IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1706

LENARD PHILMORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA, (CRIMINAL DIVISION)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, defendant below, will be referred to as "Philmore", "Appellant" or "Defendant". Appellee, State of Florida, will be referred to as the "State". Reference to the record will be by the symbol "R", to the transcript by "T", and to Appellant's initial brief by "IB" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

Subject to the additions, corrections, and/or clarifications here and in the argument portion of the brief, the State accepts Appellant's statement of the case and facts for this appeal.

Voir dire commenced with the judge asking questions related to strongly held beliefs about the death penalty, the ability to weigh aggravators and mitigators for sentencing, hardships in jury service, and knowledge of the case, parties, and/or witnesses (T.11 - 186, 218-43). Tajuana Holt ("Holt") did not respond to these questions. At the commencement of the second day of voir dire, the

prosecutor noted Holt had been sleeping (T.11 - 476).

When questioned, Holt attested to having no problem serving and admitted her mother, Rosa Holt, was the managing clerk in the trial judge's division. After a series of questions to which Holt gave monosyllabic answers, the State asked the rhetorical question, "You just don't really care, do you?" Holt confessed that her written questionnaire indicated that those convicted should not receive the death penalty, but should stay in prison for life. When questioned, she assented that death may be appropriate, but should not be the sole option (T.11 - 507-09).

The State sought Holt's excusal for cause on the basis she had been sleeping. In denying the challenge, the court agreed from the State's angle of view, it may have looked that way, but Holt was awake. The defense objected to the State's peremptory strike of Holt. In response, the State Attorney pointed out Holt had wavered in her opinion about the death penalty; on the questionnaire she indicated she was against it, but in court, she said it may be appropriate. The State was uncertain which answer to rely upon. The other reason was that Rosa Holt had indicated it would be better if her daughter did not sit. The Assistant State Attorney reminded the court Holt had been sleeping. The court contemplated the variance between Holt's written and verbal answers, found such was a race-neutral basis for the strike, and from the totality of the circumstances, the reason was not a pretense, but was genuine.

The State's "other basis" was also genuine (T.13 - 836, 844-49). The defense accepted the jury without objection (T.13 - 857).

In the penalty phase, the State established Philmore had prior violent felony convictions. Officer Podswell explained that when he approached Philmore and others to ask them to clean their jail area, Philmore reacted by punching him in the head and face, breaking his ocular bone, jaw, and nose. (T.20 - 1768-77).

On November 13, 1997, Philmore entered Michael Buss' shop, pointed a gun in his face, and demanded money. When Mr. Buss refused, Philmore fired, but the gun jammed. He then punched Mr. Buss in the head and tried to strangle him while ordering his female accomplice to shoot. Before fleeing, Philmore smashed the security camera, and took several guns, two of which (Exhibits 1 and 2) were used during the instant crimes (T.20 - 1779-92).

Philmore was convicted of the November 4, 1997 robbery and attempted murder of Saul Brito ("Brito"). Philmore pointed a gun at Brito's head and told him, "don't look up, I'm going to kill you." When Brito grabbed for the gun, Philmore tried to fire and recycle the gun after it jammed (T.20 - 1795-1802).

Yolanda Ulysse revealed that Willy Philmore, Appellant's father, left the family home when Philmore was 13 years old. She admitted Philmore never lost consciousness when hit with an ashtray or when knocked into a church wall (T.21 - 1856-61). Raymond Philmore testified there was no change in his brother's personality

or aggressiveness after being hit in the head with a rock and ash tray or knocked into a wall (T.21 - 1880-82, 1893-94).

Each time Dr. Wood has testified about Positron Emission Tomography ("PET") scans it has been for the defense in a murder case. According to him, the portion of Philmore's brain identified as injured is an area associated with higher level thinking; i.e. the ability to put into words what the senses perceive. However, Philmore did not show all of the symptoms associated with an injury to that area. Dr. Wood agreed this area was not associated with causing people to murder, impacting free will, or producing impulse control problems. (T.22 - 2007-08, 2037-39).

Philmore's mother told Dr. Wood she had disciplinary problems with her son from an early age, well before any reports of head injuries. Philmore was disruptive and would fight. Dr. Wood's conclusion of brain injury was based in part on a school psychologist's report which provided:

> Most unusual was [Philmore's] communication tactics. Initially it was felt [Philmore] was conversing with several classmates who sat beside him. However, as the observation progressed, it became apparent that the other children were ignoring him, though [Philmore] continued to gesture and talk as if speaking to someone.

No other references to hallucinations were reported (T.22 2042-49).

Whenever Dr. Berland had testified in a capital penalty phase, it had been for the defense. In evaluating Philmore, Dr. Berland gave the original versions of the WAIS and MMPI exams, even though

newer versions were available. In his opinion, the MMPI was an important tool supporting his conclusion Philmore suffers from psychosis, but not insanity (T.24 - 2084-88, 2113-15, 2162, 2235).

The doctor conceded he was speculating when he offered that drug use had a more lasting effect on a brain damaged person. He admitted Philmore had received "A's" and "B's" in school and had scored a 98 I.Q. on the MMPI and WASI. No one who had examined Philmore during his school years diagnosed a psychosis; such was developed after he faced the death penalty. The school records revealed by 15 years of age, Philmore had not suffered head injuries, did not feel "others were out to get him", did not have hallucinations, did not suffer from headaches, and was not fearful, anxious, or suspicious. However, on four occasions, Philmore had punched teachers' aides (T.24 - 2188-89, 2217-25, 2229-30, 2236).

The Department of Corrections records from Philmore's initial psychological screening showed he was not depressed, did not report anxiety, hallucinations or delusions, and was oriented for time, place, and person. Even assuming Philmore was psychotic on the day of the murder, Dr. Berland was unable to opine to what extent the psychosis impaired Appellant. From the facts of the crime, Dr. Berland agreed there was a basis to believe Philmore's behavior was purposeful (T.24 - 2227-28, 2230-31, 2261-64).

The MMPI Scale 4 is influenced by character disorder (criminal thinking) and psychosis. Dr. Berland, averred that a finding of

character disorder would not be unreasonable, but, because he was hired to look for mitigation, and such is not mitigating, he did not report it. When Philmore was 12 years old he was diagnosed with conduct disorder. The doctor admitted Philmore "probably does have some antisocial traits", but is unable to identify how much relates to mental illness as opposed to character (T.24 - 2264-72).

Dr. Landrum, whose courtroom testimony is split even between the defense and prosecution, noted that he had reviewed records, evidence, and depositions and also had conducted a five hour interview with Philmore. In his opinion, Philmore does not suffer from a psychosis and any prior drug usage did not influence his behavior on the day of the murder. The school records supported a finding of a disruptive behavior disorder; Philmore had been diagnosed previously with an impulse control disorder, intermittent explosive disorder, and conduct disorder. Based upon the conduct disorder occurring before the age of 18, Philmore met the criteria for Antisocial Personality Disorder. The disorder is a persistent, pervasive pattern of misbehavior where the basic rights of others or societal norms are violated; the disorder generally describes a person with criminal thinking (T.25 - 2285-94, 2308-13).

According to Dr. Landrum, none of the WAIS tests (original or revised) is sensitive enough to diagnose brain damage. The State's expert gave Philmore a screening test from the Luria-Nebraska battery which yielded results in the normal range. Dr. Berland

gave Philmore the original WAIS exam, but psychologists assessing intelligence and conducting a full psychological battery, no longer use the old WAIS exam. Philmore was given the WAIS-R, a more recent version, and scored a 98 I.Q. which is normal. It was noted Philmore had completed the Eleventh Grade, obtained his general equivalency diploma in prison, his reading, spelling, and math scores as well as his intelligence and learning ability were average. Dr. Landrum rejected Dr. Berland's evaluation and scoring methods and concluded that Dr. Berland found a significant difference in Philmore's test results where none existed. Dr. Landrum found "indicators of strengths and weaknesses in terms of [Philmore's] thinking ability but nothing that compels me to diagnose brain injury." There were no signs of psychosis (T.25 - 2294-305, 2310-11).

Dr. Landrum testified that in the 1980's, the authors of the MMPI revised their test because research showed the original 1940's version discriminated against minority subjects, and against black persons in particular. The research suggested 90 percent of the normal black males taking the original MMPI were mis-diagnosed as psychotic, paranoid, or more severely disturbed than they were. The 1940 MMPI given Philmore is an inaccurate assessment of his mental state as it relates to psychosis (T.25 - 2305-08).

Philmore told Dr. Landrum that Anthony Spann ("Spann"), the co-defendant, had stolen some of Appellant's drugs once. Philmore

held Spann at gun point and demanded return of his drugs. Had Spann's girlfriend not been present, Philmore "may have aggressed on [Spann] quite severely." (T.25 - 2309-10).

Dr. Mayberg, a medical doctor and professor of Psychiatry working in both the psychiatric and neurology fields, averred that her practice involves PET scans and other brain imaging tools. She received nine grants directed exclusively to PET scans and she was published in 45 peer review publications. PET scans, as tools for determining reproducible information, have been disappointing. Predominantly, they are used for determining types of epilepsy, tracking the location/cite of tumors, and judging the cause of memory issues such as Alzheimer's. PET scans are not designed for identifying the cause of brain injury (T.26 - 2370-72, 2378-88).

In Dr. Mayberg's opinion, the two sets of PET scans (Jacksonville's and Dr. Wood's) are different. Dr. Wood's set was produced on a different scale to eliminate fairly distracting background activity. A review of the two sets revealed Dr. Wood made errors in his identification of the brain involved; his identification of the brain area involved (the angular gyrus region) did not correlate to the scans and the diagnosis could not be confirmed by looking at the original Jacksonville scan. Moreover, because a different color scale was utilized in Dr. Wood's set, small differences at the low end of the scale were exaggerated, thereby, creating an apparent defect where none

existed. There was no hypometabolism in Philmore's angular gyrus region or brain. (T.26 - 2414-19, 2440-60).

SUMMARY OF THE ARGUMENT

Point I - The motion to suppress Philmore's confession was denied properly. The confession was given voluntarily and the suggestion of ineffectiveness of counsel is legally insufficient and meritless.

Point II - The State's basis for exercising a peremptory strike of Tajuana Holt was race-neutral and genuine.

Point III - The admission of a photograph depicting the victim's face as it was found days after the murder was proper.

Points IV and V - None of the alleged incidents of prosecutorial misconduct in the guilt and penalty phases have been preserved. Philmore has failed to establish that fundamental error occurred with respect to these alleged comments.

Point VI - It was correct to require Philmore to undergo a mental health examination by a State expert.

Points VI and VIII - The aggravating factors of "cold, calculated, and premeditated" and "avoiding or preventing lawful arrest" are supported by the record and should be affirmed.

Points IX, X, and XI - The statutory mitigators of (1) defendant was under the influence or extreme mental or emotional disturbance, (2) defendant was acting under the substantial domination of another person, and (3) defendant's capacity to conform his conduct to the requirements of the law was substantially impaired were properly evaluated and rejected.

Point XII - Philmore’s death sentence is proportional.

ARGUMENT

POINT I

THE MOTION TO SUPPRESS APPELLANT'S CONFESSIONS TO THE POLICE WAS DENIED PROPERLY (restated).

Philmore argues that his confessions were involuntary because he was deprived of effective assistance of counsel. Significantly, he does not challenge law enforcement's actions to the extent they overrode his will, making his statement involuntary. Rather, he blames the state for making what he has deemed a poor choice in lawyers for him in an apparent attempt to fall under the umbrella of state action. This argument, although novel, is without merit.

Initially, the state contends Philmore has failed to preserve this issue properly for review. As is evident from the motion to suppress and Appellant's testimony at the ensuing hearing, defense counsel argued Philmore's confession was the product of his own lawyer's inducement. Below, Philmore claimed his lawyer promised that the state would not seek the death penalty if he cooperated with the authorities. (R 244-245, 794, 799, 802-05, 810-811, 816, 823-824). This is a different argument than that presented on appeal. Here, Philmore does not claim his confession was the product of an inducement by counsel. Instead, he contends his lawyer's advice constituted deficient performance "in the absence of an overwhelming prosecution case against the accused." (IB 56). Stated differently, Appellant now argues "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to

police under any circumstances." (IB 61). This argument, raised for the first time on appeal, is unpreserved. Simmons v. State, 780 So. 2d 263, 265 (Fla. 4th DCA 2001); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(opining "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Should this Court find the issue preserved, the State submits it is nevertheless meritless. In reviewing a trial court's decision on a motion to suppress, this Court has held that

> appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

Connor v. State, 26 Fla. L. Weekly S579 (Fla. Sept.6, 2001). Where the evidence is conflicting, the trial court's finding will not be disturbed. Thomas v. State, 456 So. 2d 454 (Fla. 1984); Calvert v. State, 730 So. 2d 316, 318 (Fla. 5th DCA 1999).

That being said, there is no reason to disturb the judge's order in this case. In denying Philmore's motion to suppress, as required in a Fifth Amendment analysis, the trial court found Appellant's statements were made freely and voluntarily.

> The Court specifically finds that there were no promises made to the Defendant in exchange

> for his testimony, there were no threats made, no coercion made to the Defendant in order to get him to make the statements, that he did so on his own free will and again in the presence of a competent counsel contemplated under the constitution.
>
> With regards to the statements made during the polygraph examination, the Court agrees with Mr. Bauer's recitation of the facts that any free and voluntary waiver of the presence of Mr. Hetherington was specifically conditioned on being questioned and answers given consistent with those that were given during the statements. Moreover, the detective as well as Mr. Hetherington testified -- that protocol wouldn't allow Mr. Hetherington in the room. And while the Court's aware of the written waiver of the Defendant, it's the Court's view that that does not equate to a free and voluntary waiver of counsel during the time of the polygraph examination.
>
> Accordingly, the Motion to Suppress is denied as it relates to the statements made to law enforcement on November 18th, '97, November 21st, '97, November 26th, '97 is granted as it is -- relates to any statements made while with law enforcement in the polygraph room outside of the presence of Mr. Hetherington.

(R 953-954). A review of the record reveals these findings are supported by competent, substantial evidence. On November 15, 1997 Philmore waived his rights and made a statement to Detective Bach[1]. After admitting he was in Indiantown when the bank robbery occurred, Philmore indicated he wished to speak to his attorney, but told Bach he wanted to talk to the police afterwards. On

[1]The statement's admissibility is unchallenged. (R 841).

November 17th Appellant's court appointed attorney, John Hetherington ("Hetherington"), contacted the police, confirming that Appellant did, in fact, wish to speak to Bach. The next day, with Hetherington, Philmore arrived to give a statement. After being advised of his rights, he signed a waiver form indicating he was freely and voluntarily speaking with the police (SR 29, 32-33).

On November 21, through counsel, Philmore re-initiated contact with the police advising them he wished to give a taped statement. Before making his 5:15 p.m. statement, Appellant, in counsel's presence, acknowledged he understood his rights, attested he was voluntarily waiving these rights, and noted he was neither pressured, nor coerced into making a statement. Finally, on November 26, Philmore re-contacted the police through counsel. As before, Detective Fritchie advised Appellant of his rights and he waived these rights after acknowledging he understood them. Philmore further acknowledged that no promises or threats were made to induce his statement. Fritchie added that he never promised Appellant or Hetherington anything and made no promises regarding the death penalty (SR 53, 56-57, 68-73).

In sum, Philmore was neither threatened, nor promised anything in exchange for his confession. He was timely provided counsel, who was present for all but the polygraph interviews. As a result of counsel's exclusion from the polygraphs, the judge suppressed the statements made during the actual exam (R 953-954). Hence,

there is no reason to disturb the trial court's decision.

The decision to exercise one's rights under Miranda v. Arizona, 384 U.S. 436 (1966) is not irrevocable. If the evidence shows, as it does here, that a defendant voluntarily seeks out law enforcement to make a statement, after being fully advised of his rights on two or more occasions, he may do so, thereby, waiving the protection afforded by Miranda. See Michigan v. Mosley, 423 U.S. 96 (1975)(holding statement given by defendant to investigating officer was admissible even though defendant had asserted his right to remain silent during earlier interrogation same day); Jackson v. State, 359 So. 2d 1190, 1194 (Fla. 1978). In addition, the purpose of Miranda warnings is to prevent government officials from using "the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Arizona v. Mauro, 481 U.S. 520, 529-30 (1987); State v. Koltay, 659 So. 2d 1224, 1225 (Fla. 2d DCA 1995). To counter the inherent pressures of a custodial setting, counsel's presence has been found to be an adequate protective device. "[Counsel's] presence would insure that statements made in the government-established atmosphere are not the product of compulsion." Miranda, 384 U.S. at 466.

It follows then that counsel's purpose is not to prohibit his client from speaking voluntarily, but instead, is to protect his client from being compelled to bear witness against himself. Thus, when a defendant invokes his right to counsel, absent evidence to

the contrary, it must be presumed the defendant is protected from compulsion, whether counsel is privately retained or court appointed. The fact counsel is compensated by the state does not mean counsel is acting as an arm of the government. This Court has held that the actions of a public defender do not constitute state action. See State v. Meyer, 430 So. 2d 440, 443 (Fla. 1983)(opining, "[w]e find no logical basis for imputing the actions of a court-appointed attorney to the state.").

Necessarily included within a public defender's actions is the advice/promises rendered to his client. However, these promises must stem from the state before affecting a confession's validity. It is well established; a confession cannot be obtained through direct or implied promises. See Bram v. United States, 168 U.S. 532, 542-43 (1897); Johnson v. State, 696 So. 2d 326 (Fla. 1997). "Statements suggesting leniency are only objectionable if they establish an express *quid pro quo* bargain for the confession." Bruno v. State, 574 So. 2d 76, 79-80 (Fla. 1991). But again, such direct or implied promises must stem from a representative of the government, not court appointed counsel. Thus, Philmore cannot impute Hetherington's actions to the state to force suppression of his confession.

Viewed as a whole, it is clear Philmore's will was not overborne by any official misconduct. He freely waived his rights and confessed. Therefore, the trial court's decision must not be

disturbed. See Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct).

In seeking this Court's review on direct appeal, Philmore has abandoned the Fifth Amendment voluntariness analysis for that which proceeds under the Sixth Amendment ineffective assistance of counsel claim. In other words, because Philmore cannot blame the police, he has resorted to blaming his lawyer for allowing him to confess. Generally, ineffective assistance of counsel claims are not reviewable on direct appeal. Rather, they are more properly raised in a motion for post-conviction relief. See Kelley v. State, 486 So. 2d 578, 585 (Fla. 1986); Perri v. State, 441 So. 2d 606 (Fla. 1983). Although there are rare exceptions to this general rule, the State contends that this situation is not one of them.[2] Despite Philmore's claim that this issue was fully litigated at an evidentiary hearing, the claim is not apparent from the face of the record. See McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991); Kelly, 486 So. 2d at 585. First, as addressed earlier, Philmore has not preserved the issue for review. This is significant because the focus of the hearing below was on Hetherington's

[2]Appellant cites Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) for the proposition appellate counsel may raise trial counsel's ineffectiveness on direct appeal. Such reliance is misplaced as Rutherford addresses ineffective assistance of appellate counsel on a petition for writ of habeas corpus.

purported inducement of Philmore's confession, which involves an entirely different inquiry from that which is now offered. The focus on appeal turns upon the reasonableness of Hetherington's advice. But this issue was never fleshed out below. Thus, it is not apparent from the face of the record. Second, Philmore bases his claim upon his belief that because he confessed while represented by counsel, counsel's performance was *per se* deficient. This is not the type of allegation that must be addressed on direct appeal because it is not clear that the mere fact Philmore confessed establishes ineffective assistance. Also, the record does not reveal what counsel told his client, let alone what information counsel knew when he advised Philmore. Review at this point is, therefore, premature.

Further, the State contends Philmore's ineffectiveness claim is legally insufficient and was denied properly on this basis as well. The United States Supreme Court has consistently refused to "impose mechanical rules on counsel--even when those rules might lead to better representation--not simply out of deference to counsel's strategic choices, but because the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation--but rather simply to ensure that criminal defendants receive a fair trial." Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000). Philmore's claim boils down to his contention that a lawyer must refuse the police access

to his client or else he is providing assistance below the prevailing norms. The claim is not based upon any legal principle. Instead, Philmore excerpts an argument proffered in Escobedo v. Illinois, 387 U.S. 478 (1964), "any lawyer worth his salt" and couches it in terms of black letter law. But again, there are no mechanical rules imposing such a prohibition. Hence, there is no legally sufficient claim which could rest on this basis.

Finally, the State recognizes that the trial court's order contains language which may be construed as passing upon the merits of Appellant's claim. As a result, for the Court's convenience, the State will address the merits. Should this Court choose to address this issue, the State contends Philmore has failed to sustain his burden of establishing ineffective assistance of counsel. He argues that his attorney "had every duty and obligation to prevent his client from providing the prosecution's proof." (IB 61). In other words, defense counsel deficiently allowed his client to confess. And because this was not a sound trial tactic or strategy, Philmore theorizes he was deprived of his right to counsel. Contrary to these contentions, however, there is no evidence to support any claimed deficiency, nor is there a per se rule, which requires counsel to prevent his client from confessing. See Flores-Ortega, 528 U.S. at 481 (recognizing there are no "mechanical rules" for effective assistance).

As for his legal burden, Philmore must establish (1) counsel's

representation fell below an objective standard of reasonableness, and (2) that but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 688 (1984). In assessing an ineffective assistance claim, this Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. Sound tactical decisions are not subject to collateral attack. "A tactical decision amounts to ineffective assistance of counsel only if it was so patently unreasonable that no competent attorney would have chosen it." Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988). In determining deficiency, "[a] fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; see Cherry v. State, 659 So. 2d 1069 (Fla. 1995); State v. Riechmann, 777 So. 2d 342, 358 (Fla. 2000).

During the suppression hearing, Detective Bach explained that after giving a police statement admitting his involvement in the bank robbery, Philmore said, he would speak to Bach after talking to counsel. On November 15, after being appointed, Hetherington met with Philmore (T 856). Eventually, through counsel, Philmore indicated he wished to speak to Bach again, "so we scheduled an

appointment to conduct an interview." Hetherington insisted Philmore was not involved in the murder. Detective Fritchie likewise testified Hetherington was adamant his client had no involvement in the murder. When Fritchie told Hetherington Philmore implicated himself as the shooter, Hetherington put his head down into his hands (SR 29, 32, 40, 74, 84).

Hetherington stated he was present when Philmore gave his police statements and averred that Philmore told him he wanted to talk to law enforcement. Also, Hetherington did not make any promises to Philmore regarding his cooperation, nor did he induce the confession. While he noted cooperation being in Philmore's best interest, Hetherington stated this was premised upon Appellant's insistence he was not the shooter (R 793-94, 797, 799-03). Philmore knew he did not have to give a statement if he did not want to and that there was no agreement regarding his cooperation or "*quid pro quo*." (R 801-803). Hetherington had stressed to Appellant the importance of telling him the truth, and made it very clear there were serious consequences if Philmore was not truthful with Hetherington truth (R 796). He believed Philmore was telling him the truth and testified he relied upon Appellant's representations in rendering legal advice (R 797, 800). At some point, Philmore told Hetherington that he was the shooter. They sat down to discuss the implications of this admission. But again, Hetherington stressed that at no time was there ever any *quid pro*

quo agreement or promises regarding the outcome of the case (R 808-810). He added that Appellant gave his statement of his own free will; Philmore's decisions were his own and were made voluntarily (R 816, 810-811). Additionally, it was Appellant's idea to tell law enforcement where the body was; Hetherington said Philmore "was watching the news and started crying when Perron's husband came on. I remember this vividly." (R 828). Hetherington explained that his obligation to his client involved more than just to keep him from getting into trouble. "I thought my obligations were to save his life. It is not my duty to stop a client from implicating himself in a murder." (R 830).

In spite of the trial court's credibility determination that Hetherington did not induce Appellant's confession with any promises, Philmore attempts to elevate his lawyer's advice to the level of a promise regarding the outcome of the case. But such "advice is not necessarily a promise of an outcome. Rather, providing such advice is a legitimate and essential part of the lawyer's professional responsibility to his client." McKay v. State, 715 So. 2d 1001, 1003 (Fla. 1st DCA 1998). Moreover, it is important to remember that counsel's conduct must be evaluated from counsel's perspective at the time." Strickland, 466 U.S. at 689; Reichmann, 777 So. 2d at 358. It is clear from the time line established at the suppression/evidentiary hearing that counsel believed in his client's innocence to the last moment. Thus, from

counsel's perspective, the advice he offered to Appellant cannot be deemed unreasonable, nor does it qualify as bad advice inducing the confession. See Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998)(opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.")

In addition, the Court has held repeatedly that counsel must always be mindful of possible mitigating evidence. "The failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so." Reichmann, 777 So. 2d at 350. The record shows that Hetherington was dealing with the realities of the case as they unfolded, being ever mindful of the potential penalties faced. There is no claim that counsel misadvised Appellant about the potential penalties or failed to get all of the information he could from the police before speaking to Philmore. Appellant's professions of innocence short-circuited Hetherington's ability to formulate a sound strategy; counsel cannot be faulted for expressing concern for mitigation, when this Court has chided counsel to be vigilant in the pursuit of available mitigating evidence.

Addionally, Appellant must show that but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89, 694. Notwithstanding his inability to demonstrate

deficient performance, Philmore cannot demonstrate prejudice. In support of his position, he insists that his confession made the State's case against him, thus, he was prejudiced by his attorney's failure to stop him from confessing. Following Philmore's theory to its logical conclusion leads to the absurd result--any time a defendant confesses to a crime while accompanied by counsel, his confession must be suppressed based upon ineffective assistance. Such a proposition is entirely unrealistic and has no basis in law. Moreover, Philmore cannot say, nor has he demonstrated that he would not have faced the death penalty without the alleged deficiency in counsel's performance.

Although Philmore insists his confession provided the bulk of the prosecution's case, he cannot show 1) he would not have confessed absent counsel's input, which the judge specifically found did not constitute a promise; 2) the police would not have been able to make a case without the confession; or 3) he would not have faced the death penalty. The testimony revealed the police knew Appellant was involved in Ms. Perron's disappearance. Investigations were underway and naturally would have proceeded without the confession. In fact, before his confession, the police had Ms. Perron's car and Philmore's shirt--both containing the victim's blood; the guns taken by Philmore in a prior robbery/attempted homicide; and statements from witnesses who placed Philmore at both the scene of Ms. Perron's abduction and the

Indiantown bank robbery. Thus, to say the outcome of the trial would have been different without the confession is unreasonable in light of the amount of evidence collected to that point. In addition, it is far too speculative. Cf. Nix v. Williams, 467 U.S. 431, 446-447 (1984)(holding inevitable discovery exception to exclusionary rule applies to Sixth Amendment right to counsel violations and permits introduction of evidence of location, condition of victim's body where it would have been discovered even if defendant had not shown police, despite fact statement was result of post-arrest interrogation in violation of right of counsel). For these reasons, Philmore has failed to demonstrate prejudice and his conviction must be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S PEREMPTORY STRIKE AGAINST PROSPECTIVE JUROR, TAJUANA HOLT (restated).

The State's peremptory strike of Tajuana Holt was challenged and a race neutral reason requested. Based upon the State's response, the judge found the reasons for the strike were race neutral, not pretextual. Philmore claims the judge erred in finding the reasons genuine. It is his position the State's reasons are not supported by the record, therefore, they could not be found genuine. Continuing, Philmore asserts that striking this juror violated his constitutional right to an impartial jury entitling him to a new trial. (IB 67-69) The State disagrees.

A trial court's denial of a challenge to a peremptory strike is reviewed under the clearly erroneous standard. Melbourne v. State, 679 So. 2d 759, 764-765 (Fla. 1996) (stating trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous); Rodriguez v. State, 753 So. 2d 29, 41 (Fla. 2000) (same).

Questions of fact are reviewed by the competent, substantial evidence standard under which the appellate court pays overwhelming deference to the judge's ruling, reversing only when the ruling is not supported by competent, substantial evidence. If there is any evidence to support the factual findings, the lower tribunal will be affirmed. When it comes to facts, trial courts have an institutional advantage; they can observe witnesses, hear testimony, and see/touch the physical evidence. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (sitting as trier of fact, judge has superior vantage point to see/hear witnesses and assess credibility.). An appellate court's review of factual questions is very limited. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from denial of suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510 (1994).

As a preliminary matter, this issue is unpreserved. While the defense objected to Holt's excusal, its objection was not renewed; the defense accepted the jury and raised no objection when the panel was sworn (T.13 - 845, 849, 855-59). Having failed to renew

the objection, the matter is unpreserved for review. Melbourne, 679 So. 2d 765 (finding issue regarding discriminatory use of peremptory challenge unpreserved where objection not renewed before jury sworn); Franqui v. State, 699 So. 2d 1332, 1334 (Fla. 1997), cert. denied, 523 U.S. 1097 (1998); Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (finding decision to accept jury leads to assumption earlier objection abandoned). The Court should find the matter unpreserved and affirm. However, should the Court address this issue, it will find it meritless.

This Court has noted the proper method for assessing whether a peremptory challenge was exercised in a discriminatory manner.

> Under *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), the following procedure must be followed for challenging peremptory strikes: (1) the objecting party must make a timely objection, must show that the venireperson is a member of a distinct racial group, and must request that the court ask the striking party the reasons for the strike; (2) if step (1) is met, the court must ask the proponent of the strike to explain the reason for the strike; (3) if the reason given is facially race-neutral and the court believes that given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. In step (3), the court's focus is on the genuineness and not the reasonableness of the explanation.... On appeal, peremptory challenges are presumed to be exercised in a nondiscriminatory manner, but the trial court's decision, which turns primarily on an assessment of credibility, will be affirmed on appeal unless clearly erroneous. *Id.* at 764.

Rodriguez, 753 So. 2d at 40. See, Booker v. State, 773 So. 2d 1079

(Fla. 2000).

Claiming the State's reasons are unsupported, Philmore challenges only the finding of genuineness regarding the strike of Holt, (IB 67-69). He prefaces his argument with insinuations the State acted improperly with respect to striking two black panel members[3] "for cause" and asserting Holt had been sleeping[4] during voir dire (IB 66-67). Before giving its reasons for striking Holt,

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[3]Philmore implies the State acted improperly in seeking excusal of Henry Haston ("Haston") and Lois Page ("Page"). The State's motions were perfunctory and granted properly. Haston's debilitating medical condition prevented him from working for the past three years and involved spinal and cranial pain requiring medication and daily respites. Upon hearing this, the court asked if there were a motion. The prosecutor said, "Yeah, we would make the motion", to which the defense objected on the ground Haston could be impartial. Haston agreed he was seeking excusal due to his medical condition and admitted such would detract from his attention span. Excusing Haston, the judge found the condition caused him "intense pain" and he would need hours of rest time (T.10 - 406-16). Regarding Page, the court questioned her ability to be impartial. From what Page had heard she did not believe she could keep an open mind or render a verdict based solely upon the court evidence. Philmore did not object to the "for cause" challenge (T.10 - 453-57).

[4]Philmore claims the judge stopped short of finding the "for cause" challenge "contrived." (IB 66). Contrary to his position, the judge denied the challenge because she found Holt had not been sleeping, while noting the State's angle of view "it probably did look as though [Holt's] eyes were closed" and that the judge "didn't mean to imply in the least that ... it was contrived...." (T.13 - 836, 843). Given this, the belief Holt was sleeping was a genuine basis for a peremptory strike. It was facially race-neutral and genuine as evident by the fact the State complained much earlier (T.11 - 476). Davis v. State, 560 So. 2d 1346, 1347 (Fla. 3d DCA 1990) (sleeping through voir dire race-neutral basis for challenge). Yet, the judge appears not to have relied upon this basis for granting the peremptory, instead, resting her decision on the reasons given by the State Attorney.

the State noted there were other black members on the venire who had been excused for various reasons and no other minority jurors had been removed by the State. The State Attorney offered two reasons for challenging Holt: (1) her conflicting response to the questionnaire and voir dire leading to uncertainty about her position on the death penalty and (2) Rosa Holt's statement that "we would be better off without her daughter on the jury." Co-counsel noted his continued belief that Holt had been sleeping. (T.13 - 844-46, 848).

The judge based her ruling upon the State Attorney's first reason, namely, Holt's inconsistent answers regarding the death penalty. In passing, the court found the State Attorney's second reason, his reliance upon Rosa Holt's comment, was also genuine. Upon the judge's review of Holt's questionnaire, she ruled:

> First, that the explanation given is facially race neutral.
>
> Secondly, the Court, again, as previously stated, is aware of the sensitive nature of the case and (sic) bar and the scrutiny that will be given this case. I am highly aware of that. **But I have reviewed the questionnaire. I listened intently to the responses given by Ms. Holt**, because candidly, I was concerned that that issue may arise. **There is no question in my mind, that given all the circumstances surrounding the strike, the explanation is not a pretense**.
>
> The Court would state again that **I believe and feel strongly** through the responses given by the juror, the explanation given by the State and the review of the jury

> questionnaire, **that the basis and explanation given is genuine**, and accordingly, I'm going to allow the strike on a peremptory basis.
>
> I'm filing with the clerk, as Court's Exhibit 1, the questionnaire, pointing out responses to questions 20 and 21 therein. As well as, note for the record, the other basis given by the State.

(T.13 - 848-49) (emphasis supplied).

Philmore's challenge relates to the court's reliance upon the difference between the questionnaire and voir dire responses and the State's announcement of Rosa Holt's opinion about her daughter (IB 67-69). He does not assert the reasons are not race-neutral, only that they are not supported by the record. Each reason has record support and the genuineness finding should not be disturbed.

On the first day of voir dire, Holt completed her written questionnaire (T.11 - 508-09) which contained the following:

> 20. Do you have any feelings or opinions regarding the death penalty? Please explain.
>
> I feel that people shouldn't get the death penalty. Just let them stay in prison for the rest of their lives.
>
> 21. Do you think the death penalty should always be imposed in cases of murder? Please explain.
>
> Yes I do. Let them stay in prison for the rest of their lives.

(2nd SR.3 - 177). When the State inquired of her, Holt offered "Well, I think they should get it, but I think it should be other, you know, decisions too." (T.11 - 509). Philmore points to Castro

v. State, 644 So. 2d 987, 989 (Fla. 1994) for support of his argument that Holt agreed to follow the law, therefore, the State's challenge has no record support. However, Castro does not assist Philmore because there a "for cause" challenge was at issue, while here it is a peremptory strike. A party's basis for a peremptory challenge offered to address a claim of racial bias need not rise to the level of a "for cause" challenge justification. Green v. State, 583 So. 2d 647, 651 (Fla. 1991); State v. Slappy, 522 So. 2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219 (1988).

As reflected in the judge's ruling, Holt's questionnaire and voir dire answers were evaluated, the State's uncertainty in the answers was a non-pretextual basis for a peremptory strike, and such was a genuine reason to strike Holt (T.13 - 848-49). Cf. Lockhart v. McCree, 476 U.S. 162 (1986) (upholding "death qualification" of juries). Holt's questionnaire showed she disfavored the death penalty. Her later vacillation, while not rising to the level of a for cause challenge, was a valid basis to exercise a peremptory strike. Green, 583 So. 2d at 651 (finding juror's expressed concern about death penalty is non-pretextual basis for peremptory strike); Kelly v. State, 689 So. 2d 1262, 1263 (Fla. 3d DCA 1997) (recognizing uneasiness with legal concept is race-neutral reason for peremptory strike). Even though a juror may express her ability to follow the law, such does not end the inquiry into the challenge's correctness. Soto v. State, 751 So. 2d

633, 637 (Fla. 4th DCA 1999)(affirming peremptory strike where juror disagreed with legal theory, but professed she could follow law). Holt's conflicting answers were found to be a non-racial basis for a strike and under the case circumstances, the judge opined the basis was genuine. The ruling is not clearly erroneous, and should be affirmed. Melbourne, 679 So. 2d at 764-765.

As part of its ruling, the judge referenced the "other basis" offered by the State in support of its challenge (T.13 - 849). That basis, too, was genuine. When the State Attorney advised the court that members of his staff spoke to Rosa Holt, defense counsel asserted a hearsay objection. The State responded that the discussion merely went to whether his reason was genuine. The objection was overruled. (T.13 - 845-46). On appeal, Philmore argues there is no record support for the State Attorney's explanation (IB 68-69). If Philmore's argument is that there is no record proof that Rosa Holt spoke to the State Attorney's staff, his claim must fail. Smith v. State, 699 So. 2d 629, 637 (Fla. 1997) (finding court's focus not on reasonableness of explanation but on genuineness, and its determination will be affirmed unless clearly erroneous). "The test is the credibility of the attorney exercising the strike", not the credibility of the juror. Allstate Ins. Co. v. Thornton, 781 So. 2d 416, 419 (Fla. 4th DCA 2001). As a court officer, the State Attorney, Bruce Colton, advised the judge his staff had spoken to Rosa Holt. The hearsay challenge

below did not refute that Rosa Holt had a conversation. Floyd v. State, 569 So. 2d 1225, 1229-30 (Fla. 1990) (finding counsel's failure to refute opposing counsel's assertion about record preclude's review). The State noted that it was not presenting the statement for its truth, but only as a non-pretextual, genuine reason to challenge Holt. Thus, there is record proof Rosa Holt had a discussion about her daughter with State staff; such record proof is in the form of the State Attorney's representation to that such conversation took place and gave him cause to question Holt.

On the other hand, if Philmore's challenge is to the truthfulness of Rosa Holt's statement, the State submits, this inquiry is irrelevant. Whether Rosa Holt's opinion about her daughter was accurate is not the question in a Melbourne inquiry, rather, it is the genuineness of the State's basis for the strike. Smith, 699 So. 2d at 637 (announcing focus is not on reasonableness of explanation, but on genuineness of strike's basis); Allstate Ins. Co., 781 So. 2d at 419 (same). As stated in Reed v. State, 560 So. 2d 203, 206 (Fla. 1990), "we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." Primarily, the judge based her ruling upon the questionnaire responses, however, she also concluded that the State's reliance upon Rosa Holt's statement was also a valid race-neutral, genuine reason. There is nothing which

shows the judge clearly erred in her appraisal of the circumstances surrounding the strike. Philmore's conviction should be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING A PHOTOGRAPH OF THE VICTIM'S FACE (restated).

Philmore claims the trial court abused its discretion when it admitted into evidence the photograph depicting the victim's face. According to Philmore, the danger of unfair prejudice outweighed the probative value because the photograph showed additional damage to the victim caused by exposure to the elements/vermin (IB 71). The state disagrees. The trial court did not abuse its discretion by admitting the photograph as it was used by the medical examiner to explain what the wound looked like, how the bullet entered the victim's skull, and the distance from which the gun was fired. The probative value was not outweighed by the prejudicial effect.

The admission of photographic evidence is within the trial judge's discretion and a ruling on this issue will not be disturbed unless there is a clear showing of abuse. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). See, Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9 (Fla. 2000); Jent v. State, 408 So. 2d 1024 (Fla. 1981). Even gruesome photographs will not be found inadmissible "[a]bsent a clear showing of abuse of discretion by the trial court." See, Rose v. State, 787 So. 2d 786, 794 (Fla. 2001); Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

Under the abuse of discretion standard, substantial deference

is paid to the trial court's ruling and such will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000). This standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

In Dr. Hobin's proffered testimony he noted the photograph (State's B-L / 64) was taken at his direction. He averred it would be helpful in explaining the entrance wound, the angle of entry, and what the bullet did upon entering Ms. Perron's head. According to him, lay persons are assisted by photographs which augment verbal descriptions of the anatomic trajectory and defects caused by a bullet. In comparison to the X-rays, the photograph of the victim's face helps to show the distance from which the gun was fired and that there is one injury only. Dr. Hobin admitted he could describe these things using a photo with the victim's features below the eyebrows covered (T.17 - 1381-85, 1393-94).

The State asserted the photograph was relevant to how Ms. Perron was found and to premeditation. It would be used to show Philmore stood directly in front of the victim, shot her from close range, and that it was not a reflex or an automatic action committed in the heat of passion (T.17 - 1391). The judge ruled:

> ... B-L is the only photograph of the decedent which, number one, reflects the bullet wound, the injuries, the only frontal view of the victim, and the only photo that is seeking to be admitted of the victim, again, which shows the entry wound. It is relevant in showing the cause of death, the location and nature of the wound, the nature of the offense (sic) used to commit the homicide, and certainly bears on the intent of the Defendant, which has become a key issue in this case.
>
> This Court ... finds that 58 and 57 [x-rays] ... do not do that, and for the Court to preclude the only photograph that the State's seeking to admit on that issue, I think would be unduly prejudicial to the State.
>
> ... any photograph of the decedent is going to be gruesome, but in the whole scheme of things - - I mean, this is certainly not inflammatory to the extent that the probative value would be outweighed by the prejudicial effect....

(T.17 - 1392-93). Upon this record, there was no abuse of discretion in finding the photograph relevant to the case issues and admitting it into evidence (T.17 - 1392-1393).

"[P]hotographs will be admissible into evidence 'if relevant to any issue required to be proven in a case.'" Wilson v. State, 436 So. 2d 908, 910 (Fla. 1983); Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982); Welty v. State, 402 So. 2d 1159 (Fla. 1981). The fact a photograph is gruesome does not render it inadmissible. Such are admissible if they fairly and accurately represent a fact at issue. Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). Gruesome photos are admissible when they show the condition and location of the body when found or

illustrate a witness' testimony, assist the jury in understanding the testimony, or bear on issues of the nature and extent of the injuries, the cause of death, nature and force of the violence used, premeditation or intent. Rose, 787 So. 2d at 794 (noting "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."); Rutherford, 774 So. 2d 637; Pangburn, 661 So. 2d at 1188.

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.... It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So. 2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985).

Applying these principles, it is clear the photograph was relevant and admissible. It was used to describe the positioning of the victim and Philmore when the fatal shot was fired. Also, it was utilized to show the bullet's trajectory, cause of death, and the fact there was a single gunshot wound to the head. (T.17 - 1404-14). The Court should find there was no abuse of discretion in admitting the one frontal view of the victim's face because it was relevant to the case issues; its probative value outweighed any prejudicial effect. Philmore's conviction should be affirmed.

POINTS IV AND V

THERE WAS NO PROSECUTORIAL MISCONDUCT COMMITTED IN EITHER THE GUILT OR PENALTY PHASES OF THE TRIAL (restated).

Philmore challenges comments made by the State during the trial. In Point IV, Philmore alleges the State improperly (1) discussed the luck of a woman targeted, but not attacked, (2) voiced the personal opinions of the investigating officers about Philmore's veracity, (3) referred to Philmore's dress and carrying the "great equalizer", and (4) personalized the prosecution (IB 75-76). In Point V, he challenges comments related to (1) development of an advisory sentence, (2) questioning defense experts, (3) referencing the polygraph, and (4) characterization of the State's expert (IB 78-81). Philmore seeks a new trial or penalty phase. This Court will find that the alleged incidents of misconduct were not preserved, are not misconduct or do not rise to the level of fundamental error. Relief should be denied.

Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. See, Esty v. State, 642 So. 2d 1074, 1079 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995). "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). In arguing to a

jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. denied, 372 U.S. 904 (1963). "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). See, Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So. 2d 486, 488 (Fla. 1993); Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992). Reversal is not required for comments which do not vitiate the whole trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti, 476 So. 2d at 134. The harmless error analysis applies to prosecutorial misconduct claims. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the

> error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 ... and its progeny.... Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So. 2d at 956. In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994).

To preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin v. State, 717 So. 2d 462, 467 (Fla. 1998); Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982)(finding misconduct issue unpreserved where only general objection made, followed by motion for mistrial). Even where an objection is sustained, but the defense does not seek a curative instruction or mistrial, the matter is not preserved. Riechmann v. State, 581 So. 2d 133, 138-39 n.12 (Fla. 1991). See, Holton v. State, 573 So. 2d 284 (Fla. 1990).

It must be noted, none of the prosecutorial remarks referenced

drew an objection, request for a curative instruction, or mistrial. (T 913-14, 928, 1040, 1551-53, 1556-58, 1569, 1573, 1577, 1579, 2197-98, 2202, 2215, 2223-24, 2226, 2230-31, 2234, 2256, 2264, 2266, 2285, 2289, 2458, 2503-04, 2510, 2513-14)(IB 76, 80-81). Duest v. State, 462 So. 2d 446, 448 (Fla. 1985)(finding challenge to argument unpreserved where neither objection nor curative requested). The issue is unpreserved, and fundamental error must be shown. Absent a contemporaneous objection, an appellate court will not review closing argument comments unless they constitute fundamental error. See Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994). Where alleged misconduct is unpreserved, the conviction will not be overturned unless a comment is so prejudicial it vitiates the entire trial. Murray, 443 So. 2d at 956. Philmore has not established fundamental error.

Point IV

1. Luck of woman targeted, but not attacked.

During the State's opening remarks, the prosecutor outlined what he expected the evidence would show. He noted that Spann and Philmore searched for a female victim, driving a nice car, so they could overpower her, kill her, and use the car to leave town. Describing a failed attempt, the prosecutor explained Spann and Philmore had followed a target for several miles, but were unable to get to the woman "who to this day doesn't know how lucky she

was." (T.14 - 910-11, 913-14). In the guilt phase closing, the State revisited the sequence of events starting with the search for a victim in the mall and the targeting of a potential victim who did not know she was followed. This discussion was made in the context of showing that Philmore had a "fully formed conscious intent" to take the life of any female he was able to reach in order to take her car (T.18 - 1551-52). The final comment in this vein occurred during the State's penalty phase closing in relation to the "cold calculated, and premeditated" ("CCP") aggravator. The State argued CCP was proven in part by the fact Philmore and Spann had a plan which they were willing to pursue even though they were unsuccessful initially in finding a car they liked in the mall or in reaching their first target. It was posited the original target "has no idea how lucky she was." (T.28 - 2503-04).

In Philmore's confession, he described how he and Spann drove around the mall in search of a female victim driving a nice car. He explained how they spotted and followed a woman for miles along the Interstate, but were unable to reach her in time to effectuate the carjacking. Unbeknownst to the woman, she had been stalked, but, due to happenstance, escaped. (T.16 - 1227; T.17 - 1427-29).

The fact one woman was targeted but abandoned was relevant to the CCP aggravator. Such showed Philmore's plan and persistence to find the perfect victim and accomplish the carjacking and murder. Nelson v. State, 748 So. 2d 237, 244 (Fla. 1999) (affirming CCP

where defendant discussed need to kill victim to obtain car); Cave v. State, 727 So. 2d 227, 229 (Fla. 1998) (finding CCP where defendant selected store to rob and held victim at gunpoint before accomplices killed her); Brown v. State, 721 So. 2d 274, 280 (Fla. 1998) (finding CCP where co-defendant suggested they find car and kill owner). The State's reference to the initial target merely put the crime in context and established the CCP aggravtor as found by the trial court in its sentencing order (R.17 - 1227).

Referring to a missed target's luck does not inflame or instill emotional fear in the jury, it merely states the obvious; one potential victim escaped the fate of another. Bush v. Dugger, 579 So. 2d 725, 727 (Fla. 1991) (finding reference to victim's absence from upcoming holiday harmless based upon limited reference to obvious fact). The instant, brief references do not rise to the level of misconduct found in Urbin v. State, 714 So. 2d 411, 420 n.9 (Fla. 1998) where this Court noted 33 instances where the prosecutor attempted to "dehumanize and demonize the defendant." Id. This is not the case here. Likewise, Campbell v. State, 679 So. 2d 720, 723-725 (Fla. 1996) does not further Appellant's position. In Campbell, the improper comments related to disparaging a defense expert witness by linking him to testifying for "cop killers" and asking the jury to "send a message to the community." Id. Neither improper action occurred here.

The State is permitted to draw inferences from the evidence.

Without question, the woman followed, but not reached was lucky, or at least such could be inferred. Breedlove, 413 So. 2d at 8 (finding "[w]ide latitude is permitted in arguing to a jury.... counsel is allowed to advance all legitimate arguments."); Spencer, 133 So. 2d at 731 (noting "[l]ogical inferences from the evidence are permissible"). See, Bertolotti, 476 So. 2d at 133 (opining "[i]n the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial."). However, even if the State had not pointed out that the first target was lucky, anyone hearing Philmore's account would draw that conclusion. The mere reference to the unknown woman's luck does not undermine confidence in the verdict or sentencing. Murray, 443 So. 2d at 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial" before reversing).

2. Reference to personal opinions of investigating officers.

Philmore asserts it was misconduct to refer "to the personal opinions of the investigating detectives whom he said 'didn't believe what he [Lenard Philmore] was saying.'" (IB 76). In the State's guilt phase opening, the following account was advanced:

> This Defendant, over a course of a few days with his attorney present, made statements to law enforcement where he bit by bit admitted to his participation in this crime. But, at first tried to blame all of the really bad things that happened on Spann,

> and denied any participation in the actual killing of the victim.
>
> But, as time went on and as it became clear that the detectives ... didn't believe what he was saying, finally admitted ... that he was the one who actually pulled the trigger ... forced his way into Kazue Perron's car ... made her get out ... killed her, and ... put her body into the canal....

(T.14 - 927-28).

Detective Bach averred that on November 18, 1997, Philmore confessed to the bank robbery, but denied participation in the abduction and murder. Bach agreed that initially Philmore blamed Spann for Ms. Perron's disappearance, but as questioning continued over a few days, it became clear the initial statements were untruthful (T.15 - 1026, 1032, 1040). According to Detective Fritchie, Philmore's November 21, 1997 account changed. Originally, Philmore said Spann carjacked and drove Ms. Perron as Philmore followed. Philmore denied knowing she would be killed or seeing the shooting. Fritchie questioned Philmore about his truthfulness due to his expressions (T.16 - 1228-1232, 1264-67, 1276, 1285). On November 26, 1997, Philmore admitted to doing the carjacking, driving Ms. Perron, shooting her once in the forehead, and throwing her body in the canal (T.17 - 1428-40).

Without question, the State's inference in opening statement that the police did not believe Philmore as he gave varying accounts is supported by the record and is fair comment upon the evidence. Hence, Spencer, 645 So. 2d at 383 does not further

Appellant's position. Philmore's account of events changed over time from having no involvement to having committed all of the charged crimes himself. The record supports the argument that the confession changed over time and caused the officers to disbelieve Philmore (T.15 - 1040; T.16 - 1285). The police were not passing judgment upon Philmore's guilt or innocence, but merely expressing their assessment that the change in Philmore's accounts showed that his initial accounts were not truthful. Breedlove, 413 So. 2d at 8 (acknowledging "[w]ide latitude is permitted in arguing to a jury.... counsel is allowed to advance all legitimate arguments."); Spencer, 133 So. 2d at 731 (noting "[l]ogical inferences from the evidence are permissible"). Nonetheless, it cannot be said that one, un-objected to reference to the fact that Philmore was untruthful at first undermines confidence in the trial outcome. Murray, 443 So. 2d at 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial" before reversal).

3. "White tank top", "gold necklaces", and "great equalizer"

It is Philmore's claim it was improper stereotyping for the State to characterize him "as an arrogant criminal in "his white tank top and his gold necklaces' carrying the 'great equalizer', a firearm" (IB 76). A review of the record reveals that Philmore was identified as dressed in a white tank top and wearing gold necklaces. At no time did the State call Philmore an "arrogant criminal." Moreover, Philmore has not explained how this was

stereotyping. While the "great equalizer" was not mentioned by the witnesses as such, the State's use of this term, when put into context of the entire case, is proper. The Court should affirm.

On November 14, 1997, Martha Solis observed "a big person, black. He had a shirt without sleeves, white, and he had big gold chain (sic) on his neck" running from a red house. Parked near the house, she observed a thinner, lighter skinned black man sitting in the driver's seat of an old blue car (T.14 - 964-67). Rosa Quinonez, First Bank of Indiantown employee, observed a black man exiting the bank wearing a white sleeveless undershirt and blue jean shorts. Ms. Quinonez saw the man get into a "bluish, grayish" car (T.15 - 1005-10). Philmore admitted he wore a "tank top" on the day he killed Ms. Perron and robbed the bank. He discarded the shirt after finding Ms. Perron's blood on it. (T.17 - 1464-65).

Given this record, the State correctly described Philmore's attire. The State was commenting upon the evidence produced at trial which linked Philmore to the charged crimes. This was a proper use of the evidence and does not amount to misconduct.

In apparent support of this claim, Philmore points to Barnes v. State, 743 So. 2d 1105, 1114 n.5 (Fla. 4th DCA 1999). However, in Barnes, the defendant objected to some remarks and overlooked others. Based upon the sheer number of improper comments fundamental error was found. Such is not the case here. As noted above, none of the comments drew an objection and the references to

Philmore's attire and jewelry were almost exact quotes from the eye-witnesses. This leaves only the reference to the "great equalizer" (T.18 - 1553).

While the gun was not described as the "great equalizer" in the testimony, no objection was raised to the State's closing (T.18 - 1553). Philmore's defense was that he was neither the planner or instigator. It was Spann who wanted to rob a bank, steal a car, and kill the owner to gain time to flee to New York. In the defense closing, counsel asserted Philmore was a follower and did what others wanted him to do or say. (T.18 - 1537-41). The State countered that the evidence showed Philmore exercised his free will. He and Spann planned the crimes, but Philmore executed the carjacking and killing (T.17 - 1424-46). The State contended:

> What are some of the facts and circumstances? ... They planned the murder and abduction. [Philmore] abducts her at gun point. These are some of the things that show him exercising his free will. He's with her for 40 minutes. For 40 minutes, at any time, he can drop her off, put an end to this. ... No. Kazue, she's taken to that isolated location. ...he knows she can identify him. She is shot in the middle of the forehead. He cleans up blood. Right? Here's the follower guy who has enough common sense to think, all right, we're in this lady's car, she is missing. There's blood there.... He's trying to clean the car up. He had a gun the whole time.
>
> And that's where I come back finally to that comment I made earlier about the great equalizer. He's a big man physically. Anthony Spann is a little guy. So we're going to brush over that and assume that Spann is

> the leader and controls this guy. If that's the case, at any time this made Lenard Philmore his equal. At any time, Lenard Philmore could have stopped [] this chain of events on the 14th, because this made him equal. But he didn't, did he? No, because he wanted that car, he wanted to go to New York, and he wanted the money, and he didn't care who he had to murder to do it.

(T.18 - 1575-77). As the State explained, the gun put Philmore on the same level as Spann and refuted the argument Philmore was just following. It is a fair inference from the evidence and reply to the defense. Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995) (finding argument proper where it is fair reply and directs jury to consider evidence); Breedlove, 413 So. 2d at 8 (noting "[w]ide latitude is permitted in arguing to a jury.... counsel is allowed to advance all legitimate arguments."); Spencer, 133 So. 2d at 731 (noting "[l]ogical inferences from the evidence are permissible")

If the gun characterization was improper, it does undermine confidence in the verdict. Murray, 443 So. 2d at 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial"). The evidence is overwhelming; Philmore confessed his involvement (T.17 - 1424-54). The Court should find the reference harmless and affirm. See, Muhammad v. State, 782 So. 2d 343, 360-61 (Fla. 2001) (finding reference to suppressed evidence harmless as it did not contribute to verdict).

4. Comments characterized as personalizing the prosecution.

Philmore alleges "[t]he prosecutor attempted to personalize

the prosecution as a joint effort between law enforcement and the community....” (IB 76). He references five phrases[5] then later cites Ruiz v. State, 743 So. 2d 1, 6-7 (Fla. 1999) for support. Ruiz, does not further Philmore’s argument as it involves multiple incidents where the prosecutor: (1) attempted to bolster her case by asking “[w]hat interest do we as representatives of the citizens of this county have in convicting somebody other than the person” (2) “compared the defendant to Pinocchio”; and (3) “urged the jurors to do their duty as citizens just as her own father had done his duty for his country in Operation Desert Storm.” Id. at 5-7. The instant case is easily distinguishable. When each phrase is analyzed in context, it is clear each comments upon the evidence, draws reasonable inferences therefrom, or is a conversational manner of communicating. No fundamental error has been shown.

In the defense closing, counsel noted there was a high speed chase which ended when the Lexus Spann and Philmore were driving blew a tire. Describing the confessions following the arrest, counsel acknowledged Philmore had an attorney when he gave his initial version of events from which he omitted his involvement. Counsel attempted to use Philmore’s confession, grand jury testimony, and assistance in locating the victim’s body to his advantage. Philmore’s alleged remorse at Ms. Perron’s death was

[5]Philmore cites to page 1569, however, there is no corresponding challenged phrase. As such, the State is unable to address the argument as it relates to page 1569.

stressed. Counsel asserted there was no premeditation shown and argued the murder did not occur during "the commission of any particular crime, carjacking, robbery, kidnapping", therefore it was not felony murder (T.18 - 1542-49).

The first challenged phrase is "luckily for us." (T.18 - 1556). In context, it is clear the State was referring to how Philmore and Spann came to be arrested. Such was supported by the evidence. Officer Thomas ("Thomas"), a West Palm Beach officer, working an unrelated undercover community policing operation with 15 to 20 other officers, knew Spann and was aware there was an outstanding warrant for his arrest. From his position on Douglas Avenue and 4th Street, Thomas caught a glimpse of Spann driving the Lexus and alerted other officers who gave chase (T.15 - 1093-99). Had Thomas not been working that location, Philmore would not have been apprehended when he was, because, as the record reflects, he was leaving for New York (T.17 - 1425). When read in context, the phrase does not align the State with the community, it merely shows the happenstance of Philmore's capture. Spencer, 133 So. 2d at 731 (noting "[l]ogical inferences from the evidence are permissible").

Philmore contends the phrase "we determined" personalized the prosecution (IB 76). Discussing the confessions, the State noted:

> And then over a course of a period of time, the Defendant gives statements. And one of the things they keep talking about is, "He told what happened." He ultimately told everything that happened. But you see, he told what happened when we determined, "Hey,

> we've got ... her blood on a shirt" ... Anthony Spann's car ... somebody in the bank who can positively identify [Philmore].

(T.18 - 1557). Without question, this is fair reply to the defense argument to credit Philmore for confessing (T.18 - 1543-46) as the reasonable inference was that Philmore confessed to only that which he believed the police had discovered. The argument was proper. Barwick, 660 So. 2d at 694 (finding argument proper if fair reply to defense and based upon evidence).

Also challenged are the State's assertions that "we know he's lying to us" and "we can accept it ... when an accident occurs." (T.18 - 1572-73, 1577). The use of the word "we" does not personalize the prosecution nor is it an impermissible manner of addressing the jury. As recognized in State v. Lewis, 543 So. 2d 760 (Fla. 2d DCA 1989), the use of phrases prefaced with "we" do not equate to injection of personal beliefs or misconduct.

> … In delivering his closing argument, the prosecutor adopted a conversational tone for reviewing the evidence ... by saying "we saw" and "we heard" various evidence. In light of this style, we think it would be obvious to any reasonable juror that the prosecutor's statement that "we know through other testimony the story is a lie" was merely the state's interpretation of the evidence presented at trial. Given the context of the statement, we find no error on this point.

Lewis, 543 So.2d 768. The State's argument here was appropriate.

Usage of the phrase "your State Attorney" does not personalize the prosecution as suggested by Philmore (IB 76). The case was

tried by the State Attorney, Bruce Colton, and his assistant, Thomas Bakkedahl. Concluding his closing remarks, Mr. Bakkedahl stated: "Again, on behalf of your State Attorney and myself, I want to thank you for your attention throughout these proceedings." (T.18 - 1579). No objection was raised and the use of the word "your" was superfluous at worst, but clearly harmless. It cannot be said that making an accurate and obvious reference to the elected State Attorney trying the case is improper or eviscerates confidence in the verdict. Murray, 443 So. 2d 955, 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial" before reversal is required). This Court must affirm.

Point V

1. When a death sentence is appropriate

Philmore alleges the voir dire of Ms. Colosky[6] regarding sentencing was improper and made the subsequent recommendation unreliable (IB 78-79). The State disagrees. During voir dire, the following exchange took place:

> MR. BAKKEDAHL: And then you're going to weigh 'em on your own. We don't tell you how to weigh them. You have to give them as much or as little weight as you choose. But if at the conclusion of that deliberative process you determine that the aggravating circumstances outweigh the mitigating circumstances, then legally the law says your recommendations should be one for death. Are you with me?

[6]Ms. Colosky did not sit on the jury (R.4 - 613).

MS. COLOSKY: Yes.

MR. BAKKEDAHL: Okay. however, if during the process you weigh the circumstances and the mitigating circumstances, one of the jurors had indicated the mental aspect, outweigh any aggravating circumstances, then the law says your finding must be for life. Can you do that?

(T.12 - 626-27). No objection was raised. As support for his request for a new penalty phase, Philmore points to Henyard v. State, 689 So. 2d 239 (Fla. 1996). A review of Henyard shows that it supports the State's position that no error occurred, however, if the Court considers the comment improper, such was harmless.

Three times in voir dire, the Henyard prosecutor instructed the jurors that "[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death." Id. at 249 (emphasis supplied). Here, the State did not tell the venire that the vote "must" be for death. Rather, it reasoned the recommendation should be for death, but that the advisory sentence "must be for life" if the mitigators "outweigh any aggravating circumstances." (T.12 - 626-27). The venire was not told that any particular recommendation was required. The record establishes that the voir dire exchange with Ms. Colosky was not improper.

However, should this Court find that the State's wording was incorrect, any error was harmless. As noted in Henyard, circumstances such as the number of times the State offered an incorrect instruction and whether the trial court's subsequent

instructions were proper. Philmore points to only one allegedly improper voir dire comment. The record reflects the jury received proper penalty phase instructions as evidenced by the following:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court, and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> ...
>
> Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances upon which I instruct you. 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.

(T.27 - 2560-65). Clearly, these were proper instructions. Under Henyard, Philmore is not entitled to relief.

2. Allegation that State denigrated defense expert.

Philmore identifies one question from the State's cross-examination of Dr. Berland and labels it "opinionated, sarcastic, and rude", then notes "[t]here were others." (IB 79-80). The State will address the one phrase identified, but is unable to decipher what Philmore finds objectionable on the 12 pages he lists, but does not point to a particular phrase. Such pleading should be

found to be an incomplete appellate argument. In Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990), the Court rejected an attempt to raise a claim without briefing the issue.

> Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Id. at 851-52. The Court must reject Philmore's attempt to gain review of transcript pages without citing to specific portion of those pages or analyzing how they amount to fundamental error[7].

Turning to the un-objected to question identified by Philmore, this Court will find, when viewed in context, it was not denigrating. The State examined Dr. Berland as follows:

> Q. All right. And, there is no definitive connection between brain damage and criminal behavior; isn't that true?
>
> A. that's correct.
>
> Q. So that, if we were to assume, even for the sake of argument, that is the existence of some brain damage, either based on your review of the WAIS or on the PET scan, it doesn't mean anything as to how this Defendant was engaged or how he engaged in this crime on November 14, 1997?
>
> A. It's not quite that simple.

[7]If the Court is able to identify those portions Philmore finds objectionable, the State requests an opportunity to show that there was no misconduct committed below.

> Q. Okay. Well, we know that that's not the left angular gyrus. It's not the murder center of the brain. We know it's not the kidnapping center of the brain. We know it doesn't relate to impulse control. What we know is that that's apart (sic) of the brain that deals with languages, correct?

(T.24 - 2255-56). Philmore offers no case to support his conclusion that the question was improper. In fact, such inquiry is relevant to the existence of a claimed mitigator and the credibility of the expert championing such evidence. Bryant v. State, 785 So. 2d 422 (Fla. 2001) (upholding judge's rejection of mental health expert's opinion as defendant's own actions during crimes belied expert's testimony); Rutherford v. State, 727 So. 2d 216 (Fla. 1998) (rejecting expert opinion because no evidence was presented to explicitly connect mental condition to actions on night of murder); Walls v. State, 641 So. 2d 381 (Fla. 1994) (recognizing expert's credibility increases when supported by facts of case and diminishes when contradicted by same).

Clearly, the State attempted to establish that a brain injury does not result automatically in criminal behavior. In particular, an injury to that section of Philmore's brain did not cause him to act criminally or to have impulse control problems. There is nothing inherently derogatory in the instant question. It did not attack the doctor personally, imply prejudice without support, or insert irrelevant issues. See, Rose, 787 So. 2d at 797 (rejecting claim State denigrated mental health expert; questioning fell

within "broad range of permissible cross-examination"); Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992) (concluding argument proper as it was offered "to negate the psychologist's conclusion that the statutory mental mitigators applied"). Compare, Little Bridge Marina, Inc. v. Jones Boat Yard, Inc., 673 So. 2d 77, 79 (Fla. 3d DCA 1996) (finding error to allow attorney to use witness' past career as criminal defense lawyer as impeachment); Simmons v. Baptist Hosp. of Miami, Inc., 454 So. 2d 681 (Fla. 3d DCA 1984) (finding error where defense implied plaintiff's essential medical witnesses was disgruntled racist who blamed failure on foreigners); O'Neil v. Gilbert, 625 So. 2d 982 (Fla. 3d DCA 1993) (concluding admission of impeachment concerning immigration status of primary defense witness mandated reversal). The State's question was directed to the evidence and Philmore's mitigation. It did not so undermine the unanimous recommendation to require a new sentencing. Murray, 443 So. 2d at 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial" before reversing).

3. State's expert's reference to reviewing polygraph exam.

Appellant contends it was improper for the State's expert to note he reviewed polygraph examinations (IB 80). No objection was raised to the sole reference to the polygraph in the penalty phase (T.25 - 2289). Pre-trial the polygraph results were suppressed (R.5 - 566, 953-954). Dr. Landrum explained he reviewed:

> A. There's quite a bit of material. I reviewed his educational records ... several

> videotapes of his taped statements of polygraph examinations. There were two of those. Videotape ... of a jewelry store robbery, the deposition of Dr. Berland, review of his test protocols ... notes and work product of the lay witnesses ... a deposition of Dr. Maher.... Arrest affidavit, incident reports, Mr. Philmore's statements.

(T.25 - 2289-90). The polygraph results were not revealed.

Philmore cites Kaminski v. State, 63 So. 2d 339 (Fla. 1952); Codie v. State, 313 So. 2d 754 (Fla. 1975); Davis v. State, 520 So. 2d 572 (Fla. 1988). None involves capital murder, but each deals with the admission of polygraph results during the guilt phase of trial. That is not the situation faced here, therefore, these cases are distinguishable. Not only were the polygraph results not discussed, but the reference to the examination occurred during the penalty phase of the trial. The State did not violate the order suppressing polygraph results. However, should the Court conclude otherwise, the mere mention of the exam did not harm Philmore; it did not vitiate confidence in the sentence recommendation.

As noted in Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987), "[a}lthough polygraph evidence is inadmissible [c.o] the mere mention of a polygraph examination is not necessarily reversible error." As noted above, the jury never learned of the polygraph results and Philmore's veracity regarding the crime was not at issue. In rendering a guilty verdict, the jury implicitly determined that Philmore's initial police accounts were untruthful, but in the end, Philmore gave a full and accurate accounting of his

participation in the instant crimes. Whether Philmore was administered a polygraph examination had no bearing on the penalty phase. Moreover, Dr. Landrum merely mentioned he looked at the exam as part of his case review; he did not express any conclusions arising directly and exclusively from the polygraph. From the totality of the circumstances, no fundamental error occurred.

4. State's argument related to its mental health experts.

Philmore challenges the State's comments related to its mental health experts (IB 80-81). He combines two comments[8] making it sound as though they form one argument, but they actually occurred at different times. When viewed in context, these comments are neither improper nor undermine confidence in the proceedings.

In questioning Dr. Mayberg, the State inquired of the fee she would receive and her basis for testifying. The doctor explained she did not testify often, therefore, she had neglected to ask about a fee, but assumed she would be paid. She added she was testifying because she had devoted her life to the Pet-scan science and was shocked to see the technology used as it was here; in her opinion the scan was not reliable enough to diagnose depression. In closing, the prosecutor stated "Doctor, on behalf of the people of the State of Florida, we thank you." (T.26 - 2456-58).

Clearly, the prosecutor was merely thanking the witness for

[8]Philmore cites three pages (2458, 2510, 2513), but, the quoted sections appear on pages 2458 and 2413. Apparently the citation to page 2510 is in error and will not be addressed here.

making the trip from Canada to testify. Common courtesy dictates thanking the witness for her time. If this Court finds that such appreciation here was overly deferential, it certainly does not vitiate the resulting sentence. Murray, 443 So. 2d at 956 (holding unpreserved prosecutorial error must be "so prejudicial as to vitiate the entire trial" before reversal is required). Clearly, the jury knew the State, which represents its citizens, was prosecuting the case against Philmore. This one comment could not undermine confidence in the entire proceeding. Williams v. State, 444, So. 2d 597, 498 (Fla. 4th DCA) (reasoning "that the trial court should not have stated to a prosecution witness upon completion of her testimony, 'Thank you, Miss Smith. Good luck to you'", but finding a mistrial not warranted), cert. denied, 451 So. 2d 851 (Fla. 1984). Here, it was merely the prosecutor, not the judge. Thus, any error would have been even less harmful.

In its penalty phase closing, the State discussed the reasons for disregarding the testimony of the defense experts and the basis for accepting the State's experts. The State pointed out how Drs. Berland and Wood ignored some evidence showing aggravation, twisted other factors to make them appear mitigating, and administered a test which was racially biased against black males and tended to produce lower scores (T.27 - 2509-13). The State offered:

> But, I think that after Dr. Mayberg testified this morning, and you heard what her findings were, and she is a person who is highly qualified to do the job that she does,

> and she had no interest other than an interest in making sure that the science that she practices is properly represented to the public.

(T.27 - 2413). Following this, the trial judge called the parties aside and addressed the State. "But I think (sic) out of your closing please, I don't want you to give any inference to the jury with regards to the witness's testimony." (T.27 - 2413-14). The judge did not make of finding that the comments were improper, only that the State should not give the jury a wrong impression. The State amended its argument and presented the following:

> So, as I was saying, from Dr. Mayberg's testimony, you can conclude that Dr. Wood's theories, his way of arriving at his conclusions, and what he presented to you in the courtroom was not valid, and not worthy of belief. You make these decisions based on the evidence. You heard it all. You saw it all.

(T.27 - 2514). The court's direction averted any improper argument and that which was already said did not vitiate the sentencing. "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." Bertolotti, 476 So. 2d at 133.

The State's argument was appropriate; it addressed the credibility and motivation for the testimonies. Such are proper closing argument topics. Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997) (recognizing argument addressed to contradicted testimony and credibility of witness proper); Gorby v. State, 630

So. 2d 544, 547 (Fla. 1993) (finding it proper for state to draw attention to expert's experience/qualifications after defense attempted to cast doubt on testimony). Philmore's cites State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991) (finding improper argument "And Susan testified, I believe she testified totally truthfully to you."); Pacifico v. State, 642 So. 2d 1178, 1183-84 (Fla. 1st DCA 1994) (noting prosecutor, among other instances of misconduct, expressed belief in defendant's guilt and invited jury to convict because defendant lied); and Sinclair v. State, 717 So. 2d 99 (Fla. 4th DCA 1998) (arguing officer should be believed merely because he was officer). Each are distinguishable as the improper statements there are much different than the one at issue here. The State directed the jury's attention to the evidence, Dr. Mayberg's qualifications, and motivation for testifying.

However, if the Court finds the comments improper, such were harmless as reasoned in Walker v. State, 707 So. 2d 300 (Fla. 1997)

> This Court has held that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding.... The prosecutor's remarks in this case impugning the defense and later urging the jury to imagine the victim's pain and suffering were improper under Florida caselaw.... **However, the prosecutor's comments concerning defense counsel came only at the end of a legitimate argument questioning the credibility of the experts' opinions and their use of mental health data, and the prosecutor heeded the trial court's admonition to "clear it up."** Likewise, we

> recognize that argument to the jury that they "imagine" the suffering of the victims reflects a poor choice of words by the prosecutor in his effort to emphasize the painful ordeal ... endured in this case. Consequently, we find that these discrete instances of misconduct are harmless beyond a reasonable doubt and do not warrant a new sentencing trial.

Walker, 707 So. 2d at 315-16 (emphasis supplied).

As evident from the foregoing, Philmore's alleged instances of misconduct, individually are not prosecutorial misconduct, hence, together they do not constitute fundamental error. The trial was not permeated with inappropriate actions or overreaching as were found in Ruiz, 743 So. 2d at 8-9; Garcia v. State, 622 So. 2d 1325 (Fla. 1993) and Nowitzke v. State, 572 1346, 1356 (Fla. 1990). Here, each argument was addressed to the evidence or reasonable inferences from such evidence. As analyzed above, the Court should find the State's actions were proper or at a minimum, harmless. Walker, 707 So. 2d at 315-16 (reasoning penalty phase misconduct was not so "egregious" to require a new sentencing) Bertolotti, 476 So. 2d at 133(same). This Court should affirm.

POINT VI

> THE TRIAL COURT PROPERLY REQUIRED PHILMORE TO UNDERGO A MENTAL HEALTH EXAMINATION BY A STATE EXPERT DUE TO PHILMORE'S CLEAR INTENT TO RELY UPON MENTAL HEALTH MITIGATORS (restated).

Philmore contends Florida Rule of Criminal Procedure 3.202 unconstitutionally compels him to submit to a mental health evaluation by the State's expert in violation of the United States

Constitution and Florida Constitution (IB 83, 85). He claims such compulsion requires a defendant "to either forego his right to present mitigating evidence or forego his constitutional right not to be a witness against himself." Philmore asks this Court to conclude that his "self-incriminating statements" made to the State's expert should have been excluded and not utilized as a basis for rejecting a statutory mitigator (IB 85). The State disagrees and submits the matter is not preserved. However, if preserved, the rule is constitutional and no error was committed.

Constitutional challenges to a statute are reviewed de novo. Dep't of Ins. v. Keys Title & Abstract Co., 741 So. 2d 599, 601 (Fla. 1st DCA 1999), review denied, 710 So. 2d 158 (Fla. 2000) (stating decision on statute's constitutionality is reviewed de novo); United States v. Head, 178 F.3d 1205, 1206 (11th Cir. 1999), cert. denied, 528 U.S. 1094 (2000) (noting court's interpretation of sentencing guidelines and statutes are reviewed de novo).

The admissibility of evidence is within the sound discretion of the trial court, and its ruling will not be reversed unless there has been a clear abuse of discretion. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25; Jent, 408 So. 2d at 1039. Under this standard, the appellate court pays substantial deference to the trial court's ruling and will uphold such "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable

man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203. See, Trease, 768 So. 2d at 1053, n. 2.

Pre-trial, the defense filed a motion challenging the constitutionality of rule 3.202 on the grounds that it (1) created a "one-sided rule of discovery" and (2) improperly compelled a mental health evaluation. The State cited Elledge v. State, 706 So. 2d 1340 (Fla. 1997) and Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994), cert. denied, 514 U.S. 1022 (1995). Orally, the judge denied the motion without prejudice for the defense to re-raise the matter after the guilt phase (R.3 - 400-04, 604; T.8 - 122-24).

On October 8, 1999, Philmore filed a Notice of Intent to Present Expert Testimony of Mental Mitigation (R.4 - 532-33). The constitutionality of Rule 3.202 was not re-raised following the guilty verdict, in fact, following the verdict, the defense announced that at least one expert would evaluate Philmore. With this declaration, the State sought leave for its expert, Dr. Landrum, to evaluate Philmore. Such sounded "reasonable" to defense counsel who did not object when the Court ordered Philmore to be examined (R.4 - 636-37; T.18 - 1642-44, 1717; T.25 - 2291).

The constitutionality of Rule 3.202 as it relates to compelling submission to an exam by a State expert has not been preserved. Below, Philmore challenged Rule 3.202 on the grounds it

did not afford reciprocal discovery[9] and that he should not be compelled to submit to an exam nor precluded from putting on mental mitigating factors should he refuse the exam. Dispositive however, is the fact that even though the motion was denied, it was denied without prejudice to be re-raised after the guilt phase (R.3 - 400-04; R.4 - 604; T.8 - 124; T.18 - 1644). Philmore never renewed the challenge as it relates to compelled exams, thus, it is unpreserved. "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." Steinhorst, 412 So. 2d at 338 (citations omitted). "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Id. Where there has been no ruling by the judge, the appellate court will have nothing to review, and nothing upon which to find error. Archer v. State, 673 So. 2d 17, 21 (Fla. 1996) (rejecting issue where judge did not rule). Having failed to renew the matter below, Philmore has waived the constitutionality of Rule 3.202.

Similarly, whether the judge erred in relying upon Philmore's

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[9]While Philmore filed his Notice of Intent to Present Expert Testimony of Mental Mitigation, he has abandoned this claim by making no argument addressed to the constitutionality of the rule based upon reciprocal discovery. See, Kearse v. State, 770 So. 2d 1119 (2000) (finding rule does not impose one-sided discovery obligations in violation of due process clause because another rule provides for reciprocal discovery imposing obligations on both parties), cert denied, 121 S. Ct. 1411 (2001).

statements to the State's mental health expert as a basis for rejection of a mitigator is not preserved. At no time did Philmore object to the trial court's reliance upon such evidence, nor did he object to the admission of such testimony during the penalty phase (T.25 - 2309-10). This matter is unpreserved. Steinhorst, 412 So. 2d at 338 (opining "appellate court will not consider an issue unless it was presented to the lower court"). The Court should decline to reach the merits, but, should it address the matter, it will find rule 3.202 constitutional and no abuse of discretion occurred when the contents of Philmore's interview was utilized.

At trial, the defense sought the statutory mental health mitigators of: (1) defendant was under the influence of extreme mental or emotional disturbance; and (2) capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (T.21 - 1833-34; T.23 - 2137-41). Rule 3.202 provides that in a capital case when the defense intends to present testimony from an mental health expert who has tested, evaluated, or examined the defendant in order to establish mental mitigation, written notice must be given. Once such notice has been given and upon a guilty verdict on first-degree murder, the judge shall order the defendant to submit to an exam by a state expert limited to those mitigators the defense intends to establish. Should the defendant refuse to cooperate with the State's expert, the court may order all of the defense

expert's reports, tests, and evaluations disclosed or may prohibit the expert from testifying concerning his evaluation.

Prior to the creation of Rule 3.202, in Dillbeck, 643 So. 2d 1030-31 the Court discussed the need to "level the playing field" where expert mental health testimony was offered in mitigation. Based upon the ruling in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved", this Court concluded that it was necessary for the State to have the same opportunity to examine a defendant claiming mental health mitigation in a capital case. Dillbeck, 643 So. 2d at 1030-31. The Court opined. "No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved." Dillbeck, 643 So. 2d at 1030. The Court then asked that the Criminal Rules Committee of the Florida Bar to develop a rule similar to the one proposed in Hickson v. State, 630 So. 2d 172 (Fla. 1993) which requires a defendant to undergo an exam by a State expert where the defendant seeks to present a mental health expert who has interviewed the defendant. Dillbeck, 643 So. 2d at 1031. This directive produced Rule 3.202. See, Amendments to Florida Rule of Criminal Procedure 3.220 - Discovery (3.202 - Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So. 2d 83 (Fla. 1995).

Citing to Estelle v. Smith, 451 U.S. 454 (1981), Philmore asserts Rule 3.202 is unconstitutional because it forced him to give up his right against self-incrimination in order to present mental mitigation (IB 85). While Philmore correctly notes that the constitutional protection against self incrimination extends to penalty phases, the unique circumstances of Smith do not dictate reversal. Instead, Buchanan v. Kentucky, 483 U.S. 402 (1987); Kearse v. State, 770 So. 2d 1119, 1125-26 (Fla. 2000); Davis v. State, 698 So. 2d 1182, 1191 (Fla. 1997); and Elledge, 706 So. 2d at 1345-46 confirm that compelled psychiatric exams do not violate the Fifth Amendment when the defendant puts his condition at issue.

In Buchanan, the United State Supreme Court was faced with a defendant who had asserted an insanity defense and claimed a Fifth Amendment violation arose from the compelled State psychiatric exam. In resolving the question of whether a compelled psychiatric evaluation violates the Fifth Amendment, the Supreme Court discussed its holding in Smith reasoning:

> In *Estelle v. Smith* ... we were faced with a situation where a Texas prosecutor had called as his only witness at a capital-sentencing hearing a psychiatrist, who described defendant Smith's severe sociopathic condition and who expressed his opinion that it could not be remedied by treatment.... The psychiatrist was able to give this testimony because he had examined Smith at the request of the trial judge, who had not notified defense counsel about the scope ... or ... the existence of the examination.... Moreover, Smith's counsel neither had placed at issue Smith's competency to stand trial nor had

> offered an insanity defense....
>
> ...
>
> ... We thus acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense:
>
> > "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case....
>
> ... if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution....

Buchanan, 483 U.S. at 421-25 (citations omitted). The State's need to rebut mitigation evidence recognized in Dillbeck, 643 So. 2d at 1030-31 and the fact that a compelled mental health evaluation for this purpose was not a Fifth Amendment violation was confirmed in Davis v. State, 698 So. 2d at 1191. See, Kearse, 770 So. 2d 1125-26 (holding rule 3.202 does not violate "proscription against compelled self-incrimination"); Elledge, 706 So. 2d at 1345-46 (finding rule kept State from being unduly prejudiced; information discovered through defendant's evaluation may be used by state).

Citing Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, Philmore claims the State may not limit the introduction of

evidence which may mitigate his sentence (IB 84). He also asserts it was error to utilize his admissions (IB 85). However, rule 3.202 in no way restricts a defendant from presenting mitigation so long as he affords the State the same opportunity to investigate and test the mental mitigation claimed by the defense. Buchanan, 483 U.S. at 421-25 (finding no Fifth Amendment privilege where defendant put psychiatric status at issue). Philmore raised mental mitigation as a means of reducing his sentence, thus, the State is authorized to gather and present evidence to rebut the claim.

While Philmore was required to choose between presenting mental mitigators and submitting to a State exam, such did not prove a constitutional violation.

> The criminal process ... is replete with situations requiring 'the making of difficult judgments' as to which course to follow. [c.o.] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

McGautha v. California, 402 U.S. 183, 213 (1971). Were the Court to permit a defense expert to testify about conversations he had with Philmore without affording the State the same opportunity, it would in effect permit Philmore to testify without being subject to cross-examination. In Dillbeck, this Court quoted State v. Hickson, 630 So. 2d 172 (Fla. 1993):

> If a defendant decides that she wants to rely on her expert's relating the battered-spouse syndrome to the facts of her

> case ... she waives her right to refuse to submit to an examination by the state's expert. A defendant who takes the stand waives the privilege against compelled self-incrimination. If a defendant were able to rely on her statements being presented to a trier of fact through an expert's testimony, she would, in effect, be able to testify without taking the stand and subjecting herself to the state's questions. Allowing the state's expert to examine a defendant will keep the state from being unduly prejudiced because a defendant will not be able to rely on expert testimony that the state has no effective means of rebutting.
>
> *Hickson*, 630 So. 2d at 176.

Dillbeck, 643 So. 2d at 1030. Clearly, there is no violation of Philmore's Fifth Amendment right. See, Davis, 698 So. 2d at 1191 (rejecting claim rule 3.202 violates Fifth Amendment).

Likewise, the trial court should not be precluded from relying upon the testimony of the State's expert relating conversations he had with Philmore. There was no abuse of discretion in the judge's use of Philmore's admissions regarding co-defendant Spann in order to reject the mitigator of murder committed while under the substantial domination of Spann. See Elledge, 706 So. 2d at 1346 (finding no error in State's expert rebutting mitigation with "information available to him from his evaluation" of defendant including clinical interview). There had been no objection to the admission of such evidence, therefore, it was in evidence and could be used against Philmore. This Court should find there was no abuse of discretion and affirm Philmore's sentence.

POINTS VII AND VIII

THE FINDING OF THE "COLD, CALCULATED, AND PREMEDITATED" AND "AVOIDING OR PREVENTING LAWFUL ARREST" AGGRAVATORS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE (restated).

It is Philmore's contention that the record does not support a finding of the CCP (Point VII) and avoid arrest (Point VIII) aggravating factors. He claims his police statement was insufficient to prove these aggravators, and that his alleged mental infirmity precluded him from carefully planning the murder (IB 86-87, 89-90). Instead, he asserts that it was co-defendant, Anthony Spann ("Spann"), who had conceived the "well planned robbery/kidnapping" of Kazue Perron which led to an "unplanned murder" by Philmore (IB 87) and that he was acting under Spann's dominion and direction (IB 90). This Court's review of the record will reveal that the CCP and avoid arrest aggravators are supported by substantial, competent evidence. While Spann conceived the criminal plan, he and Philmore together discussed robbing a bank, laid out the carjacking of a vehicle driven by a woman, and resolved to kill the victim in order to give them time to escape with the vehicle and evade identification. Further, the crimes were completed by Philmore. As Spann watched from another vehicle, Philmore kidnapped Mrs. Perron, drove her to a remote, isolated location where he fired one shot into her forehead, and then dumped her body into the canal. The sentence should be affirmed.

Whether an aggravating circumstance exists is a factual

finding analyzed under the competent, substantial evidence standard of review. In reviewing challenges to the finding of an aggravator in a capital murder case, this Court must determine whether there is substantial, competent record evidence to support the aggravator found to exist. See, Hildwin v. State, 727 So. 2d 193, 196 (Fla. 1998), cert. denied, 528 U.S. 856 (1999); Gordon v. State, 704 So. 2d 107 (Fla. 1997); Larzelere v. State, 676 So. 2d 394 (Fla. 1996). It "is not [the Florida Supreme] Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Alston v. State, 723 So. 2d 148, 160 (Fla. 1998) (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997)).

Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when that ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower court's findings will be affirmed. When it comes to facts, trial courts have an institutional advantage; they can observe witnesses, hear their testimony, and see/touch the evidence. Guzman v. State, 721 So. 2d

1155, 1159 (Fla. 1998) (recognizing judge, sitting as fact finder, has superior vantage point).

Point VII - Cold, Calculated, and Premeditated

Recently, in Farina v. State, 26 Fla. L. Weekly S527 (Fla. Aug. 16, 2001), this Court affirmed what is necessary to prove that a murder was committed in a cold, calculated, and premeditated manner. This Court opined:

> In order to establish the CCP aggravator, the evidence must show
>
> > that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted); *accord Walls v. State*, 641 So. 2d 381 (Fla. 1994). While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." *Walls*, 641 So. 2d at 388. The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992). However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Farina, 26 Fla. L. Weekly at S529. "[T]he State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill." Bell v. State, 699 So. 2d 674, 677 (Fla. 1997).

In its sentencing order, the trial court stated:

> The evidence shows a carefully planned and prearranged killing. The defendant stated to law enforcement that the day of the murder the codefendant and he discussed killing the person so they could not be identified and they would have enough time to get away with the car. In furtherance of this plan, the evidence shows that after following one vehicle without success, the two then spotted the victim's gold Lexus and followed it to a residence. In furtherance of the plan the defendant entered the vehicle at gun point and drove the victim to a remote area. The defendant then told the victim to go by the side of the canal, where he shot her execution style in the middle of her forehead. It is clear from the evidence that the defendant and his codefendant discussed killing the victim before the murder and they transported the victim to an isolated area to carry out their plan. The killing was a product of calm and cool reflection based on their plan to abduct and murder another human being. This prearranged plan continued while they hunted for a victim.
>
> Clearly there was no pretense of moral or legal justification for this killing. The cold, calculated, and premeditated nature of it was shown by the general plan of the defendant and his codefendant. The premeditation in this case is far greater than is necessary for a conviction for, the crime of First Degree Murder and is of the heightened nature required for the establishment of the aggravator. This aggravating circumstance was proved beyond a reasonable doubt.

(R17. - 1227-28) (footnote omitted). The findings are supported by Philmore's November 26, 1997 videotaped confession (T.17 -1421-69).

In that confession, Philmore admitted that on November 13, 1997, the day before the murder Spann, "brought up the idea about robbin' a bank." When Philmore awakened the next day, Spann asked if he were ready to carry out the robbery and that they needed to obtain a car for the robbery and their trip to New York. According to Philmore, Spann admitted that on several occasions he took cars belonging to someone else "and did away with the people who was drivin'." Philmore confessed that he was going along with Spann's idea to get a car and that they initially looked around the Palm Beach Mall parking area, but finding no car to their satisfaction, they moved north where they targeted a woman and followed her to the Northlake Shopping Plaza. However, by the time they reached the woman, she was too far away from her car for them to complete the abduction. According to Philmore, the plan was to catch a woman getting out of her car and push her back. During this search, Spann and Philmore carried a .38 calabur weapon and a .40 calabur Glock. Philmore claimed that at this point he did not know how they would get rid of the woman. (T.17 - 1424-30, 1441).

Having failed to find a victim, Spann and Philmore drive back to 45th Street and Community Drive (West Palm Beach) where they see a woman driving a gold Lexus. Then, upon observing the woman, Spann brought up the subject of the victim's death, discussing

that she would have to be killed so she could not get to the police and the perpetrators would have time to get to New York. Philmore claimed he asked why they had to kill the victim, and that Spann just said do it and trust him. (T.17 - 1430-35).

When Ms. Perron parked, Philmore, approached, pulled his gun, and ordered her to the passenger seat. He entered her car and drove away with Spann following. As Philmore drove, Ms. Perron told him she was scared and commented on his driving, suggesting he put on his seatbelt. She cried as she told him she had been carjacked before and had just buried her mother (T.17 - 1435-38).

During the drive, Spann signaled for Philmore to stop and told him to take the victim to the bank at which point, Ms. Perron offered the $40 dollars she had with her. When she asked if they were going to kill her, Philmore told her no, but they were going to take her to a remote location so she could not call the police. Ms. Perron continuously told Philmore she was scared, but remained in the car the entire way to Indiantown (T.17 - 1438-40).

Philmore confessed he knew what had to be done; as he drove out to Indiantown, he knew he would have to kill Ms. Perron. When Spann flashed his lights, Philmore drove into a "little cut", a dirt road where the killing would be done. When they stopped, Ms. Perron exited the car and Philmore, with the .38 calabur weapon in hand, directed her to walk toward the cane. Upon seeing the gun which was visible from the time he got out of the car, Ms. Perron

began having "a fit"; she started to back away and that is when Philmore walked around the back of the car and shot her. Ms. Perron fell where she was shot and did not move again. Philmore got blood on his shirt and in the car from throwing Ms. Perron's body into the canal. Spann never indicated that he had wanted to do the killing; he just said it had to be done. According to Philmore, "Stupid old me did it. I guess [Spann] wanted to be part of it too, wanted to shoot his gun too." Following the murder, the co-defendants robbed a bank (T.17 - 1440, 1443-54, 1462-64).

Clearly, the above confession supports the finding of the CCP aggravator. Discussed before the murder was the need to kill the victim of the carjacked vehicle required for a planned bank robbery and trip to New York. Toward this goal, Philmore armed himself with a .38 calabur weapon, searched for a female victim, accosted her at gun point, drove her to a remote location, shot her once in the forehead, and disposed of her body in a canal (T.17 - 1424-26, 1428-30, 1433-41, 1443-48, 1462-64; T.20 - 1790-91). Without question, Philmore had no moral or legal justification for this killing. Instead, it was done to obtain a car and give the perpetrators time for a subsequent robbery and escape to New York.

This Court has affirmed cases where the defendant has procured a weapon in advance, lacked provocation to kill, murdered the victim in a remote, isolated location as a matter of course, and stole the victim's belongings. See, Nelson, 748 So. 2d at 244

(affirming CCP where defendant discussed need to kill victim, lured him to remote site, where victim was killed to avoid detection and to get car for a trip); Cave, 727 So. 2d at 229 (finding CCP where Cave was involved in plan to select store to rob, led victim from store at gun point, held her in car during long ride to remote location, where she was killed by accomplices); Brown, 721 So. 2d at 280 (finding CCP where co-defendant suggested he and Brown find car and kill owner, selected quieter method of killing victim than gun, had co-defendant corner victim so Brown could kill); Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992) (finding CCP based on defendant confessing to wanting to rob victim steal his car to have money and transportation to Louisiana, that defendant selected victim, prepared for trip, then returned to rob and kill); Koon v. State, 513 So. 2d 1253, 1257 (Fla. 1987) (deciding prior procurement of weapon, luring victim from home - deep into wilderness on deserted road, and firing single bullet into his head supported CCP).

Citing Valdez v. State, 626 So. 2d 1316 (Fla. 1993), Philmore asserts this was a "well planned robbery/kidnapping" by Spann which "resulted in an unplanned murder" by Philmore. Clearly, the instant crime is distinguishable from Valdez in which the testimony was that Vladez admitted "they" had planned the murder, but that the "they" referred to someone other than Valdez. Id. at 1323. Here, Philmore and Spann discussed the plan to select a female for

the carjacking and the need to kill her to afford them time to get to New York. Philmore did the actual carjacking, kidnapping, and murder. Such were not the "unplanned" actions noted in Valdez.

Appellant's claim of mental mitigation and reliance upon Spencer, 645 So. 2d at 377 does not undermine the fact his actions met the standard for CCP. It must be noted that in Spencer, a case involving a domestic relationship, this Court found the mental mitigators established, however, here, the trial court rejected each statutory mental mitigator proposed. As this Court will find, that decision was supported by the record (See Points IX - XI). Thus, Spencer is distinguished easily as is Maulden v. State, 617 So. 2d 298, 302 (Fla. 1993), another domestic relationship case where mental mitigation was found. Here, Philmore did not know his victim and no statutory mental mitigation was proven (R.4 - 1228-32; T.17 - 1433-34). However, even if mental mitigation should have been found, it does not preclude a finding of CCP. Cruse v. State, 588 So. 2d 983, 992 (Fla. 1991) (concluding advanced procurement of weapon and time for reflection before killing supported CCP notwithstanding defendant acted under extreme mental/emotional disturbance). Philmore obtained the murder weapon during his robbery of a pawn shop the prior day. Moreover, as he drove his victim from one county to a remote location in another county, Philmore knew full well he would kill Ms. Perron. Philmore had time to reflect upon his plan to kill and decided to shoot even

before the co-defendant left his vehicle. The State's experts found no statutory mitigators and no basis for finding a brain injury (T.17 - 1430-40; T.20 1790-92; T.25 - 2304-05, 2311-13; T.26 - 2442-60). CCP should be affirmed even if the Court finds the statutory mental mitigators established.

Point VII - Avoid Arrest

Similarly, the trial court's finding of the avoid arrest aggravator should be affirmed. In Farina, this Court stated:

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. [] Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." [] However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
>
> In other cases, this Court has found it significant that the victims knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator ... we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.

Farina, 26 Fla. L. Weekly at S529 (citations omitted). Also, in Preston, 607 So. 2d at 409 this Court reasoned:

> ... in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. [c.o.] However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.

See, Cave v. State, 476 So. 2d 180, 188 (Fla. 1985) (agreeing avoid arrest aggravator established based upon fact victim was kidnapped from store and taken thirteen miles to rural area and killed after robbery), cert. denied, 476 U.S. 1178 (1986).

Here, Philmore's confession revealed he knew Spann previously had carjacked several vehicles and killed their owners. Also, when Spann first brought up the subject of the victim's death, the accomplices discussed that the victim would have to be killed so she could not get to the police and they would have time to get away. Philmore followed this plan when he accosted Ms. Perron, forced her back into her car at gunpoint, drove her to a remote site, and shot her once in the head almost immediately upon her exiting the vehicle. According to Philmore, he knew what had to be done (T.17 - 1426, 1434-47). The judge found:

> The evidence of the facts of the case shows that there was only one reason to kill the victim and that was to avoid detection by the police authorities, thereby avoiding arrest.
>
> The defendant's own statement is that he killed the person whose car he carjacked so he could not be identified and would have enough time to get away with the car. He further

> stated to law enforcement that once the vehicle was carjacked the victim was taken to a remote area and upon exiting the vehicle he shot the victim in the head. The evidence was unrebutted that the elimination of the victim as a witness was the sole motive for the murder. Additionally, there was no evidence whatsoever that reflected any other apparent motive for the killing. The physical evidence supported the testimony of the defendant in this regard as well. The victim's body was discovered in an isolated location and the victim was shot in the forehead which is consistent with an execution style killing. The purpose of the abduction and killing was clearly to eliminate the only witness to the carjacking. The aggravating circumstance was proved beyond a reasonable doubt.

(T.4 - 1226).

It is Philmore's position that the aggravator was not established because he was acting under the substantial domination of Spann and did not commit the murder "as a product of his own independent decision to silence the sole witness to the carjacking." (IB 90). The State disagrees that this allegation would undermine the validity of the aggravator.

Here, all of the mental mitigators were rejected and the trial judge found the facts developed "belie the defendant's claim" that the murder was committed due to the substantial domination of Spann (R.4 - 1231) (See also State's Point X). For this reason, Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) is distinguishable. In Santos, there was unrebutted evidence that the defendant was acting under extreme emotional distress. Id. Here we have substantial, competent evidence that the mental mitigators

were not proven. (State's Points IX - XI). See, Sliney v. State, 699 So. 2d 662 (Fla. 1997) (affirming avoid arrest aggravator where defendant testified accomplice told him "Sliney would have to kill the victim because '[s]omebody will find out or something'").

Moreover, we have Philmore's confession that he knew the victim had to be killed and that the sole purpose for the killing was to ensure the victim could not reach the police and the assailants could get away with the car to New York (T.17 - 1434). See, Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (finding confession in which defendant admitted victim was killed so there would be no witnesses was direct evidence supporting avoid arrest aggravator); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (holding avoid arrest aggravator proven where defendants discussed beforehand need to kill victims to avoid detection). This Court should affirm the finding of the avoid arrest aggravator.

POINTS IX, X, AND XI

THE TRIAL COURT PROPERLY EVALUATED AND REJECTED THE STATUTORY MENTAL MITIGATORS (restated).

Philmore claims that the trial court erred in not finding the statutory mitigators of (1) the defendant was under the influence of extreme mental or emotional disturbance (Point IX); (2) the defendant was acting under the substantial domination of another person (Point X); and (3) the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired

(Point XI) as defined in sections 921.141(7) (b), (d), and (e), Florida Statutes (1997) (IB 93-98). It is Philmore's position that the trial judge should not have rejected the testimony of the defense mental health experts or the defense lay witnesses (IB 93, 95, 97). The record reveals the testimony of the defense witnesses was refuted by the State's evidence including Philmore's confession and the State's mental health experts. The judge's reasons for rejecting the mitigators are supported and should be affirmed.

While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), mitigators are "established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990)(finding judge may reject mitigator if record contains competent substantial evidence supporting decision). In Campbell, this Court established relevant standards of review for mitigators: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established is a question of fact and subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigator is within the trial court's discretion and subject to the abuse of discretion standard. See, Kearse, 770 So. 2d at 1134 (observing whether mitigator exists and weight to be given it are matters within sentencing court's discretion); Trease, 768 So. 2d

at 1055 (receding in part from Campbell; holding that though judge must consider all mitigators, "little or no" weight may be assigned); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (explaining judge may reject mitigator provided record contains competent, substantial evidence to support rejection). At issue here is the propriety of the trial court's rejection of mitigation. Thus, the standard of review is the competent, substantial evidence test where an appellate court to pay overwhelming deference to the trial judge's ruling. Guzman, 721 So. 2d at 1159.

In analyzing mitigation at the trial level, the judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature." Campbell, 571 So. 2d at 419. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991); Stano v. State, 460 So. 2d 890, 894 (Fla. 1984). Resolution

of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id.

Philmore sought the statutory mitigators of: (1) extreme mental or emotional disturbance; (2) substantial domination of another; and (3) capacity to conform conduct to requirements of law diminished. The judge rejected each based upon the evidence presented. Taking each mitigator in turn, the Court will find the judge's rationale and conclusions are supported by competent, substantial evidence.

Point IX - Extreme Mental or Emotional Disturbance

Philmore asserts that through his mental health experts, their review of school records, and discussions with family members, he has established "by the greater weight of the evidence" that he was suffering from extreme mental or emotional disturbance at the time of the murder (IB 93). the State disagrees. This Court stated:

> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.... Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance.... Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case.... As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion...

Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert denied, 520

U.S. 1122 (1997); Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987) (opining "[i]n determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness."). Philmore's evidence was not uncontroverted and the ruling below is supported by the evidence.

Analyzing the extreme mental of emotional disturbance mitigator, the trial judge found:

> ... Dr. Landrum testified that the tests utilized by Dr. Berland are outdated, which was ultimately acknowledged by Dr. Berland as it relates to the MMPI. Dr. Landrum opined that there is no credible evidence to suggest that the defendant suffered from psychosis or brain damage.
>
> Both experts agreed that the defendant has a anti social personality disorder. The testimony being that the nature of the disorder is that the defendant has a disregard for the rights of others and it reflects criminal thinking and behavior.
>
> ... This Court however simply cannot from Dr. Berland's diagnosis which was strongly rebutted on cross examination and the expert's opinion that the defendant has a personality/character disorder find that on November 14, 1997, the defendant acted under the influence of extreme mental or emotional disturbance.
>
> The facts and the circumstances of the homicide indicate a coherent well thought out plan which spanned over the course of two days. The abduction and homicide were part of a deliberate plan. Further, there was no evidence that the defendant was under the influence of drugs or alcohol at the time of the commission of the homicide. There simply

> is no record evidence to suggest the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the homicide. The facts themselves belie any suggestion by Dr. Berland that the defendant acted while under extreme mental or emotional disturbance on November 14, 1997.

(R.4 - 1229-30). It was revealed that Philmore denied using drugs or that they influenced his behavior on the day of the murder. His school records revealed he had a disruptive disorder, had been diagnosed with an impulse control disorder, intermittent explosive disorder, and conduct disorder before 18 years of age. This supported a finding of Antisocial Personality Disorder. The State's testing showed he had a normal IQ, Dr. Landrum's interview revealed no signs of psychosis or support for a diagnosis of brain injury. It was established that the MMPI tests employed by the defense, discriminated against black males by producing a diagnosis of psychotic/paranoid disturbance 90 percent of the time in normal individuals. Dr. Berland's assessment of Philmore's mental state was inaccurate (T.25 - 2293-94, 2304-13).

Given the testimony, and the judge's analysis of the evidence, it cannot be said error occurred. Rose, 787 So. 2d at 802 (finding no abuse of discretion in rejecting mental health mitigator where state undermined defense mental mitigation by impeaching expert with his oversights, showing defendant had normal IQ, and was sociopath); Foster, 679 So. 2d at 755 (holding judge may reject uncontroverted expert testimony regarding mitigation where such

cannot be reconciled with evidence). Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci, 587 So. 2d at 453. The rejection of the extreme mental or emotional disturbance mitigator should be affirmed.

Point X - Acting Under Substantial Domination of Another

The trial court rejected this mitigator, reasoning:

> ... Dr. Berland testified that through discussion with the defendant "and a couple of lay witnesses" it was his opinion that the defendant acted under the substantial domination of ... Spann. The defendant also indicated in a statement to the Court at the time of the sentencing hearing that he was in fear of Anthony Spann and committed the homicide because, while he was not threatened by the codefendant, he feared what he might do if he didn't do what he was told. The state expert, Dr. Landrum testified that he found no basis for the opinion of Dr. Berland and discussed an incident that the defendant told him about in which the defendant pulled a gun on his codefendant, Anthony Spann, because he thought he had stolen some of his drugs.
>
> While the Court finds that the codefendant initiated the planning of the car jacking, abduction and murder, the defendant was clearly a willing and active participant. At all times during the course of the events, the defendant carried his own firearm, he himself carjacked and abducted the victim and he himself told the victim to exit the vehicle and shot her in the head execution style.
>
> There was no evidence that the use of force or threats motivated the defendant to murder the victim in this case. If the Court were to accept the premise that the defendant was in fact under the substantial domination of his codefendant, then the inevitable

> conclusion would be that this was also the case when the defendant was captured on video pointing a firearm at the head of Saul Brito just ten days prior to this homicide and pulling the trigger at point blank range. While the gun apparently jammed, the video reflects the defendant's efforts to recycle the firearm again and attempted to shoot Mr. Brito at point blank range. Yet, there was absolutely no evidence of record that the codefendant, Anthony Spann, was in the store with Mr. Philmore when he attempted to murder Mr. Brito. Further, the defendant himself indicated to the Court that during the first crime with Anthony Spann he was a willing participant.
>
> The facts of this case belie the defendant's claim that on the day of November 14, 1997, he murdered Mrs. Perron because of the substantial domination of Anthony Spann. The Court finds that the evidence in this case shows that the defendant simply made choices which were oriented to improve his own financial situation and that the defendant was not acting under extreme duress or under the substantial domination of his codefendant or any other person.

(R.4 - 1230-31).

Philmore points to the judge's finding that Spann initiated the planing of the crimes and argues the mitigator should have been found based upon the testimony of the defense experts and Philmore's assertion he feared Spann (IB 95-96). Here again, the thrust of Philmore's claim is that he disagrees with the court's resolution of conflicting evidence. Yet, such does not create a basis for reversal. This Court has opined, "[i]t is the trial court's duty to resolve conflicts in the evidence, and that court's determination is final if supported by competent substantial

evidence." Lopez v. State, 536 So. 2d 226, 231 (Fla. 1988) (citing Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985)). It also recognized that the finding of a mitigator is within the trial judge's discretion and would not be reversed simply because the appellant disagreed with the result. Id.

A review of this record establishes that the trial judge understood the law pertaining to this mitigator, fully explained her reasoning in rejecting the factor, and resolved the facts against Philmore. The facts surrounding the crimes, as well as Philmore's own actions and admissions provide substantial, competent evidence supporting of the judge's decision. Philmore confessed to having pointed a gun at Spann when they argued over drugs. He admitted Spann was not present in the store owned by Mr. Brito where Philmore attempted to murder the owner, nor was Spann present when Philmore robbed and attempted to murder Mr. Buss before stealing the guns used in the instant crimes and where it was Philmore himself who carried out the crimes. Moreover, in the sentencing hearing, Philmore informed the court that Spann had never told him what Spann would do to him if he did not comply with Spann's plan and admitted he did some things with Spann willingly (T.17 - 1434-41; T.20 - 1778-1803; T.25 - 2309-10; T.28 - 2667-72). Such supports the rejection of this mitigator and affirmance of the sentence. See, Raleigh v. State, 705 So. 2d 1324, 1330 (Fla. 1997) (confirming defendant was not under substantial domination of

another where evidence showed defendant, although described as follower, killed victims himself, carried weapon, and had pecuniary interest in the deaths), receded from on other grounds, Delgado v. State, 776 So. 2d 233 (Fla. 2000); Valdes v. State, 626 So. 2d 1316 (1993) (finding evidence sufficient to reject substantial domination mitigator when defendant murdered police officer during escape attempt and participated equally with co-defendant by providing murder weapon, and took officer to place where he was executed), cert. denied, 512 U.S. 1227 (1994).

Point XI Capacity to Conform Conduct to Requirements of the Law Was Substantially Impaired

Philmore maintains the court "erred in failing to find the existence" of the mitigating circumstance that his capacity to conform his conduct to the requirements of law was substantially impaired (IB 97-98). The judge identified the mitigator, analyzed the evidence, and reasoned it was unproven. Taken together, the facts of the crimes and expert witnesses' testimony is substantial, competent evidence supporting the rejection of the mitigator.

For support, Philmore cites Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994). However, it does not further his case. In Morgan, the judge rejected mental mitigation based upon the jury's guilt phase verdict rejecting the insanity defense. Id. Such is not the case here. The trial court analyzed the mitigator based upon the facts developed at both the guilt and penalty phases as is proper. Similarly, Carter v. State, 560 So. 2d 1166 (Fla. 1990) is

distinguishable. There, the court overrode the life recommendation and rejected unrebutted expert mental health testimony that Carter "probably suffered extreme mental disturbance at the time of the murder and probably was unable to appreciate the criminality of his conduct." Id. at 1169. That is not the situation in the case at bar where the State presented expert testimony refuting claims of mental impairment. Likewise, Irizarry v. State, 496 So. 2d 882 (Fla. 1986) is not applicable. Irizarry, like Carter, involves a life recommendation override. Id. at 825-26. Here, the jury's recommendation was unanimous for death (T.27 - 2581-85).

Rejecting this mitigator, the judge noted it was a distinct factor, but incorporated her analysis conducted for extreme mental or emotion disturbance (R.4 - 1231). The court opined:

> The criminal episode from the time of the abduction of the victim to the time of her murder took approximately thirty minutes. During this time the defendant rode with the victim and he indicated that she was crying and frightened. The defendant clearly had time to reflect on the impending homicide. He reached logical decisions on how to effect the carjacking, kidnapping, homicide and robbery. Further, he reached a calculated planned decision on how to prevent the victim from notifying the police and identifying him. His own expert opined that he could appreciate the criminality of his conduct stating that "though, he knew what he was doing was wrong--that there was some pressure on him that was not under his control that helped push him into this situation. Not that that made him do it, but helped push him into the situation." The record evidence suggests that the defendant was not using drugs on the day of the homicide and the state's expert

> testified that neither the defendant's drug use or history of drug use diminished his capacity or influenced his behavior on November 14, 1997.

(R.4 - 1232). This ruling is supported by the evidence.

Dr. Wood, agreed Philmore's alleged brain injury would not cause him to commit murder, did not impact his free will, or create impulse control problems (T.22 - 2037-39). Philmore admitted he had taken no drugs on the day of the murder and was not under the influence of prior narcotics. Even assuming Philmore was psychotic on the day of the murder, Dr. Berland was unable to opine to what extent it impaired him; in fact, Dr. Berland agreed there was a reasonable basis to believe Philmore's behavior was purposeful (T.24 - 2188, 2228, 2230-31, 2261-64, 2393-94). Dr. Landrum opined Philmore does not suffer from a psychosis (T.25 - 2292, 2308-09). Philmore confessed to successfully carjacking the victim, conversing with the tearful Ms. Perron on their drive to Indiantown, directing her to walk near the cane, before shooting her once in the forehead, and disposing of her body in the canal. On the drive to Indiantown, Philmore knew what had to be done; he knew he had to kill the victim. (T.17 - 1433-41).

The judge did not err in rejecting the instant mitigator. The evidence was conflicting, thus, it was the court's duty to resolve the conflict. Rose, 787 So. 2d at 802 (finding no error in rejecting mental mitigator where state undermined mental mitigation and impeached defense expert); Knight v. State, 746 So. 2d 423, 436

(Fla. 1998) (concluding there was no error in judge's rejection of mental mitigation where court weighed evidence presented and resolved conflicts against defendant).

Given the fact each mitigator was "expressly evaluated" and supported by record evidence, the judge complied with the law and did not abuse her discretion in rejecting the claimed mitigation. A judge may reject the mitigation offered where such decision is supported by substantial, competent evidence. Kearse, 770 So. 2d at 1134; Trease, 768 So. 2d at 1055; Campbell, 571 So. 2d at 419. The Court should affirm the sentence of death.

POINT XII

THE DEATH SENTENCE IS PROPORTIONAL.

Although Philmore has not challenged the proportionality of his sentence, the Court is required to complete such a review. Gore v. State, 784 So. 2d 418, 438 (Fla. 2001) (recognizing even absent challenge, Court "has an independent duty to review the proportionality of [the] death sentence as compared to other cases where the Court has affirmed death sentences."); Jennings v. State, 718 So. 2d 144 (Fla. 1998). Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin, 714 So. 2d at 416-17; Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the

totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

Philmore admitted he and Spann were looking for a female to carjack, take to a remote location, and kill in order to escape detection. While Spann watched, Philmore abducted Ms. Perron, drove her to an isolated area, and shot her once in the forehead. The death sentence is proportional based upon five aggravating factors: (1) prior violent felony, (2) felony murder (kidnapping), (3) avoid arrest, (4) pecuniary gain, and (5) CCP, no statutory mitigators, and eight non-statutory mitigators. The non-statutory mitigators are: (1) Philmore was victim/witness of physical/verbal abuse by alcoholic father (moderate weight), (2) history of extensive drug/alcohol abuse (some weight), (3) severe emotional trauma and subsequent port-traumatic stress (moderate weight), (4) molested/raped at young age (some weight), (5) classified as severely emotionally handicapped (little weight), (6) ability to form close loving relationships (moderate weight), (7) cooperation (moderate weight), (8) remorse (little weight) (R.4 - 1233-36).

Based upon the circumstances of this crime along with the strong aggravation and weak mitigation, the sentence is proportional. Cave, 727 So. 2d at 229(affirming sentence based on

felony murder (robbery-kidnapping), CCP, HAC, and avoid arrest, one statutory and eight non-statutory mitigators where defendant was involved with plan to select store to rob, led victim at gun point, controlled her during long ride to remote location, where she was killed by accomplices); Pope v. State, 679 So. 2d 710, 712 n. 1, 716 (Fla. 1996) (deciding sentence proportionate with prior violent felony and pecuniary gain aggravators, extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct, and nonstatutory mitigation of intoxication, violence after domestic dispute, and under influence of mental/emotional disturbance); Bryan v. State, 533 So. 2d 744, 745 (Fla. 1988) (affirming sentence where victim kidnapped, robbed, transported, and killed at remote location, where there were six aggravators and two mitigators); Puiatti v. State, 495 So. 2d 128, 129 (Fla. 1986) (finding sentence proportional with avoid arrest, pecuniary gain and CCP, no mitigation, and where co-defendant Glock kidnapped and robbed victim, used her car to take her to orange grove where she was shot, and then drove to New Jersey); Whitton v. State, 649 So. 2d 861, 864 n. 6, 867 (Fla. 1994)(affirming sentence with five aggravators, no statutory, but and nine nonstatutory mitigators). The Court has upheld death sentences with less aggravation than shown here. Sliney, 699 So. 2d at 662 (affirming sentence with felony murder and avoid arrest aggravators, two statutory mitigators, and several nonstatutory mitigators); Hayes v. State,

581 So. 2d 121 (Fla. 1991) (affirming death penalty with CCP and felony murder aggravators, one statutory and other nonstatutory mitigators). This Court should affirm.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Appellee requests respectfully that this Court AFFIRM Appellant's conviction and sentence of death entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by U.S. Mail to: PATRICK C. RASTATTER, ESQ., Glass & Rastatter, P.A., 524 S Andrews Avenue, Ste. 301N, Fort Lauderdale, FL 33301 on November 13, 2001.

_____
LESLIE T. CAMPBELL

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

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LESLIE T. CAMPBELL