intellectual disability according to three criteria: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances); and (3) the onset of these deficits during the developmental period." Id. at 1994.

The first prong, significant subaverage intellectual disability is demonstrated by IQ scores of "approximately 70 points." Id. The Hall Court noted that because "intellectual disability is a condition, not a number . . . courts must recognize, as does the medical community, that an IQ test is imprecise" and because of this, a strict cutoff number of 70 is improper in the context of death penalty cases. Id. at 2001. In short, the Court recognized and "agree[d] with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant is able to present additional evidence of the intellectual disability, including testimony of adaptive deficits." Id.

Hall explained that standard deviation is distinct from the standard error of measurement ("SEM") and found that the Florida Legislature did not intend to establish a bright-line rule, but to implement a range, which includes the SEM. Id.

at 1994, 1998. The mean IQ test score is 100. Id. One standard deviation is 15 points, so two standard deviations are 30 points. Id. Thirty points below the mean is 70. *Id.* The Supreme Court cited the Florida Senate Staff Analysis and Economic Impact Statement and found that the bill does not contain a single standard IQ level, but that the IQ test level score could be extended up to 75. Id. at 1998.

In this case, Mr. Phillips's IQ scores placed him within the standard margin of error and therefore, his adaptive functioning and manifestation prior to age 18 must be considered. Dr. Ouaou concluded Mr. Phillips had a full-scale IQ score of 79, with his "true full scale score falling between 75 and 83, with a confidence interval of 95 percent," meaning "95 percent of the time it will fall between 75 and 83." (2 R 2949-50; 1 R 2635-36.) Dr. Prichard's testimony completely disregarded the holding in Hall when he testified that an IQ must be 70 or below, and only *then* can one consider adaptive functioning and manifestation. (1 R 2835-36.)

Therefore, because Mr. Phillips's IQ score falls within 75 and the standard margin of error, his adaptive functioning and manifestation must be examined. As Dr. Ouaou reported, Mr. Phillips adaptive functioning and manifestation prior to age 18 was well documented. Mr. Phillips's academic records reflect he had he had been in special education classes, had poor grades, and been in trouble for

smoking, skipping school, and fighting. Furthermore, Mr. Phillips's family all testified that he was physically abused and neglected by his drug-addicted mother, Mr. Farns, and the only adult figure he could rely upon, Ms. Hall, passed when he was ten years old. Thereafter, he "gave up," began abusing and selling drugs, failing academically, and getting into trouble with the law. Mr. Phillips's drug abuse, coupled with the trauma from his childhood likely affected his brain development and presented additional factors that contributed to his intellectual and cognitive abilities, as well as his diagnosis of depression, bipolar disorder, ADHD, and PTSD. (1 R 2218, 2247-48, 2251, 2474.)

Therefore, this Court should consider medical experts' opinions, regarding Mr. Phillips's mental disabilities and his deficit in adaptive functioning. In conclusion, it would be violation of Mr. Phillips's Eighth Amendment right to sentence him to death.

CLAIM II

THE TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN THE GUILT AND PENALTY PHASES FOR FAILING TO DISCOVER AND ARGUE THE APPELLANT WAS INTELLECTUALLY DISABLED AND THEREFORE, BARRED FROM EXECUTION.

Standard of Review. The Court's standard of review following a denial of a post-conviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. McLin v. State, 827 So.2d 948, 954 (Fla. 2002). However, deference to the trial court's factual findings does not fully apply when the findings are not based on live testimony, but on documentary sources, equally available to the appellate court. Black v. State, 59 So. 3d 340, 344 (Fla. 4th DCA 2011).

Argument. At the post-conviction hearing, Phillips presented considerable evidence of intellectual disability, both from forensic and lay witnesses that easily could have precluded the death penalty sentence. To establish ineffective assistance of counsel, the appellant must satisfy both prongs of the test outlined in Strickland v. Washington, 466 U.S. 688 (1984). A convicted appellant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires the appellant to show that: (1) counsel's performance was deficient, and (2) The deficient performance prejudiced the defense so as to deprive the defendant a fair trial. Strickland, 466 U.S. at 669.

Unless both prongs are satisfied, it cannot be said that the conviction or sentence of death resulted from a breakdown of the adversary process that renders the result unreliable. Id.

To establish deficient performance, the appellant must prove that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. at 687. In determining whether performance was deficient, courts consider whether the attorney's performance was reasonable considering all the circumstances. Id. at 688. Further, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as the time of counsel's conduct." Id. at 690. The appellant must also overcome the presumption that counsel's actions, challenged as deficient, might be considered sound trial strategy under the circumstances. Id. at 691.

To prove he or she was prejudiced by counsel's deficient performance, the appellant must show that counsel's errors were "so serious as to deprive the appellant of a fair trial, a trial whose result is unreliable." Id. at 687. In challenging a death sentence, the question is whether there is reasonable probability that, absent counsel's errors, "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. A "reasonable probability" is not of an absolute certainty, but a

probability sufficient to undermine confidence in the outcome. Sims v. State, 602 So. 2d 1253, 1256 (Fla. 1992).

In this case, Phillips's trial counsel conducted an inadequate investigation into Mr. Phillips's mental mitigation. The United States Supreme Court has consistently held that a reasonable investigation into a defendant's social, mental, educational, and medical histories must be completed in preparation for making informed decisions as to what to present in a capital penalty phase trial. Williams v. Taylor, 529 U.S. 362, 396 (2000). Under American Bar Association ("ABA") Guidelines, counsel must conduct a complete investigation. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Sect. 1.1 (rev. ed. 2003). Duties under the ABA guidelines require an "obligation to conduct a thorough and independent investigation relating to issues of both guilt and penalty." ABA Guidelines Sect. 10.7(A). This obligation must begin as quickly as possible, because it may affect the investigation of first phase defenses, decisions about the need for expert evaluations, motion practice, and plea negotiations. ABA Guidelines, Sect. 10.7 at 1023. Counsel must interview any relevant mitigation witnesses multiple times in face-to-face interviews, to establish trust and elicit sensitive information necessary for a "thorough and reliable life-history investigation." ABA Guidelines Sect. 10.11(c) at 689.

Mr. Phillips's trial counsel conducted very little mitigation investigation. Mr. Shea testified that at the time of Shea's appointment, the American Bar Association Guidelines recommended a mitigation specialist be a part of the defense team. (1 R 1746.) Despite this, he and Mr. Anderson chose not to retain a separate mitigation expert because Mr. Anderson was "an expert in the form an attorney who had skill, had knowledge and experience in mitigation, that would be much more effective than some individual that we could not depend upon." (1 R 1747.) Mr. Shea testified that he has never hired a mitigation specialist for any case he handled. (1 R 1749.)

Further, and more remarkably, Mr. Shea and Mr. Anderson did not initiate any investigation into a possible mental deficiency. Mr. Shea testified that while representing Mr. Phillips over a period of a year and a half, Mr. Phillips never "demonstrated any characteristics that he suffered from an intellectual disability." (1 R 1781-82.) In Mr. Shea's opinion, Mr. Phillips "always understood fully what he was facing, what was going on in the case." (1 R 1762-63.) Mr. Shea testified that he recalled Dr. Miller testing Mr. Phillips's IQ and believed he scored in the "85 or 90 range." (1 R 1764-65.)

In assessing the prejudicial effect of a failure to investigate mitigation evidence, is whether there is reasonable probability that, absent counsel's errors, "the sentencer . . . would have concluded that the balance of aggravating and

mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. at 695. A "reasonable probability" is not of an absolute certainty, but a probability sufficient to undermine confidence in the outcome. Sims v. State, 602 So. 2d 1253, 1256 (Fla. 1992).

In Mr. Phillips's case, counsel presented only the barest bones of mitigation at trial, and the scant mitigation that was presented was not particularly helpful to Mr. Phillips—especially considered they did not offer any explanation of Mr. Phillip's substance and emotional abuse to the jury. Considering Mr. Phillips's horrendous childhood filled with brutal beatings, constant violence and crime, the explanation for why he developed a substance abuse disorder (to cope with the trauma he suffered as a child) and an explanation of why he was committing crimes to satisfy the drug addiction, a reasonable probability exists that jurors would have struck a different balance had they heard the complete history of Mr. Phillips's past.

As the Supreme Court held in Porter v. McCollum, "Indeed, the Constitution requires that 'the sentence in capital cases must be permitted to consider any relevant mitigating factor'" Porter, 130 S.Ct. at 454-55 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)). The evidence presented in Mr. Phillips's evidentiary hearing—much of what was not discovered by trial counsel but would

have been critical for the jury to hear—is sufficient to undermine confidence in the death sentence in this case, establishing the prejudice prong under Strickland.

For these reasons, this court must reverse Mr. Phillips's death sentence and remand for a new penalty phase proceeding.

CLAIM III

THE TRIAL COURT IMPROPERLY DENIED THE CLAIMS BELOW, FOR WHICH PHILLIPS RELIES ON HIS MOTION TO VACATE JUDGMENT AND SENTENCE UNDER RULE 3.851 AND SUBMITS WITHOUT BRIEFING.

a. Trial Counsel was ineffective and deficient for failing to object to prosecutor's misstatements of the law and for allowing the jury to be given improper instructions to use in returning its recommendation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution.

b. Trial counsel was ineffective for failing to properly object to instances of prosecutorial misconduct in the penalty phase of Appellant's trial resulting in prejudice to Appellant and a violation of Appellant's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of the Florida Constitution.

c. Trial counsel was ineffective and deficient for failing to adequately prepare for the "avoid arrest" aggravating circumstance, in violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of the Florida Constitution.

d. The State committed prosecutorial misconduct by failing to list the "eliminate witness/avoid arrest" aggravator prior to closing arguments in guilt phase and after being ordered to disclose all statutory aggravators. The State did not disclose its intent to use this aggravator until April 10, 2008, after the jury found the Defendant guilty of first-degree murder in its Amended Listing of Aggravating Circumstances.

CONCLUSION

In following the United States Supreme Court and the Florida Supreme Court's holdings above, Phillips's sentence must be remanded for a new penalty phase for the previously mentioned reasons.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Frank Tassone___________
FRANK TASSONE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via electronic mail to the Office of the Attorney General at carine.mitz@myfloridalegal.com, Attorney for Appellee, and the Office of the State Attorney, to Meredith Charbula at mcharbula@coj.net, this 17th day of November, 2017.

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